Neutral Citation Number: [2020] EWHC 3273 (Comm)

Case No: CL-2020-000360

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th November 2020

Before :

THE HON. MR JUSTICE BRYAN

- -

Between :

ZEUS INVESTORS	**Claimants/ Applicants**
- and -	
HSBC BANK PLC	**Defendant/ Respondent**

- -
- -

James Ramsden QC (instructed by **Bermans**) for the **applicant**
Harry Adamson (instructed by **Norton Rose Fullbright**) for the **respondent**

Hearing date: 24th November 2020

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APPROVED JUDGMENT

MR JUSTICE BRYAN:

A. INTRODUCTION

1. The parties appeared before the court today on the hearing of the applications of the claimants, who are referred to in the application notice somewhat cryptically as "Zeus Investors", as referred to in the claimants' application notice dated 8 June 2020 for orders pursuant to the *Norwich Pharmacal* jurisdiction and/or pre action disclosure under CPR part 31.18 seeking disclosure and inspection of the information specified in a revised draft order against HSBC UK Bank Plc, as successor to HSBC Private Bank (UK) Limited (which I shall refer to hereafter as HSBC), which the claimants allege is required in order to properly assess, formulate and plead their claim that is contemplated against HSBC.

2. In fact, CPR 31.18 simply provides that rules 31.16 and 31.17 do not limit any other power which the court may have to order disclosure before proceedings have started and disclosure against a person who is not a party to proceedings; and Rule 31.18 merely preserves the *Norwich Pharmacal* jurisdiction and does not modify it: see *Mitsui & Co Limited v Nexen Petroleum UK Limited* [2005] EWHC 625 (Ch), at [36].

3. In its skeleton argument, and despite not being within the scope of its application notice (which has not been amended), the claimant sought, in three brief paragraphs at the very end of its skeleton argument, to apply for pre action disclosure under CPR 31.16, albeit that little, if any, attempt was made in that skeleton to address the requirements of CPR 31.16. Such belated reliance on CPR 31.16 was, however, consistent with HSBC's case that the present case is not an appropriate one for *Norwich Pharmacal* relief, but if there were to be any basis for obtaining any of the documentation sought, it would have to be by way of pre action disclosure, under CPR 31.16 (albeit that HSBC submits that the claimants cannot begin to bring themselves within the requirements for pre action disclosure).

4. Although not entitled to advance any such case on the basis of the application notice, and despite it not being addressed in the witness evidence and only briefly touched upon in the claimants' skeleton, I indicated at the start of the hearing that I would hear argument on the point *de bene esse* which I considered was preferable from a case management perspective, rather than proceeding with a contested amendment application which would have been time consuming to hear and rule upon, and which would have jeopardised the completion of the matter within the existing time estimate.

5. In the event, during the course of the hearing, Mr Ramsden QC recognised, on behalf of the claimants, that if they were not going to succeed under the *Norwich Pharmacal* jurisdiction, they would not succeed under CPR 31.16 either. That was a realistic concession, but I will nevertheless have to say something about CPR 31.16 during the course of this judgment.

6. The central tenet of HSBC's position is that the claimants' *Norwich Pharmacal* application is fundamentally flawed and should never have been brought. Without engaging into the detail of the debate at this stage as to whether *Norwich Pharmacal* relief is appropriate in the present case, I would simply note at the outset that it might be thought it is a somewhat inauspicious start to an application for a *Norwich*

Pharmacal relief against HSBC that, in the context of a contemplated action against HSBC itself, the supporting witness statement of Mr Nicholas Harvey, dated 8 June 2020, expressly states by way of evidence at paragraph 6 (under the heading "Purpose of the application") that:

> "Whilst the documents that are available indicate a breach has occurred and may well be sufficient in their own right to support the claimant's prospective claims, disclosure of the categories of the documents set out in schedule 1 will, it is believed, provide a more complete picture of the nature and scope of the breach, such that claims for breach may be fully considered with investors, then particularised in detail."

(emphasis added)

7. The applications are also set against the backdrop of paragraph B3.3 of the Commercial Court Guide which provides that:

> "The parties to the proceedings in the Commercial Court are not required or generally expected to engage in elaborate or expensive pre action procedures and restraint is encouraged."

8. And the claimants themselves expressly state in their skeleton argument that they are mindful of the recent observations *in Carillion Plc (in liquidation) v KPMG LLP & Anor* [2020] EWHC 1416 (Comm), of Jacobs J stating at [15] that *"Pre action disclosure in the Commercial Courts are rare."* In that passage Jacobs J noted that the authorities to which he was referred contained no recent examples of successful applications.

9. It is also to be borne in mind, when contemplating an action being pleaded out in the Commercial Court, that paragraph C1.1 of the Commercial Court Guide provides that statements of case must be *" ... as brief and concise as possible"* and *"Particular care should be taken to set out only those factual allegations which are necessary to enable the other party to know what case it has to meet"*, and "*evidence should not be included."* There is a 25 page limit for a statement of case, and it is also noted that the courts *"... will only exceptionally give permission for a longer statement of case to be served."*

10. Whilst on procedural matters and what is within the scope of the application notice, it should also be noted that whether or not an application for a *Norwich Pharmacal* relief is likely to be uncontested (and in the present case the claimants well knew it would be contested from extensive pre-action correspondence with HSBC's solicitors, Norton Rose Fulbright) a first application should be made by claim form under Part 8 and not by way of an application notice, so that issues arising can be identified early and managed appropriately (see, amongst other authorities, *Santander Bank Plc v National Westminster Bank* [2014] EWHC 2626 (Ch), at [50] to [51], per Birss J.

11. The claimants have not followed that procedure, despite the need to do so having been pointed out by HSBC's solicitors. In the event, the parties were able to agree directions as to the service of witness evidence and the like, but that is beside the point. Whilst in the *Norwich Pharmacal* case itself an originating summons was

used, it has long since been established that the correct procedure is to use a claim form, so that any such actions can be case managed by the court.

12. I was nevertheless prepared to hear the application, despite the inappropriate procedure adopted. The failure to use a claim form may, however, be of some significance in the context of the issues that have arisen as to who the claimants in fact are, which it will be necessary for me to address in some detail after first identifying the background to the current applications.

B. FACTUAL BACKGROUND

13. I take the factual background from the first witness statement of Nicholas Harvey, dated 8 June 2020, on behalf of the claimants; the witness statement of Katie Stephen, dated 16 September 2020, on behalf of HSBC; and the second witness statement of Nicholas Harvey, dated 13 October 2020. Much of what is said (or alleged) is not common ground between the parties and I simply recount the parties' respective versions of events and associated cases to place the applications in context.

14. The claimants/applicants are investors in a series of (mainly film production) tax mitigation schemes (the "Schemes"). According to the evidence of Mr Harvey, the prospective claim in respect of which disclosure is sought concerns approximately 200 claimants in a potential claim for damages believed to be in the region of a collective minimum sum of £50 million, against HSBC for what is alleged to be "breach of contract and/or negligence".

15. The claim against HSBC arises out of claimed breaches of alleged duties on the part of HSBC to investors in regard to the sale of the Schemes. It is alleged that the Schemes were devised by HSBC, although that is denied in the witness evidence of Katie Stephen; a stance that the claimants characterise as "a highly controversial proposition" (which I might add is not the function of the present applications to resolve).

16. What is not controversial is that an agreement was entered into, dated 21 November 2007 (the "Agreement"), between an entity referred to as "Zeus Partners", but which it would appear was, in fact, a limited liability partnership, Zeus Partners LLP ("Zeus") and the respondent.

17. It will be necessary to return to the terms of the Agreement in more detail in due course, in considering the alleged wrongdoing and any alleged causes of action in the context of the applications that are made. At this stage, it suffices to note that the investors in any relevant tax mitigation schemes were **not** parties to that agreement; and clause 26 of the Agreement (the applicable law of which is English law) provides that:

> "No person who is not a party to this agreement shall be able to enforce this agreement by virtue of the Contracts (Rights of Third Parties) Act 1999."

18. Mr Harvey's evidence is that Zeus were, at all material times, the primary promotors of the schemes; that Zeus was a wholly owned subsidiary of Zeus Group Limited ("Zeus Group") and that Zeus Group were a successful and profitable UK brokerage

firm which from the outset was established to deliver relationship led investment opportunities. Zeus carried on the business of corporate finance, raising cash through the subscription of high net worth individual investors, for shares in high risk start-up ventures. Mr Harvey states that Zeus had promoted several high risk investment schemes which included investments in 2008 and subsequent years.

19. Mr Harvey alleges that at the heart of the agreement was the sale of various tax mitigation schemes which it is alleged were developed by HSBC and to which they were effectively the "master minds" behind. It is said that the promotion of schemes in around about 2008 was itself significant. By 2008, both the Treasury and HMRC had threatened legislative actions against what they claimed to be aggressive tax management arrangements. The General Anti Avoidance Regulations (GAAR) emerged as a consequence. Previously and by section 58 of the Finance Act 2008, the Government introduced controversial and unusual retrospective legislation to address the IR35 tax avoidance schemes. That legislation was upheld on a challenge by way of a judicial review at first instance by Kenneth Parker J and on appeal to the Court of Appeal: *R (Huitson) v HMRC* [2011] EWCA 893. Both judgments recorded the intention of the Treasury and HMRC to pursue anti-avoidance measures in the public interest, which had gained considerable momentum by early 2008. The challenge to section 58 of the Finance Act 2008 failed, as the retrospectivity it entailed was considered a proportionate interference with the taxpayer's A1P1 rights, when those rights were balanced against the wider public interests reflected in what the court considered "a justified fiscal policy". Retrospectively has been similarly deployed in the well-known loan charge rollout by HMRC as its response to EBTs as tax avoidance structures.

20. It is said that by the time HSBC is alleged to have conceived and devised the schemes for the promotion to taxpayer clients such as the claimants, considerable circumspection was therefore required. It is said that was also to be reasonably expected from well resourced and informed, financially incentivised and specialist advisers.

21. It is alleged that in such context, obligations were assumed by HSBC under the agreement which, it is said, stand to be assessed according to the *'arguable wrong'* condition for pre action disclosure and for *Norwich Pharmacal* relief.

22. It is said that the agreement concerned the discussion, formulation and development of financial, legal and commercial structures or arrangements that could be sold as products, as part of a tax mitigation scheme. It is alleged that Zeus were to be the promoters of these schemes and HSBC were to provide the financial planning and ongoing tax and financial advice in relation to the arrangements for customers. It is said that HSBC is the provider of banking related services and Zeus was a partnership set up to promote and sell products, such as the one that it is alleged to have been devised by HSBC as part of the agreement.

23. The claimants' stance (presumably also to HMRC) is that the schemes had a claimed primary legitimate commercial objective, with only the *possibility* of ameliorating losses through tax relief as a secondary and contingent consideration. For a minimum investment of £100,000, investors would contribute 18 per cent of their own money, with the remaining 82 per cent being provided through a limited recourse loan, secured on the value of their shares. After a reasonable trading period the investments

would be valued by third party independent valuers. If the valuation was low or zero, the investor had the opportunity to claim tax relief based on the total investment, i.e. the sum of £100,000. The investment also allowed for the claiming of tax relief in relation to the interest charged for the limited resource loans. If the valuation was high the investments could then be sold and would then be subject to CGT.

24. It is said that the Scheme essentially targeted high net worth individuals who would subscribe for shares in these companies. This would buy them participation in the future profits expected from a number of high risk business ventures, including principally investments in the film, gaming and pharmaceutical industries.

25. Mr Harvey's evidence is that six investors in the scheme were charged were conspiracy to cheat HMRC, contrary to section 1(1) of the Criminal Law Act 1977 ("the Criminal Proceedings"). Those investors, including a Mr Ryder, who is named by Bermans (the claimants' solicitors) in evidence as a potential claimant to any claim against HSBC.

26. The criminal proceedings arose from an investigation by HMRC into the failed investment offerings generated by the Scheme and allegedly fashioned by HSBC. HMRC alleged in the Criminal Proceedings that there was no real or legitimate commercial aim at the heart of the investments and that they were designed and intended to illegally evade tax by creating an artificial tax loss in order to provide the individual investor with the opportunity to claim tax relief pursuant to section 131 to 151 of the Income Tax Act 2007.

27. In essence, HMRC alleged that the investments were not commercially viable and were destined or intended to fail. The Criminal Proceedings were discontinued and formally dismissed on 20 June 2017. Mr Harvey states that one of the reasons for the dismissal of the Criminal Proceedings was a failure to make proper disclosure on the part of HMRC.

28. As Mr Harvey notes, documents in the possession of HSBC were partially disclosed to the defence in the Criminal Proceedings, and HSBC were ordered to keep and preserve all documents in its possession pertaining to the schemes.

29. The claimants allege that in or around the start of 2008, HSBC became aware that the schemes were not only ineffective but incredibly high risk from a legal and regulatory perspective. It is said that HSBC gave no such cautionary advice, choosing instead to seek to distance itself from the schemes, whilst remaining contractually entitled to its fees for their promotion; and whilst retaining a 50 per cent share in intellectual property associated with them; and receiving at least £2 million in fees.

30. It is said that the applicants were only made aware of the concerns that HSBC had formed in 2008 about the efficacy and risks of the scheme by way of several email exchanges which came to their attention in the course of disclosure by HMRC in the Criminal Proceedings. These emails were between HSBC employees, in the main, and displayed, it is said, how they developed concerns as to the efficacy of the schemes and yet chose not to take action but rather acting in favour of continuing to receive remuneration for being involved with their sale.

31. The claimants contend that despite HSBC's concerns as to the legal efficacy and viability of the schemes, they failed to notify any of their own tax compliance team and those to whom it is alleged they owed advisory duties under the Agreement. Instead, it is said they continued to allow the Scheme to be sold, whilst continuing to profit from its sale.

32. It is accepted by HSBC that it is not appropriate on this application to attempt to resolve the factual disputes, but it is to be noted that HSBC does not accept the factual contentions made by the claimants and deny that the emails cited support the same.

33. HSBC says that it appears from the face of the emails cited that the HSBC employees in question did not wish HSBC to be involved in the promotion of the Scheme. Furthermore, there is some discussion as to whether the Scheme would be "disclosable" (presumably under the DOTAS rules and, if so, whether HSBC was a "promoter" for tax disclosure purposes). But none of that indicates, says HSBC, that HSBC had a secret belief that the Scheme would not be effective for tax purposes.

34. The applicants rely in particular on an email in which Mr Bowman of HSBC states that he does not wish to be in a position whereby he was required to clear transactions internally with Group Tax. HSBC submits that the applicants' reliance on that email in support of the applicants' core contention is impossible to understand. First, it is said the email does not say or indicate that Mr Bowman believed the Scheme did not operate effectively. Second and most fundamentally, says HSBC, the email is written to Mr Ryder of Zeus. It appears that Mr Ryder signed the agreement on behalf of Zeus and he was named as the proper recipient of information on behalf of Zeus (see clause 16.1 of the Agreement). HSBC submits that he is likely to be standing behind the present application. HSBC submits that if and so far as Mr Bowman was expressing any doubts about the efficacy (and they say he was not) he was expressing them to Zeus. It cannot therefore be said on the basis of that email that HSBC had covertly realised that the Scheme could not operate.

35. It is alleged in the skeleton argument of James Ramsden QC on the claimants' behalf that:

> "The agreement between Zeus and [HSBC] does not on its face permit that conduct. If [HSBC] assumed certain duties under that agreement ... there is a sufficient and justified claim that [HSBC] assumed those duties not just to Zeus, but to the "customers" (investors) to whom frequent reference is made in the contractual context of HSBC's duties."

36. It is said that the claimants seek disclosure of the documents identified in what is a revised draft order (following criticisms of the breadth of the original draft order) because it is said that they will form the bulk of what it is said has been seen only in snippet form as a consequence of the Criminal Proceedings. It is said they plainly exist in the possession of the respondent, that they are relevant documents and it is submitted that they "will assist in the formulation and assessment of the proposed claim" (Claimants' Skeleton Argument paragraph 26).

37. It will be seen, therefore, consistent with paragraph 6 of Mr Harvey's witness statement quoted above, that such documentation is not there stated to be necessary to

formulate the proposed claim against HSBC, still less vital to a decision to sue or ability to plead (in the context of any order being necessary in the interests of justice under the *Norwich Pharmacal* requirements, as to which see *Nikitin & Others v Butler & Others* [2007] EWHC 173 (QB), as further addressed below).

C. THE CLAIMANTS

38. As already noted, the application notice (and the draft application notice provided before issue thereof) refers to the claimants as "Zeus Investors" without any elaboration as to who or what "Zeus Investors" are, in terms of natural persons, corporate bodies or other body or bodies. In pre-application correspondence, in a letter from the solicitors Bermans, dated 1 May 2020, to HSBC's solicitors, Norton Rose Fulbright ("NRF") which enclosed documentation materially identical to the application subsequently issued; Bermans stated that:

> "We are instructed by a number of prospective claimants that we believe will eventually exceed 200 in number in a potential claim for substantial damages against HSBC for breaches of the agreement and further tortious breaches of duty."

39. In a letter in response on 15 May 2020, NRF, as well as pointing out HSBC's stance that Bermans were not entitled to the documents sought under the *Norwich Pharmacal* jurisdiction or as pre-action disclosure (a stance that HSBC has maintained ever since) asked who the proposed applicants were and which "Zeus Investors" had instructed Bermans.

40. On 22 May 2020, Bermans again requested voluntary disclosure from HSBC and answered some of HSBC's questions, to which NRF responded on 8 June 2020 that the requirements for *Norwich Pharmacal* relief or any form of pre- action disclosure were not met and that Bermans had failed to respond to many of NRF's substantial requests and comments (including as to the identification of the proposed claimants). The application, in the form of the application notice, did not seek to narrow the scope of disclosure, nor did it engage with many of the points raised by HSBC in correspondence. The claimants were (as in the draft) simply stated as "Zeus Investors".

41. Extensive correspondence between the solicitors followed. In a letter dated 7 July 2020, NRF stated that Bermans had still not identified any of the applicants or given any satisfactory explanation for not doing so, as well as pointing out (as already noted) that an incorrect procedure had been followed as an application for *Norwich Pharmacal* relief under CPR 31.18 should be made by a claim form under Part 8. In a response on 10 July 2020, Bermans neither disclosed the names of the applicants, nor engaged with NRF's points. On 16 July 2020, NRF wrote to Bermans and asked Bermans to explain the basis on which they were refusing to disclose the name of the applicants, and Bermans did not address the point in their response of 17 July 2020.

42. On 24 July 2020, NRF again asked Bermans to confirm or explain the basis on which they were refusing to disclose the name of the applicants. Bermans replied the same day, stating that: *"Your request for individual details of the prospective claimants is premature*."

43. On 27 July 2020, NRF wrote again, stating that:

> "Contrary to [the letter of 24 July 2020], NRF did not ask for details of all prospective claimants. The question was who the purported applicants were on this application, i.e. those to whom it was intended disclosure would be made and who would be giving the undertakings set out in paragraphs 1 and 2 of the draft order."

44. It was stated that HSBC were entitled to seek costs orders against those applicants and it was said that an application which did not name them was procedurally defective.

45. On 29 July 2020, Bermans replied to NRF as follows:

> "We have explained to you already the reasons for details of the prospective claimants in this matter not yet having been provided. The same applies to the individual members of the applicant group and there is, in any event, no good reason for your requiring this information at this stage. For the avoidance of doubt, a prospective costs award against the applicant is not a good reason for requiring that information. In the event that your client became entitled to a costs award, as a result of the application, it would be entitled to seek payment of that costs award from the applicant. If, for some reason, the applicant failed to make payment, then it would be open to your client to seek a third party costs order under the provisions of section 51 of the Senior Courts Act 1981 and, as part of any search application, could seek details of the individual members of the applicant group. Until then, your demands are premature and without merit."

46. In her witness statement, Ms Harvey stated that HSBC still did not know the applicants' names, whilst noting that the reference to HSBC applying for a third party costs order was not understood. She also noted that, at paragraph 16 of Mr Harvey's first statement, a Mr Ryder who was involved in the Criminal Proceedings was identified as "one of the investors and prospective claimants", but it was not known whether he was one of the applicants.

47. In the Claimants' Skeleton Argument at paragraphs 53 to 55, the following is stated:

> "Unnamed applicants."
>
> "53. Zeus Investors is, as explained in Harvey 1, a representative group analogous to an unincorporated association. An unincorporated association has no separate legal identity and each member's personal liability will usually be limited to the extent of his subscription fee (*Wise v Perpetual Trustee Co* [1903] AC 139.
>
> "54. It is also not possible to contract with an unincorporated association itself; nor is it possible to contract with the

> members from time to time. An unincorporated association could become involved in a claim in tort because of something that happens on the association's premises or because of the actions of members.
>
> "55. However, an injunction may be obtained by or against persons belonging to an unincorporated association. Where in proceedings there is a clear conflict of interest between persons belonging to or affiliated with an unincorporated association, it is inappropriate to sue selected individual members as representing all other members. In particular, see *London Association for the Protection of Trade & Anor, appellants, v Greenlands Limited, respondents* [1916] 2 AC 15, where an unincorporated body called the London Association for the Protection of Trade was party to proceedings. Further, in the *Oxford University v Webb* [2006] EWHC 2490 (QB), despite its efforts to avoid the formal trappings of an organisation, it was held that the Animal Liberation Front was a coherent organisation that was capable of being represented in a legal action and was subsequently joined to the proceedings. There is no reason why the applicant, as a representative body, most clearly analogous to an unincorporated association, cannot obtain NPO relief or relief under CPR part 31.16."

48. Whilst it is correct that an injunction may be obtained by or against persons belonging to an unincorporated association, "Zeus Investors" on the information before me is not an unincorporated association; nor do I consider that there is a *"representative group analogous to an unincorporated association"*. Ultimately, if anyone has a cause of action against HSBC, it would be (as is alleged to be the case in both of Mr Harvey's statements and the Claimants' Skeleton Argument) individual investors who must be capable of identification. "Steering committees" to manage the furtherance of an action on behalf of a group of claimants are not uncommon and, for example, such committees were used extensively in the Lloyd's litigation in the context of group litigation by Lloyd's names against their members and managing agents. But ultimately, the claimants in that litigation were the individual Lloyd's names, as in, for example, *Henderson v Merrett Syndicates No 1* [1995] 2 AC 145 (to which the claimants themselves refer in alleging an assumption of responsibility to investors co extensive and concurrent with the duties owed to Zeus on the terms of the Agreement).

49. In this regard, and as I explored with Mr Ramsden in the course of his oral submissions, I was then, and remain, concerned about the content and approach adopted in Mr Harvey's witness statements in support of the application.

50. CPR Part 32.8 provides that a witness statement must comply with the requirements set out in Practice Direction 32. Practice Direction 32 paragraph 18.2 provides that:

> "18.2, a witness statement must indicate (1) which of the statements in it are made from the witness's own knowledge and which are matters of information and belief and (2) the source for any matters of information or belief."

51. In this regard, the high point of what is stated by Mr Harvey in his first statement, at paragraph 7 is, and I quote:

> "Both Bermans and Newport Tax Management LLP have been instructed by a small group of investors that have formed an Investor Steering Committee to explore the remit and scope of the claim(s) further."

52. I do not consider that that meets the requirements of CPR 32.8 or Practice Direction 32 and paragraph 18.2 thereof.

53. I consider that neither of Mr Harvey's statements complies with CPR 32.8 and those requirements of paragraph 18.2 of the Practice Direction 8.2 and there is no paragraph in the witness statement addressing such matters (as is the norm) nor are such matters addressed in the course of the witness statement itself (which, of course, is an alternative way to meet those requirements).

54. Even more troubling than that, however, is what is said at various points throughout that statement about Mr Harvey's belief and that of others, quite apart from the fundamental matters of who is making the application. Statements include:

> "(1) *"I am duly authorised by the applicants to make this statement on their behalf"* (but the identity of the applicants is not given).
>
> (2) *"I make this statement in support of my client's application"* ("client" being in the singular).
>
> (3) *"The applicants are circa 200 plus perspective claimants ... the applicants make this application in a representative capacity on behalf of the other prospective claimants"* (which suggests that there are circa 200 applicants party to the application notice).
>
> (4) *"The applicants and I believe, having obtained sight of and/or having been made aware, by contemporaneous records between key staff members within [HSBC], that a serious breach of contract and/or tortious duty has been committed by [HSBC]"* (which appears to be stating a belief held by circa 200 individuals or at least a belief held by whoever the applicants (who are unidentified) actually are).
>
> (5) "*Both Bermans and Newport Tax Management LLP have been instructed by a small group of investors that have formed an Investor Steering Committee to explore the merit and scope of the claims further"* (who is in that group of investors is not identified and it is not clear if they are the applicants).
>
> (6) *"It is the applicants' position therefore"* (without identifying the applicants).

> (7) *"Once this information is made available the applicants and other investors should have sufficient information to take further legal or seek other redress against [HSBC]"* (drawing a distinction between the "applicants" and "other investors").
>
> (8) *"I am duly authorised by the claimants to sign this statement and confirm that full and frank disclosure of all relevant matters has, as far as I am aware, been given"* (the reference on this occasion being to the "claimants" who are not identified)"

55. As appears above, the statement of truth contains a confirmation that full and frank disclosure has been given (albeit that the application is in fact made *inter partes*). I will need to return to aspects of what is stated in Mr Harvey's statement in this context and in the context of the fact that witness statements should not contain legal argument.

56. I am satisfied that it remains unclear who the applicants are who issued the application notice and I am equally satisfied that they should have been identified for any number of reasons:

(1) The applications by their very nature are seeking information which has the potential to be confidential and which is sought for, and then can only be used for, a specific purpose. It needs to be clear who is applying for and is receiving such information, so that it can be assessed whether they have any entitlement to such information and whether it is appropriate to give them such information.

(2) The applicants by their counsel are giving binding undertakings, as reflected in the draft order. They need to be identified so that if necessary the undertakings can be fully enforced. In addition, by virtue of the wording of the draft order at paragraph 2(a), the information cannot be shared to anyone other than the applicants. Therefore it is also important to identify who those applicants are.

(3) The application is one for *Norwich Pharmacal* relief and, as such, HSBC are entitled to their costs, not only in complying with the order (as provided for in the draft order), but also in coming to court to deal with any queries. It follows that the applicants are (and indeed are agreeing to be) under a liability to pay costs if their application is successful (and *a fortiori* given that costs will follow the event if they are not) and so the identity of each applicant/claimant is required. There will, on any view, be costs orders against the applicants, and their identity should therefore be stated at the time of the application. This is nothing to do with third party costs orders and any possible application of section 51 of the Senior Courts Act.

(4) An undertaking in damages is being offered but (somewhat confusingly) it is now stated in the skeleton argument that "the applicant" in the singular is" a solvent, well funded entity" (emphasis added), this being the first reference to an entity as the applicant, and it is stated that:

> "The applicant can provide an undertaking in damages that carries substance to support it and the applicant has third party funding which has been procured for both this application and

> the substantive prospective claim(s) and is in place to a value as required in excess of 5 million."

This is a different statement to what is given at paragraph 34 of Mr Harvey's first statement, which provides:

> "I confirm that the applicants can provide an undertaking in damages that carries substance to support them and the application of third party funding has procured for both this application and the substantive prospective claim(s) and is in place to a value if required in excess of 5 million."

(emphasis added)

Thus, whilst the parties to the application must have been known at the time of the issue of the application notice and Mr Harvey's witness statement (and they are stated as "applicants" specifically in the plural), they have gone from the plural to the singular in the Skeleton Argument which appears to correspond with the latest suggestion that the "applicant" is a representative body. This vividly illustrates why the identity of the parties to the application notice should have been given. If this did not suffice, paragraph 76 of the skeleton argument provides:

> "There is no other evidence that casts doubt over the ability of the applicant to pay out under the cross undertaking, should this application be unsuccessful."

(emphasis added)

Yet the court is not in a position to assess this, as the applicant is not identified and the applicant's financial worth is not evidenced, nor is there evidence behind the suggestion that there is funding in place in relation to any action and in relation to costs, other than what is said by Mr Harvey.

(5) If the reality is that it is not the “investors” who have brought the application but some other entity, that entity needs to be identified.

(6) In relation to the application notice, Practice Direction 23(a) paragraph 2.1 requires the full name of the applicant to be stated as must be done in the case of a Part 7 claim form. And in that context Practice Direction 16, paragraph 2.6, specifies that the full name of each party should be stated and what amounts to a full name is identified. None of the permutations would appear to be apt for "Zeus Investors". By Practice Direction 8(a), paragraph 4.1, the rules and directions in relation to Part 7 claim forms are to be applied, where appropriate, to Part 8 claim forms, as is apt in the present case. There are also many reasons why the full name of each party is to be used in a claim form (for example, to stop time running for limitation purposes). If a claim form had been used, as it should have been used, the need to identify each claimant would have been all the more apparent.

(7) In the context of costs (which will normally be summarily assessed at the end of the hearing) it is necessary to know at that time who is liable to pay those costs. That will also distinguish between who may be the subject of a costs order and also

facilitate investigation of who else may have funded the application or be subject to a possible third party costs application.

57. When I raised those matters with Mr Ramsden during the course of oral argument, he identified that, if necessary, an individual could be named. That individual is a Mr Manny Mifsud. At a different part of the oral submissions he also indicated that the other 100 investors, if it was felt necessary, could be named.

58. I consider that neither of those solutions is necessarily satisfactory; because for all the reasons I have just identified, at the time of the applications, i.e. at the time of the issue of the application notice and as should have been addressed within the witness statements, it should have been clear who the claimants were.

59. I consider that there is substance in Mr Adamson's point that there has been a real reticence throughout of identifying to the respondents, HSBC, who are the applicants making the claim. And that remains the position to this day, because even at this present time, as I will come on to, the application notice has not been amended, there has not been supplementary evidence and it is still unclear, both to HSBC and I should say to the court, exactly who is party to this application.

60. I will need to return to this in the context of whether or not this is an appropriate case for relief under the *Norwich Pharmacal* jurisdiction, in particular, when one gets to the interests of justice stage of that investigation.

D. APPLICABLE PRINCIPLES - NORWICH PHARMACAL

61. In *Collier v Bennett* [2020] 4 WLR 116, Mr Justice Saini drew on recent case law to summarise the test at [35] as follows:

> "(i) The application has demonstrated a good arguable case that form of legally recognised wrong has been committed against them by a person ***("the arguable wrong condition").***
>
> (ii) The respondent to the application must be mixed up in, so as to have facilitated the wrongdoing ***(the "mixed up in condition").***
>
> (iii) The respondent to the application must be able or likely to be able to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued ***(the "possession condition").***
>
> (iv) Requiring disclosure from the respondents is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction ***(the "overall justice condition").”***

62. In this regard HSBC makes a number of points on the authorities which are not understood to be controversial.

63. First, as to the *"arguable wrong"* condition, the claimant must show that it has a "good arguable case", i.e. the well-established test in applications for freezing

injunctions, per Flaux J (as he then was) in *Ramilos Trading v Buyanovsky* [2016] 2 CLC 896 at [14]. Even if the applicants surpass the threshold, the strength of the case will be relevant to the overall justice condition.

64. Second, there is repeated emphasis in the authorities that (as Saini J summarised in *Collier* at [39]):

> "The court has to be vigilant in guarding against 'fishing exercises' in what is regarded as an exceptional jurisdiction."

65. The authorities on the scope of the information that may be ordered were comprehensively set out by Flaux J in *Ramilos*, supra, at [28] and following. In brief summary:

(1) At its inception the jurisdiction was limited to the provision of the identity of and information about the wrongdoer.

(2) Subsequently it was extended to situations in which "the identity of the claimant is known, but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw" (Mitsui, at [19], cited with approval in Ramilos at [37] and [38]).

(3) In *P v T* [1997] 1 WLR 1309, the court ordered disclosure when the claimant knew neither the identity of the wrongdoer nor even whether a tort had been committed. And in Mohamed the Divisional Court accepted that disclosure could in that "truly exceptional" case (because it was information required to exculpate an individual facing a possible death penalty) go beyond "merely the identity of the individual or a certain specific fact". (Paragraph 132, cited in Ramilos at paragraph 45).

(4) In *Axa Equity v National Westminster Bank Plc* [1998] PNLR 433, the plaintiffs sought discovery in the nature of documentary evidence which would enable them to assess whether they had a claim in tort. Rimer J held at page 443 that:

> "Norwich Pharmacal provides no authority for the making of any such order."

(5) Flaux J concluded at [62]:

> "The Norwich Pharmacal jurisdiction remains an exceptional jurisdiction with a narrow scope. The court will not permit the jurisdiction to be used for wide ranging disclosure or gathering of evidence, as opposed to focussed disclosure of necessary information: see the judgment of Mr Justice Rimer in *Axa* and the Divisional Court in Mohamed at paragraph 133 ... Furthermore, it is impermissible to use the jurisdiction as a fishing expedition to establish whether or not the claimant has a good arguable case or not [sic]."

66. Third, the information will be necessary if:

> "In the circumstances of a particular case justice requires from the facilitator the particular cooperation demanded of him by the claimant with a view to righting facilitated wrongdoing." (per Andrew Baker J in *Burford Capital v London Stock Exchange* [2020] EWHC 1183 (Comm) at paragraph 40).

67. In that case, Andrew Baker J held at [161] that if the potential claimant could already (even absent the disclosure) commence proceedings against one wrongdoer, then that would *"provide a sufficient just means for the vindication of Burford's relevant legal rights*". Any further disclosure that was required *"could all be managed within the overarching process of a live claim ... in short, this Norwich Pharmacal claim ... is either bad or premature."*

68. In this regard, in *Nikitin & Ors v Richards Butler LLP* [2007] EWHC 173 (QB) the court considered the condition for necessity and held that there were two questions to be asked: whether the information sought was vital to a decision to sue or an inability to plead and whether the information could be obtained from another source (and I emphasise the word "vital"). As Langley J held at [24]:

> "The questions are whether such information is vital to a decision to sue or an inability to plead and whether or not, even if it is, it can be obtained from other sources. The purpose of an order is to enable an applicant to take action which could not otherwise be taken."

69. The information in question in *Norwich Pharmacal* itself was such that, without it, *"No action can ever be begun because the appellants do not know who are the wrongdoers who have infringed their patent"* and could not be obtained from any disclosure or witness summons (per Lord Reid, page 174).

70. In *Mitsui*, the decision was that it was not necessary to order a party said to have become innocently mixed up in the wrongdoing by E to make disclosure of its dealings with E, because the information could be obtained from E by pre-action disclosure under CPR 31.16.

71. In the course of his judgment, at [19], Lightman J cited a number of authorities in support of the proposition that:

> "Relief can be ordered where the identity of the claimant [sic] is known but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claim requires a missing piece of the jigsaw".

72. At [27], Lightman J referred in the context of CPR 31.16 to a purpose of that rule being:

> "... to assist those who need the disclosure as a vital step in deciding whether to litigate at all or to provide a vital ingredient in the pleading of their case."

73. For his part, Mr Ramsden himself referred me to the case of *Ramilos*, in particular, at [11] to [26] and [61] to [62], and *Nikitin v Richards Butler*, at [23], and *Burford Capital Limited v London Stock Exchange*, in particular at [39] to [42], as well as the recent decision of Clare Ambrose (sitting as a Deputy High Court judge) in *Linda Hickox v Simon Dickinson* [2020] EWHC 2520 (Ch), in particular at [41] to [51], all of which I bear well in mind when considering the applicable principles in relation to *Norwich Pharmacal* relief.

E. THE APPLICATION AND HSBC'S RESPONSE THERETO

74. HSBC submits that the application is plainly misguided for a number of reasons, each of which it is said individually are a reason for the claim to be dismissed:

(1) The applicants do not have a good arguable case against HSBC;

(2) The applicants seek evidence and not information, which cannot be ordered under the *Norwich Pharmacal* jurisdiction;

(3) The applicants have refused to reveal their identities, which is not only a breach of the CPR but also gives rise to insuperable difficulties of substance; and

(4) The overall justice condition is not met in circumstances where (amongst other matters) the information sought is not vital to a decision to sue or an ability to plead.

75. I will consider each of these in the context of the claimants' application for *Norwich Pharmacal* relief.

F.1: THE ARGUABLE WRONG CONDITION

Claim in Contract/Tort

76. It appears clear enough, from the witness statement of Mr Harvey and the skeleton argument of Mr Ramsden, that what the claimants are seeking to advance is a claim in contract and/or in the tort of negligence. HSBC submits that the claimants have not in evidence specified how the contractual or tortious duties arose, or which contractual clause was allegedly breached, or how any breach has resulted in loss (and if so, how much). Most fundamentally, it says that it has never been understood how the applicants can assert a claim for breach of contract (or any concurrent tortious duties) in circumstances where the contractual parties had an agreement with Zeus and HSBC and **not** any investors in Zeus schemes. They note that this is not addressed at all in the applicants' evidence and that the only partial response on this point has been made in correspondence in which Bermans stated:

> "The suggestion that the investors and third party beneficiaries of your clients' assumed contractual duties under the agreement cannot claim the benefit of them and pursue your client for losses arising from their breaches is naive/disingenuous. We suggest you take the allegations more seriously and provide a more considered response than your letter suggests has thus far been given to them."

77. To the extent that this appears to foreshadow any attempted reliance on the Contracts (Rights of Third Parties) Act 1999, I have already noted that any such rights are expressly stated to be excluded in clause 26, a clause that is not referred to in Mr Harvey's statement or in the Claimants' Skeleton Argument.

78. I am satisfied that in the application notice, and in the supporting witness evidence of Mr Harvey, there has been a failure to engage with matters which are relevant to any contractual claim, and the supporting witness evidence is argumentative and also fails to draw to the attention of the Court pertinent provisions of the agreement which would result in a very different impression to that which was sought to be created in the application and the witness evidence.

79. In this regard, Mr Harvey states:

> "I contend that what is clear ... is that ... [HSBC] assumed both contractual and tortious duty to investors under the agreement and this was an ongoing duty ... yet despite receiving substantial funds for their purported delivery of 'services', failed to notify the investors of their concerns in breach of duty and, as such, there exists a good arguable case of wrongdoing against the respondent." (Harvey 1, paragraph 32) (emphasis added)

80. And perhaps, even more egregiously:

> "It cannot, I submit, be objectively disputed that ... the investors can demonstrate clearly that HSBC assumed contractual duties to them, pursuant to the ... agreement." (Harvey 2, paragraph 10) (emphasis added).

81. Mr Harvey also asserts, at paragraph 12 of Harvey 1, that:

> "The assumption of a clear duty to the investors, I believe, cannot be credibly challenged by HSBCPM/the respondent."

82. Quite apart from the witness statement descending into inappropriate legal argument which should be in the skeleton argument and not the witness statement which should deal with matters of fact (as Mr Ramsden accepted during the course of his legal submissions), I am satisfied that what is not made clear in that witness evidence, as it should have been, is that the services are being provided by HSBC to Zeus, that the investors are not a contractual party to the Agreement, and that the Agreement expressly provides that:

> "No person who is not a party to this agreement shall be able to enforce this agreement by virtue of the Contracts (Rights of Third Parties) Act 1999." (Clause 26).

83. In this regard, it is clear from a consideration of the Agreement that:

(1) Whilst recital B, provides *"Zeus has agreed to appoint HSBC to provide financial planning and ongoing tax and financial advice in relation to the agreed arrangements for customers"* (which is quoted by Mr Harvey), recital D makes clear that such services are being provided to Zeus:

> *"Zeus has agreed to appoint HSBC, and HSBC has agreed to provide such services to Zeus"* (emphasis added)

(2) "Customers" are defined as *"customers **of Zeus** from time to time"* (emphasis added) (which Mr Harvey does refer to and says that these are the investors).

(3) "Services" are defined as:

*"The services carried out by HSBC **for Zeus** as described in schedule 1 of this agreement"* (emphasis added).

(4) Clause 3.1 provides (in relation to "obligations of HSBC") that:

> *"HSBC will supply the services **to Zeus** and perform its other obligations under this agreement in accordance with the terms of this agreement."* (emphasis added)

(5) Clause 3.3 provides that:

> *"Zeus acknowledges that it will be responsible for making its own decisions in relation to any advice, financial structure or other information provided by pursuant to this agreement ... however HSBC acknowledges that **Zeus** will use and rely on advice and information provided by HSBC in connection with the provision of the services."* (emphasis added)

(6) Clause 4.1 provides:

> *"HSBC hereby covenants with and undertakes **to Zeus** without prejudice to any of its specific obligations under this agreement it will: (1) act with all due skill, care and diligence in the provision of the services provided pursuant to this agreement"* (emphasis added)

(7) Schedule 1 is referred to by Mr Harvey, but he omits the words that I have emboldened:

*"HSBCPB will provide **the following services related to plans to Zeus** ... advice on legislative and financial issues which arise from time to time with recommendations and advice on impact for Zeus and/or customers."*

(Mr Harvey himself emboldening the separate word "customers", albeit that he does in the next paragraph (11) refer to the definition of "services" to be provided to Zeus).

84. Little attempt is made to grapple with the difficulties that there would be in any action of establishing contractual duties with investors (as opposed to Zeus) in the Skeleton Argument, and indeed it begins at paragraph 4 by stating, and I quote:

> "The prospective claim in respect of which this disclosure is sought concerns approximately 200 claimants in a potential claim for damages believed to be in the region of a collective minimum sum of £50 million against the respondents for breach of contract and/or negligence." (emphasis added)

85. Whilst at paragraph 25, it is asserted that:

> "[HSBC] assumed certain duties under the agreement ... recitals B and D ... clause 3.3 .../schedule 1 definition of "services" ... there is a sufficient justified claim that the respondent assumes those duties not just to Zeus but to 'customers' (investors) to whom frequent reference is made in the contractual context of [HSBC]'s duties."

86. But no attempt is made to explain how there could be a contractual claim in favour of the investors or how clause 26 (which is not mentioned) could be overcome.

87. Furthermore, when addressing "the respondent's objections to the order", in the Claimants' Skeleton Argument, no response is made to the objection of HSBC that investors are not party to any contract with HSBC and the claimants do not grapple with the fact that (as HSBC had submitted in correspondence) but is not dealt with in either Mr Harvey's second statement or the Claimants' Skeleton Argument, that it is over ten years since any advice was given by HSBC (per Stephen 1) and so any contractual claim would prima facie be time barred in any event (any cause of action having arisen more than six years ago, and no action having yet been commenced so far as I am aware).

88. In fact, pressed on a number of those matters during the course of his oral submissions, Mr Ramsden did not pursue before me a contractual claim as a basis for the *Norwich Pharmacal* relief and concentrated his submissions that there was a good arguable case in relation to a tortious duty based on an assumption of responsibility. It is fair to point out, however, as I have already quoted, that such contractual basis for the claim was pursued as recently as the Claimants' Skeleton Argument.

89. I am satisfied, on the basis of the evidence adduced to date by the claimants, that there is no good arguable case of any contractual wrongdoing between HSBC and the investors. The material is not *"more than barely capable of serious argument"* (Ramilos at 14, quoting from *The Niedersachsen* [1983], 2 Lloyd's Reports, 600, 605, left hand column). On the contrary, there is nothing, on the basis of the evidence adduced to date, that would justify even an arguable contractual claim for breach of contractual duties by investors against HSBC.

90. The basis for any tortious claim is barely articulated in the witness evidence and consists in the assertion of Mr Harvey that *"the assumption of a clear duty to investors I believe cannot be credibly challenged by HSBCPB/the respondent"*, seemingly based on the various references to "customers" in the agreement (albeit that it is expressly stated that the services are being provided to Zeus).

91. In their Skeleton Argument, the claimants refer (for the first time) to *Hedley Byrne* and the assumption of responsibility test. In this regard, it is asserted at paragraphs 42 and 43 that:

> "42. The current juridical basis for the claim is a *Hedley Byrne* assumption of responsibility by the respondent to the applicants and investors, see *Barclays Bank Plc v Fairclough Building Limited No. 2* [1995] IRLR 605, *Riyad Bank v Ahli United Bank (UK)* [2006] EWCA Civ 780, *HOW Engineering Services Limited v Southern Insulation (Medway) Limited* [2010] EWHC 1878 (TCC) especially per Mr Justice Aikenhead [14]. There may be a number of objections to the claim of a voluntary assumption of responsibility in opposition to a fully formulated claim, but for the purposes of this application the fact that the applicants are identified "as customers" of the "services" defined in schedule 1 to the agreement is highly persuasive.
>
> 43. The respondents' involvement cannot be disputed and the basis upon which there are suspicions of wrongdoing are clear. The provision of further information by way of this disclosure order is necessary and proportionate, in order to understand more about the alleged wrongdoing already identified and to understand if further wrongdoing has been committed."

92. However, as the claimants made clear at footnote 6:

> "If the applicants can establish an assumption of responsibility, they accept it must be co extensive and concurrent with the agreement following the consistent ratio of cases since *Henderson v Merrett Syndicates*."

93. The authority that they place much reliance on, the judgment of Aikenhead J in *HOW Engineering Services*, is a concurrent duty case. As is said at [14]:

> "A concurrent duty of care in tort can exist as between the two parties to a contract for services or for the supply of goods and services; that duty of care will be definable by reference to the contractual responsibilities and liabilities assumed by the parties to the contract ..."

94. However, in the present case, on the evidence available to date, there are no arguable contractual duties owed to the investors (but only to Zeus) so this would not be a concurrent duties case (save in the sense that HSBC could not be said to owe any greater or different duties than under the contract with Zeus). The investors would have to establish a freestanding (in relation to the investors) assumption of tortious responsibility under *Hedley Byrne* principles. That is a hard ask, in circumstances where they do not rely, in Mr Harvey's evidence anyway, on any evidence "crossing the line" to support such an assumption of responsibility.

95. A potentially fatal obstacle to any such assumption of responsibility is revealed in paragraph 18 of Bermans' letter of 27 May 2020, where it is stated (presumably in anticipation of a section 14A of the Limitation Act argument on limitation):

> "A Limitation Act 1980 defence is not available to your clients *as the investors have only (in part) been recently made aware of the existence of the agreement and its terms.* ***Most investors are, as yet, unaware of the agreement, let alone the express contractual duties assumed in their favour"*** (emphasis added)

96. If the investors were not even aware of the Agreement, still less its terms, that does not auger well for any assumption responsibility in tort, given that the very basis for the assertion of the assumption responsibility is the existence of the Agreement and its terms, a contractual agreement the investors are (on this evidence) unaware of.

97. Mr Adamson also points out that there is, in fact, a lack of evidence within Mr Harvey's witness statements to bring the claims within the *Hedley Byrne* jurisdiction and to grapple with what evidence gives rise to the assumption of responsibility, if one goes down that route, or the threefold test, in circumstances where no material is identified.

98. Yet further, it is pointed out that any claims, both in contract and tort, are prima facie time barred and, despite that being extensively aired in the correspondence, no answer is given in the witness evidence or in the Claimants' Skeleton Argument or, indeed, as Mr Adamson pointed out in his oral submissions, by Mr Ramsden in his submissions before me today.

99. The events to which the investors alleged claims relate, and therefore any breach of any contractual or tortious duty would have occurred, are in 2007/2008. Any claim would prima facie, therefore, be statute barred by reason of the expiry of the six year limitation period and, limitation having been raised, it would be for the claimants to prove why the claimants' claims were not time barred at any trial.

100. The point is simply ignored by the claimants in their witness evidence and the Skeleton Argument, despite the point being made clearly and repeatedly by HSBC in correspondence and in the evidence.

101. The point is only briefly dealt with in Bermans' letter of 27 May 2020 as quoted above. This response itself is problematic in relation to any riposte to a limitation defence. First, it appears to be predicated on the basis of a mistaken belief that limitation in respect of contract claims can be extended in the same way as claims for negligence and as a result of this misapprehension Bermans are actively withholding the Agreement from former investors *"for protective purposes under the Limitation Act 1980"*. It is said that the investors have only (in part) been recently made aware of the existence of the Agreement and its terms, but it cannot be judged as to which applicants this might apply to, given that they have not been identified.

102. Secondly, the only potential applicant who is actually mentioned in evidence (Mr Ryder), as I have already noted, appears to be the signatory to the Agreement on

behalf of Zeus and is named at clause 16.1.1 of the Agreement as a recipient of any notices or communications to Zeus. So it would appear that he has always known about the Agreement and its terms since inception.

103. Thirdly, any point as to knowledge would have to be made good by evidence which the claimants have not to date done. Indeed, in reply, Mr Ramsden accepted that he was constrained by the evidence that is before the Court and there is nothing before the Court that would allow me to investigate further whether or not there was a possible answer under section 14A of the Limitation Act 1980 to the prima facie defence which has been identified.

104. Fourthly, and Mr Adamson says fundamentally, even if the time limit were to be extended by section 14A of the Limitation Act 1980, on the basis of the current evidence any tortious claim would appear to be time barred in any event (subject to any relevance of knowledge of the Agreement) as the claimants' case would appear to be that they were made aware of "the concerns" which form the basis of this application when the emails cited by Mr Harvey *"came to their attention in the course of disclosure by HMRC in the Criminal Proceedings"*. However, as is clear from paragraph 17 of Mr Harvey's first statement, those Criminal Proceedings were dismissed in June 2017, i.e. more than three years ago.

105. I have already concluded that the claimants, on the material currently before me, have not demonstrated a good arguable case in contract against HSBC. As is apparent from the above discussion, there are formidable hurdles to any assumption of responsibility and a claim in tort.

106. However, I consider it preferable not to express any concluded view on such tortious claims, given that it seems clear enough that the claimants consider that they have sufficient information to commence a claim (Harvey 1, paragraph 6) and have funding in place for the prospective claims (Harvey 1, paragraph 33, Harvey 2, paragraph 11), with the consequence that if the envisaged proceedings are commenced against HSBC, it is possible that this Court may be called upon to adjudicate upon the merits of such a claim at an interlocutory stage and I would prefer that I, or indeed any other judge of this Court, has a clean slate when doing so, without any preliminary view on the merits having already been expressed.

107. The position might have been different if the *arguable wrong* condition was on the critical path to the Court's decisions. In that case, it would have been necessary for me to opine on the merits of the tortious claim in more detail and to reach a conclusion on the good arguable case.

108. However, in the context of the other considerations addressed below, I consider it suffices to note that such a tortious claim would face formidable hurdles, which is, of itself, of relevance at the discretion stage.

F.2. THE MIXED UP CONDITION AND POSSESSION CONDITION

109. 118. As was stipulated in *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366:

> "... the order for discovery must not offend against the 'mere witness' rule which prevents a party from obtaining discovery against a person who will in due course be compellable to give that information either by oral testimony as a witness or on a subpoena duces tecum (now under the CPR a witness summons) to give oral evidence or to produce documents."

110. The claimants acknowledge that whilst it remains a possibility that agents of HSBC may be compelled as witnesses in the proceedings, the disclosure is sought against HSBC whose documents these are, so there is no difficulty in satisfying the possession condition.

111. The real difficulty for the claimants is not so much that HSBC might be said to be "mere witness" or might not be in possession of the documents, but in the fact that HSBC is the proposed defendant and the real battle ground is in relation to the overall justice condition and whether the information sought is necessary in the interests of justice, in circumstances where, if a claim is brought, disclosure will be given (and specific disclosure if justifiable sought in the context of the disclosure process).

F.3. OVERALL JUSTICE CONDITION / ORDER NECESSARY IN THE INTERESTS OF JUSTICE

112. The claimants cannot possibly, and have not, demonstrated that the *Norwich Pharmacal* order that is sought is necessary in the interests of justice. Even assuming that there is an arguable tortious wrongdoing, the Agreement itself is already available. The existing documentation relied upon clearly does allow the pleading out of an alleged assumption of responsibility and a breach of duty thereunder together with the plea as to loss. Yet further, whether or not there has been assumption of responsibility, and the claimant's case in that regard, is unlikely to be advanced or improved by the disclosure sought which all relates to internal HSBC documentation, which is unlikely to shed light on whether or not there has been an assumption of responsibility, looking at the overall relationship as between HSBC and the investors.

113. In reality, the bolt was shot from the very start with paragraph 6 of Mr Harvey's first statement in which he acknowledges that:

> "The documents that are available indicate breach has occurred and may well be sufficient in their own right to support the claimants' prospective claims."

114. This candid admission was inevitable and anything less would have appeared disingenuous as, armed with the Agreement and the internal documentation to date, the claimants have what they need to plead a claim against HSBC. It does not suffice to say (and indeed it rather gives the game away as to the nature of what is really being sought) for Mr Harvey to continue:

> "Disclosure of the categories of documents set out in schedule 1 will, it is believed, provide a more complete picture of the nature and scope of the breach, such that claims for breach may be fully considered with investors and then particularised in detail."

115. It is not, and cannot be suggested that there is *"some missing piece in the jigsaw"* (*Mitsui* at [13]) or that the documentation is needed as a vital step in deciding whether to litigate at all or to provide a vital ingredient in the pleading of their case (*Mitsui* at [27]).

116. What is more, as is developed further below, the order itself, in terms of the disclosure that is sought, does not contain missing pieces of any jigsaw.

117. This is also the case where the claimants' own evidence is that they have funding in place for any claims, set against the backdrop of the articulated claims and evidential material already relied upon in the witness evidence. The acquisition of such (third party) funding will inevitably have included an assessment as to the merits and viability of a claim, without which funding cannot normally be obtained.

118. But whether that is so or not, it cannot possibly be suggested, and most certainly has not been demonstrated, that the documentation sought is vital to a decision to sue or an ability to plead (see *Nikitin v Richards Butler LLP*, supra, at [24]).

119. The information is not, I am satisfied, necessary in order to enable the claimants to take action which could not otherwise effectively be taken. As addressed below I consider that the application is an unfocused and overwide application that has all the hallmarks and characteristics of a "fishing expedition" (see *Ramilos* at [62]), the product of which is not needed to plead a proper claim.

120. Additionally, and addressing what was said by Andrew Baker J in the *Burford* case at [40], as to whether, in the circumstances of a particular case, justice required from the facilitator the particular cooperation demanded of him by the claimant with a view to righting a facilitated wrong, I am satisfied that this is not a case where justice so requires, or where justice could not be done, unless the order is made. On the contrary, the information sought is neither necessary nor vital, and is not necessary to ensure that justice is done.

121. I would reiterate again, in the context of an action being pleaded out in the Commercial Court, what is made clear by paragraph C.1 of the Commercial Court Guide, that the statements of case must be *"as brief and concise as possible"* and *"particular care should be taken to set out only those factual allegations which are necessary to enable the other parties to know what case it has to meet", "evidence should not be included"*, set against the backdrop of a 25 page limit for a statement of case and the fact that the court *"will only exceptionally give permission for a longer statement of case to be served"*.

122. Little is said in the supporting evidence or the Bermans correspondence as to why the overall justice condition is satisfied. Rather, Mr Harvey simply submits at paragraph 10(d) of his second statement that:

> "Given that all three principal criteria are satisfied, in my respectful submission, the overall justice in ordering focussed disclosure of key documents, subject to keyword search criteria, as is suggested below, is both appropriate and proportionate in the interests of justice."

123. As I address below, what is sought is not focussed disclosure of key documents, nor is what sought appropriate and proportionate. However, before addressing such matters, the reasons actually given for the disclosure sought themselves do not justify a *Norwich Pharmacal* order. Reference is made to a "complete picture" of the wrongdoing and to remove the possibility of amendments being required after disclosure. These are not justifications for *Norwich Pharmacal* relief.

124. A complete picture is not needed to decide to advance, and to advance, a claim, and the possibility of future amendments is not a justification either. Amendments to statements of case often follow disclosure and, in that context, only necessary amendments should be made in any event.

125. Nor do the wider matters identified in the evidence justify the making of an order. On the contrary, they militate against the making of an order. Mr Harvey has stated that several investors have provided an indicative commitment and that funding and ATE insurance are in place. Such evidence is indicative of the applicants already being in a position to be able to assess the merits of a claim and to bring a claim if they choose to do so.

126. Equally, there has been little attempt to engage in substantive pre-action correspondence (with the points raised by HSBC's lawyers largely not responded to in correspondence) and the claimants have not engaged in pre- action protocols.

127. The claimants' skeleton argument contains the assertion that *"this is not a conventional professional negligence claim to which the pre action protocol for claims in professional negligence would apply"*. Notwithstanding what Mr Ramsden said to me during his oral submissions, it remains unclear to me why that is so, given the nature of the allegations.

128. But in any event, the Practice Direction on Pre Action-Conduct and Protocols would apply and is usually to be observed (see paragraph B3.1 of the Commercial Court Guide). Little attempt seems to have been made to obtain focussed or specific documentation, and no vital or key document has, in any event, been identified that the claimants do not have. This all militates against the making of a *Norwich Pharmacal* order.

129. Even more fundamentally, the scope of the original order was unjustifiably wide and has never been justified in evidence as to why such far ranging disclosure was needed at this stage. Yet further, the scope of the amended order before today was itself neither justified, nor justifiable. The prospects for obtaining a *Norwich Pharmacal* order are materially impaired by an attempt to obtain disclosure in wide ranging and unfocused terms.

130. One only has to look at the face of the amended draft order to see that that is an apt description of the present application. What was sought is:

> "Disclosure of all documents within [HSBC's] control that contains information, **relating to, including but not limited to** ... all attendance notes, memoranda, advices and **email exchanges between any and all of:**

> Neil Bowman, Guy Surtees, Mark P Williams, Olivia Emmerton, Tim Levy of Future Capital, Marie Earnest and Group Tax (and members thereof), Steve Bold, Dominic Ryder or Richard Hughes **between January 2007 and December 2010** and making reference to any or all of the following keywords…" (emphasis added).

131. There then follows a lengthy list of keywords, including: *"HSBC Private Bank/HSBC/HSBCPB/HSBC (UK) Limited/Private Banking Great Britain/PBGB or any variation thereof "* that has all the hallmarks, in my view, of not being focussed, proportionate and necessary documentation to plead a claim, or even disclosure within the standard of disclosure, but a wide ranging fishing expedition worthy of the worst excesses of *Peruvian Guano* and today only rarely available under category E (and only to be ordered in an "exceptional case" Practice Direction 51U, paragraph 8).

132. It is to be borne in mind that various of the named individuals are employees of HSBC, including Neil Bowman, Guy Surtees, Mark Williams and, I am told, Olivia Emmerton. So what is being sought is all emails between them, as they will inevitably all contain variations on the word "HSBC" in their email address, and no doubt in their signature, over a four year period.

133. When this was pointed out to Mr Ramsden in the course of oral argument, he accepted that this would result in irrelevant documentation being revealed and would be disproportionate. He stated that the intention was to catch communications between the individuals involved in the schemes; and in this regard he produced, over the short adjournment, a yet further refinement, adding an initial qualification at the beginning, so it provides:

> "The applicants seek disclosure of all documents within the respondents' control that contain ..."

And then deleting the words that followed, and then going on:

> "All attendance notes, memoranda, advice and email exchanges."

And including the words:

> "Relevant to the arrangements in schedule 4 to the agreement dated 21 November 2007, between any and all of ..." (emphasis added)

And then he maintained all the bullet points that follow.

134. So in other words, what was contemplated was that there would still be all the electronic disclosure generated by reference to those individuals searched by reference to the keywords which are then set out, and that there would then have to be a manual exercise, not only to check for privilege, but to decide whether or not those documents were "relevant to the arrangements in schedule 4 to the agreement dated 21 November 2007".

135. Yet further schedule 4 to the Agreement is itself in imprecise terms and refers to the following arrangements being covered by this agreement: "Enterprise investment scheme structures and offshore income deferral plans."

136. So not only would all the electronic searches have to be done, there would then have to be a manual review of all of that to see whether or not those documents were relevant to the arrangements in schedule 4 to the Agreement dated 21 November 2007.

137. If that was not bad enough, when one then looks at the individual search terms, not only would they trigger a very large amount of documentation, simply because of the fact that the individuals worked at HSBC, but a similar vice was created in relation to a number of the other terms.

138. For example, one of the other keywords to be searched was *"fee/charges/commission/remuneration"*, which one would have thought in the context of a bank might generate rather a large amount of material. Also in the context of the reference to the Group Tax and members thereof, there would therefore be a number of individuals and one would be looking in relation to those individuals, in relation to keywords, amongst other matters, for *"HM Revenue & Customs and HMRC"*. Well, given that group is entitled "Group Tax", I would have thought the overwhelming likelihood is that there would be rather a lot of documentation, in terms of hits, for the words *"HM Revenue & Customs and HMRC"*.

139. There are also other wide terms, such as "Group Tax/credit/compliance", and there are also references to not only individual named QCs, but also references to "counsel". Well, again, when you've got an entity with references to "Group Tax" and members thereof, that would be likely to trigger potentially quite a large number of references to "counsel", assuming Group Tax deal with tax matters and might seek information and advice from counsel.

140. Quite apart from the fact that any search terms which search in relation to the Group Tax department and communications with counsel would be prima facie privileged, in any event, the extreme breadth of the electronic search can be seen.

141. I am satisfied that those search terms are not properly formulated by reference to the underlying claim and nor are they what is absolutely necessary and, indeed, would be a fishing expedition of some considerable proportion, made worse by the fact that the electronic exercise which is, at the end of the day, designed to reduce cost and acquire documentation by an electronic search, would then be subject to a manual review, in order to bring it within the bounds of the two relevant, or however many relevant, schemes there are.

142. That is not the sort of exercise which is appropriate in relation to an application for *Norwich Pharmacal* relief, and nor, as I am going to make clear, is it the sort of exercise that would be justifiable on standard disclosure. In order to get that sort of disclosure, one would need to be within category E of the disclosure pilot which, as I have already foreshadowed, is only to be ordered in an exceptional case. That is not to pre judge any such application hereafter, but simply to point out that if one is in that territory, then one is in some difficulty, in the context of *Norwich Pharmacal* relief.

143. Notwithstanding Mr Ramsden's valiant attempts over the short adjournment to narrow the scope of the disclosure sought, it continues to read as a "wish list" of every document of even possible relevance to any purported claim the claimants may choose to particularise in the fullness of time, with a real risk that it will generate a morass of irrelevant documentation or "documentary chaff" as an inevitable consequence of the search terms before a manual sift through that material to identify that which is relevant to the claims.

144. As I have already foreshadowed, sight should also not be lost of the fact that whatever work product was produced would have to be sifted, not only for relevance to the schemes concerned under the Agreement, but also for matters such as privilege.

145. The disclosure sought, even as refined, is not, I am satisfied, focussed "necessary information" and as such the disclosure sought is not within the narrow scope of the court's *Norwich Pharmacal* jurisdiction; since such disclosure falls under Flaux J's categories in *Ramilos* as "evidence" and I am satisfied it is also properly characterised as a "fishing expedition" in the *Ramilos* sense at [62], and indeed in the general disclosure sense, and would not be appropriate for pre-action disclosure under CPR 31.16 either, going beyond what would be ordered under standard disclosure. It is not in the interests of justice to order such disclosure.

146. There is a further hurdle that has not been surmounted, and that relates to the identity of the claimants, which is relevant to whether the relief sought should be granted, both at the interests of justice stage and in the overall exercise of discretion. I have already addressed what I consider to be the unsatisfactory position in relation to the identity of the claimants which impacts upon the application at various levels and various stages of the issues under consideration; and why I consider the claimants should have been named in such context, and I repeat the points made at this stage.

147. In particular, the applications, by their very nature, are seeking information which has the potential to be confidential and which is sought for, and can only be used for, a specific purpose. It needs to be clear who is applying for it, who is receiving that information and who can use it, so it can be assessed whether they have any entitlement to such information and whether it is inappropriate to give them such information. It is also necessary to know who the claimants are, in the context of the envisaged order, and the undertakings being proffered and in relation to the cross undertaking in damages.

148. I do not consider that those concerns are met by the suggestion from Mr Ramsden during the course of oral argument that there could be a further statement from Mr Harvey to address such concerns, or that one individual who is part of the Steering Committee, Mr Mifsud, could be added or indeed that the 100 or so investors who have already associated themselves with the application could be named. These are all matters that should have been grappled with, in advance of the application, given that HSBC's solicitors repeatedly sought information and it was repeatedly not provided.

149. Even now, there was no application to amend the application notice; no names other than Mr Mifsud have been given, other than Mr Raynor and the identity of the 100 individuals (out of a larger cohort of 200 investors that it is hoped to recruit) have not been given, still less added to the application notice.

150. Accordingly, if, contrary to the above conclusions, I had considered that the requirements for relief might otherwise have been satisfied, it would not have been appropriate to grant relief as matters stand, given such matters and the continuing uncertainty as to the identity of the claimants.

151. For the above reasons, the requirements for *Norwich Pharmacal* relief are not met. Equally, had the requirements been met, I would not have considered it appropriate in the exercise of the court's discretion to have granted the relief sought. It is neither vital nor necessary in advance of any action being commenced and I am satisfied that such information is not required in order for justice to be done. Such additional disclosure, as is appropriate, will be provided, either under any Protocol or by way of initial disclosure or by any appropriate extended disclosure under a particular Model, in due course, if an action proceeds.

152. In such circumstances the application for *Norwich Pharmacal* relief is dismissed.

G. PRE-ACTION DISCLOSURE CPR 31.16

153. No application for pre action disclosure was made in the application notice, nor in the supporting witness statement of Mr Harvey, nor was such an application made when HSBC's solicitors pointed out that the present case is not an appropriate one for *Norwich Pharmacal* relief and if there was to be any basis for obtaining any of the documentation sought, it would have to be by way of pre action disclosure under CPR 31.16. Indeed, the riposte from Bermans was that:

> "Your assertion that an application under CPR 31.16 is more appropriate ... is also misplaced and has no substantive value ... CPR 31.18 expressly preserves the court's common law power to award a pre action disclosure and disclosure against non parties."

154. Even if there had been any merit in an application for a pre action disclosure, I would have been reluctant to grant permission to amend during the course of the hearing, in circumstances where neither party has had an opportunity to address the matter in evidence, Mr Adamson for HSBC only became aware of any such purported application on service of the Claimants' Skeleton Argument, with the result that he had limited opportunity to respond, and in circumstances where the claimants were denying the relevance of CPR 31.16 and where, even at this late stage, no reason, still less any good reason, was given for now seeking to make such an application.

155. Had I been minded to allow such an amendment, an adjournment might have been required to ensure that the respondent thereto was not prejudiced. However, that is now academic for two reasons.

156. Firstly, because Mr Ramsden realistically recognised that if he could not meet the requirements, including the interests of justice requirements, in relation to *Norwich Pharmacal* relief, he would not be able to meet the requirements of CPR 31.16; so, in effect, he ultimately did not pursue the application under 31.16, which was only

foreshadowed for the first time in his Skeleton Argument served immediately before the hearing.

157. But secondly, because the requirements for pre action disclosure are clearly and self-evidently not met and pre action disclosure of the documentation sought would not be appropriate. As already noted, and as was noted by Mr Justice Jacobs in *Carillion* at paragraph 15:

> "Pre action disclosure applications in the Commercial Court are rare and no recent examples of successful applications have been identified."

158. But be that as it may, I am satisfied that the requirements of CPR 31.16 are not met and that this would not be an appropriate case to add to the select oeuvre of successful such applications.

159. CPR 31.16 provides as follows:

"(1) This rule applies where an application is made to the court under any Act for disclosure before the proceedings have started.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where:

(a) the respondent is likely to be a party to subsequent proceedings.

(b) the applicant is also likely to be a party to those proceedings.

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure, and:

(d) disclosure before proceedings have started is desirable in order to:

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs."

160. The application was not supported by evidence addressing the CPR 31.16 test, albeit that the evidence did address the documentation and why it was sought, at least to an extent.

161. However, the application fails at the first hurdle of CPR 31.16(3)(c) because had the proceedings started HSBC's duty, by way of standard disclosure, would not extend to the documents/class of documents of which the claimants seek disclosure; the disclosure sought being way wider than that and properly characterizable as a 'fishing expedition' for the reasons I have given.

162. In any event disclosure before proceedings have started is most certainly not desirable in order to dispose fairly of the anticipated proceedings or to assist the dispute to be resolved without proceedings or to save costs. On the contrary, such disclosure is not desirable and is not necessary to dispose fairly of the proceedings, which can properly and fairly be commenced without it, nor would it assist the parties in resolving their dispute without proceedings, nor would it save costs. On the contrary, it would increase costs.

163. In the above circumstances, even if the application had been pursued, I am satisfied that the application would have failed on its merits and I find that the claimants are not entitled to the documentation sought as pre action disclosure.