

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

No.IHQ07/0049

[2007] EWHC 457 (QB)

Royal Courts of Justice
Monday, 26th February 2007

Before:

MR. JUSTICE KING

BETWEEN:

CAMPAIGN AGAINST ARMS TRADE

Applicant

- and -

BAE SYSTEMS PLC

Respondent

*Transcribed by **BEVERLEY F. NUNNERY & CO**
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737*

MISS D. ROSE QC and MR. B. JAFFEY (instructed by Leigh Day & Co) appeared on behalf of the Applicant.

MR. A. WHITE QC (instructed by Allen & Overy) appeared on behalf of the Respondent.

J U D G M E N T

(As approved by the Judge)

1 MR. JUSTICE KING:

2
3 1 I have handed down judgment in this case, and pursuant to that judgment
4 I have made an order for disclosure in the terms set out.

5
6 2 There remains the question of costs. I have been reminded by both parties that
7 in respect of an order of this nature, one does not follow the normal principle
8 of costs following the event. Counsel on behalf of the Respondent has drawn
9 to my attention a specific paragraph in **The White Book**, p.791 vol.1, in the
10 notes to CPR Part 31 rule 18 as follows:

11
12 “The claimant seeking the name of the wrongdoer will have to pay a
13 blameless defendant’s expenses in providing the information, and if the
14 defendant has any doubts then he may properly require the matter to be
15 submitted to the Court before supplying the information and the
16 claimant will nevertheless be obliged to pay the costs of these
17 proceedings. Where a claimant obtains the name of a wrongdoer by a
18 claim for disclosure and production in which he has to pay the costs, and
19 where the wrongdoer can or ought to foresee that steps by way of
20 investigation and disclosure are likely to result from his wrong, the
21 claimant may recover such costs as damages in subsequent proceedings
22 against the wrongdoer”.

23
24 This is all extracted from the decision in *Morton Norwich Products Inc v*
25 *Intercen Ltd (No.2)*[1981] FSR 337.

26
27 3 There is further helpful guidance in the Court of Appeal decision in
28 *Totalise Plc v The Motley Fool Ltd & Ors* [2001] EWCA Civ 1897, a decision
29 of the Court of Appeal of 19th December 2001. It is sufficient if I read the
30 following paragraphs from that judgment:

31
32 “Paragraph 22: We accept that the Court has a discretion as to the order
33 for costs when deciding a *Norwich Pharmacal* application, but such
34 applications are not truly ordinary adversarial proceedings as the
35 defendant, whether it be a web provider, Customs & Excise, a telephone
36 company or a bank, does not normally resist the order being made.
37 Such defendants have become mixed up in tortious acts and are only
38 concerned that duties and rights, such as duties of confidence and
39 legitimate interests of privacy, are considered by the Court. It is for the
40 Applicant to satisfy the Court that the order should be made, not for the
41 defendant to take a view which could be wrong. We believe that this is
42 emphasised by an analysis of the parties’ submissions on the effect of
43 the Data Protection Act 1998.

1
2 Paragraph 28: We also believe it is legitimate for a party, such as
3 Interactive, who reasonably agrees to keep information confidential and
4 private, to refuse to voluntarily hand over such information. That we
5 believe was applicable to this case. Despite the submissions of
6 Mr. Maloney as to the effect of clause 12 of Interactive's terms and
7 conditions, we are not convinced that Interactive were free to hand over
8 the material without coming to a view on the merits. That was not their
9 task. The position could have been different if they were in some way
10 implicated or involved in the wrongful act.
11

12 Paragraph 29: We believe that Mr. Higham is right. *Norwich*
13 *Pharmaceutical* applications are not ordinary adversarial proceedings, where
14 the general rule is that the unsuccessful party pays the costs of the
15 successful party. They are akin to proceedings for pre-action disclosure
16 where costs are governed by Part 48.3 CPR. That rule, we believe,
17 reflects the just outcome and is consistent with the views of Lord Reid
18 and Lord Cross in the *Norwich Pharmaceutical* case. In general, the costs
19 incurred should be recovered from the wrongdoer rather than from an
20 innocent party. That should be the result, even if such a party writes a
21 letter to the Applicant asking him to draw the Court's attention to
22 matters which might influence a Court to refuse the application. Of
23 course, such a letter would need to be drawn to the attention of the
24 Court. Each case will depend on its facts and in some cases it may be
25 appropriate for the party for whom disclosure was sought to appear in
26 Court to assist. In such a case he should not be prejudiced by being
27 ordered to pay costs.
28

29 Paragraph 30: The Court when considering its order as to costs, after a
30 successful *Norwich Pharmaceutical* application, should consider all the
31 circumstances. In a normal case the applicant should be ordered to pay
32 the costs of the party making the disclosure, including the costs of
33 making the disclosure. There may be cases where the circumstances
34 require a different order, but we do not believe they include cases
35 where:
36

37 (a) the party required to make the disclosure had a genuine doubt
38 that the person seeking the disclosure is entitled to it;
39

40 (b) the party was under an appropriate legal obligation not to reveal
41 the information, or where the legal position was not clear, or the
42 party had a reasonable doubt as to the obligations; or
43

1 (c) the party could be subject to proceedings if disclosure was
2 voluntary; or

3
4 (d) the party would or might suffer damage by voluntarily giving the
5 disclosure; or

6
7 (e) the disclosure would or might infringe a legitimate interest of
8 another.

9
10 Paragraph 31: That does not mean that a party who supports or is
11 implicated in a crime or tort or seeks to obstruct justice being done
12 should believe that the Court will do other than require that party to bear
13 its costs and if appropriate pay the other party's costs".
14

15 4 In my judgment this is not a normal case. What is striking in this case – as is
16 set out in my judgment – is that the Respondent to this application, that is
17 BAE, did not put any evidence before the Court whatsoever; secondly, even in
18 oral argument and in skeleton argument, the Respondent put forward no
19 explanation as to why it was taking, as it undoubtedly was, a generally
20 obstructive attitude to the reasonable requests of the Applicant for assistance in
21 the discovery of the wrongdoer who had wrongfully leaked privileged
22 information to the Respondent.
23

24 5 This is not a case which would fall into the description set out in paragraph 22
25 of the Court of Appeal decision in *Totalise* which I have just set out, in which
26 it is said that defendants who have become mixed up in tortious acts are
27 normally only concerned that duties and rights such as duties of confidence
28 and legitimate interests of privacy, are considered by the Court. This is not the
29 case of a normal third party in a *Norwich Pharmacal* application who does not
30 resist the order being made as such, but simply raises countervailing interests,
31 either public or private, which are said to militate against the making of the
32 order. What is undoubtedly remarkable in this case in my judgment is that at
33 no stage did BAE ever put forward any countervailing interest which could be
34 said to militate against disclosure, other than a reliance upon the normal
35 principles by which *Norwich Pharmacal* jurisdiction is to be established. That
36 is to say it denied that the facts equalled being mixed up in the wrongdoing on
37 their part, and it fought very strongly for the contention that there was no
38 necessity for the order by reference to the fact that, even if in principle an
39 order was required, the open offer which they had made was more than
40 sufficient. The offer they had made was to restrict the information as to the
41 source of the leak to such routing information as might be obtained from the
42 emails themselves; and no explanation was ever given for the attitude of BAE
43 that the order should go no further, even though on my findings they had the

1 ability to give far greater assistance. It was further contended that the
2 Applicant had suffered no loss, a positive averment against the position of the
3 Applicant which I rejected.
4

5 6 It is right, as is said by the Respondent, that I have found in my judgment that
6 for the purposes of the application I should treat it as an innocent third party,
7 and I do. A strong case was put to me by the Applicant that I should find that
8 the Respondent was involved in the wrongdoing to a greater extent than a mere
9 innocent party but, as has been rightly pointed out on both sides, I was not
10 prepared so to find, as I did not and do not believe that the evidence as it
11 presently stands goes that far.
12

13 7 The Applicant, however, is entitled to rely upon that which I set out in
14 paragraph 81 of my judgment where I say that the Applicant has undoubtedly
15 established reasonable cause for the suspicion that the Respondent has
16 previously been party to the infiltration of its organisation and the obtaining of
17 its confidential information by covert means, but that the evidence goes no
18 higher.
19

20 8 When, therefore, I look to the factors set out in paragraph 30 of the Court of
21 Appeal judgment in *Totalise* which lists circumstances which the Court said do
22 not embrace cases which require an order different from the normal order,
23 I find as follows.
24

25 9 The first one was that:

26
27 “the party required to make the disclosure had a genuine doubt that the
28 person seeking the disclosure was entitled to it”.

29
30 I find it very difficult to discern what the quality of the doubt was which BAE
31 had because they chose to lay no evidence about this matter before this Court.
32

33 10 Secondly:

34
35 “the party was under an appropriate legal obligation not to reveal the
36 information or where the legal position was not clear, or the party had a
37 reasonable doubt as to the obligations”.

38
39 Again, no material was laid before this Court to bring this case under this head.
40

41 11 Thirdly:

42
43 “the party could be subject to proceedings if disclosure was voluntary.

1
2 Again, there was no submission made under this head.

3
4 12 Fourthly:

5
6 “that the party would or might suffer damage by voluntarily giving the
7 disclosure”.

8
9 Again, no material was laid before the Court under this head.

10
11 13 Finally:

12
13 “the disclosure would or might infringe the legitimate interest of
14 another”.

15
16 Again, no material was laid before me under this head.

17
18 14 Paragraph 31 said:

19
20 “That does not mean that a party who supports or is implicated in a
21 crime or tort or seeks to obstruct justice being done, should believe that
22 the Court will do other than require that party to bear its costs and, if
23 appropriate, pay the other party’s costs”.

24
25 I have not found that BAE supported or was implicated in the wrongdoing for
26 the purposes of being characterised as more than an innocent party for the
27 purposes of this jurisdiction. However, I have no hesitation in saying that the
28 Respondent’s attitude to the requests of the Applicant can be characterised as
29 obstructing the legitimate requests of the Applicant for assistance, and to that
30 extent the Respondent obstructed justice being done.

31
32 15 I bear in mind, of course, that I have held that the Respondent was under no
33 obligation in law at the time they refused to co-operate, to answer any of the
34 Applicant’s questions. But that is a different issue from whether or not it can
35 be said this is a normal case in which the refusal to assist is apparently based
36 upon a desire to protect legitimate interests of the sort set out in the Court of
37 Appeal judgment. No such basis was put forward in this case.

38
39 16 I have no doubt at all that it would not be just in these circumstances for the
40 Applicant to have to pay the costs of the Respondent. I also bear in mind in
41 coming to that conclusion, the conduct of the Respondent (albeit on my
42 finding innocent on the evidence I have) when returning the email in question
43 in this case, by which it went out of its way to ensure that no information

1 would be passed on which could possibly assist the Applicant in discovering
2 the source; that is to say the Respondent redacted the email by reference to the
3 condition in which it had been received, so that all routing information was
4 eliminated.

5
6 17 The more difficult issue, it seems to me, is whether or not I should order that
7 the Respondent should pay the Applicant's costs of this application. I have to
8 bear in mind that the Applicant was not wholly successful in this case. It is
9 right, as the Respondent reminds me, that on one particular issue the Applicant
10 failed, that is to say I declined to find on the evidence that it was established
11 that the Respondent was more than an innocent third party, or that it was
12 established as a fact to the required standard that the Respondent had
13 previously infiltrated the Applicant.

14
15 18 I have to bear in mind that on one part of the draft order sought, the Applicant
16 did not succeed. That was the application that, not only should the Respondent
17 give *Norwich Pharmacal* relief to the extent I have ordered, but that in
18 addition it should disclose any documentation obtained from the Applicant
19 other than the email in question in this case, in other words other confidential
20 information.

21
22 19 The decision I have come to is this: there certainly should be no order for
23 costs by which the Applicant should pay the costs of the Respondent. Whether
24 the Respondent should pay the costs of the Applicant in my judgment will
25 have to await what is revealed in the ordered disclosure. It would be a very
26 strong order indeed for this Court, having found that the Respondent was for
27 these purposes an innocent party, not simply to deny the Respondent its costs,
28 as I have done, but to go further and order in a *Norwich Pharmacal* application
29 that the Respondent should pay the Applicant's costs.

30
31 20 I propose therefore to reserve the question whether the Respondent should pay
32 the Applicant's costs to await further submissions when the disclosure has
33 been given. If it were to transpire that the Respondent was in fact more
34 involved in this wrongdoing than has so far been established, then this Court
35 could very well reach the conclusion that it would be just and proper to make
36 the order sought. But for the moment I simply make clear that I will not make
37 an order that the Applicant should pay the Respondent's costs.

38
39 21 Accordingly whether the Respondent should pay the Applicant's costs must
40 await the disclosure in this case, and I reserve judgment on that. That is the
41 order I make.

42
43 MISS ROSE: Yes, my Lord, I am grateful.

1
2
3
4
5
6
7
8
9

MR. JUSTICE KING: Is there anything else I should do?

MR. WHITE: No, my Lord.

MR. JUSTICE KING: Then I thank the parties for the submissions made in this case.
