Neutral Citation Number: [2019] EWCA Civ 899

Case No: A2/2018/0918

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE (QUEEN'S BENCH DIVISION)
Her Honour Judge Melissa Clarke (sitting as a High Court Judge)
IHQ180155

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2019

Before:

THE MASTER OF THE ROLLS
and
LORD JUSTICE LEGGATT

- -

Between:

(1) JOFA LIMITED	**Appellants**
(2) JOSEPH FARAH	
- and -	
(1) BENHERST FINANCE LIMITED	**Respondents**
(2) CHESTONE INDUSTRY HOLDING	

- -

Graeme Kirk (instructed by **AMZ Law**) for the **Appellants**
Jonathan Cohen QC (instructed by **Edmonds Marshall McMahon**) for the **Respondents**

Hearing date: 16 May 2019

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Approved Judgment

Lord Justice Leggatt:

1. This is an appeal against an order of HHJ Melissa Clarke sitting as a High Court Judge which ordered the appellants, who are a small building company called Jofa Limited and its sole director and shareholder, Mr Joseph Farah, to pay a proportion of the respondents' costs of applying for a "*Norwich Pharmacal*" order requiring the appellants to disclose documents to them. The type of order made has acquired its name from the seminal case of *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133, in which the House of Lords established the principle that, where a wrong has been done or arguably done, a third party who has got mixed up in the wrongdoing so as to facilitate it, albeit innocently, may be ordered to provide information which is needed to enable the victim to sue the alleged wrongdoer.

The background

2. The respondents to this appeal, Benherst Finance Limited and Chestone Industry Limited, are, respectively, a company incorporated in the British Virgin Islands and a limited partnership incorporated in Luxembourg. They participated as investors in a joint venture to purchase and redevelop a flat in Ennismore Gardens, London SW7, and in this judgment I will refer to them as "the investors". The investors allege that a company called JMT Property Limited ("JMT") which was retained to manage the project and its sole director and shareholder, Mr Elie Taktouk, have defrauded them of large sums of money. Between February 2015 and February 2016 Mr Taktouk made periodic cash calls, mostly for money said to be required to pay building contractors and suppliers in connection with the redevelopment of the property. Most of the cash calls were supported by invoices or quotations, many of which were apparently issued by Jofa Limited, the first appellant. The total amount of the cash calls was over £2.2m, of which the investors paid their share of around £925,000 to JMT. However, when the property was inspected in May 2016 by a chartered surveyor, it turned out that far less work had been done to redevelop the property than Mr Taktouk had represented. The value of the work done was estimated to be in the region of only £250,000. A lender which held a mortgage over the property subsequently exercised its power to sell the property, with the result that the investors have lost their entire investment.

3. On 2 June 2017 Edmonds Marshall McMahon, a firm of solicitors instructed by the investors, wrote to the second appellant, Mr Farah, saying that they were instructed to pursue a criminal investigation and thereafter to consider initiating a private prosecution against his company, Jofa Limited, and/or against him personally, as well as against Mr Taktouk. The letter contained a detailed account of the alleged factual history and asserted that there were reasonable grounds to believe that Mr Farah and his company were guilty of criminal offences. These were said to include (though not to be limited to) offences of: conspiracy to defraud; fraud by false representation, contrary to sections 1 and 2 of the Fraud Act 2006; VAT evasion and/or conspiracy to commit that offence; and money laundering, contrary to section 329 of the Proceeds of Crime Act 2002. The letter set out a long list of questions which Mr Farah was requested to answer, whilst at the same time cautioning him that he was under no obligation to answer the questions, that any answers he gave might be used in evidence in any prosecution but also that, should he fail to answer the questions, the

investors might seek to rely on his failure to do so as evidence against him if proceedings were commenced. The letter ended with threats to refer the matters set out in the letter to "any criminal investigation agency, including the police" and to pursue confiscation proceedings against Mr Farah and/or Jofa following any criminal prosecution.

4. In response to this letter, Mr Farah telephoned Edmonds Marshall McMahon on 16 June 2017. An attendance note was made of the conversation. Three solicitors were parties to the call and one of them began by administering a formal caution, similar to that contained in the letter. Mr Farah is recorded as saying that "nothing was correct in the letter" and asking whether he could have half an hour to speak to the solicitors. He said that he did not know anything about what was being alleged and that the invoices referred to in the solicitors' letter, which were huge invoices, were not issued by him and he had never seen them. He said that he had invoices which he could show them. Mr Farah was told that a formal interview could be arranged in which an investigator would ask him questions after giving him a formal caution. He said that he would prefer to sit down with the solicitors. Mr Farah was told that he might need to consider seeking legal advice but he said that he did not want to spend money and asked to be told what to do. The conversation ended with Mr Farah giving the solicitors his telephone number and address, with a view to their contacting him to arrange a formal interview.

5. This telephone conversation was followed up by a letter dated 22 June 2017 sent by Edmonds Marshall McMahon to Mr Farah inviting him to be interviewed under caution in respect of the investors' allegations. Details were set out of the formal process that would be followed.

6. On 6 July 2017 the investors' solicitors called Mr Farah to arrange a date for such an interview. According to the attendance note of this conversation, Mr Farah asked whether Edmonds Marshall McMahon would be able to act as lawyers for him. He was told that they were seeking to interview him as a suspect so this would not be possible as there would be a conflict of interest. A date of 13 July 2017 was provisionally arranged for an interview. The solicitors emphasised that Mr Farah might want to obtain legal advice, though this was up to him.

7. On 11 July 2017 Mr Farah telephoned Edmonds Marshall McMahon to say that he had found solicitors to advise him called AMZ Law. The person dealing with the matter was Mr Hadi Zeaiter and he had given Mr Zeaiter all the papers.

8. On 12 July 2017 a solicitor from Edmonds Marshall McMahon called Mr Zeaiter to ask if the interview would be going ahead the next day. Mr Zeaiter said that the interview could not go ahead as he had not yet had a chance to read the papers but hoped to do so over the weekend and to revert early in the following week.

9. Mr Zeaiter did not contact the investors' solicitors in the following week, nor did he respond to a letter dated 21 July 2017 proposing new dates for an interview. Nothing then appears to have happened until on 12 October 2017 Edmonds Marshall McMahon wrote again to Mr Zeaiter. In this letter they said that they had now obtained evidence from suppliers involved in the redevelopment of the property which demonstrated that a number of contractors for whom funds were raised in the cash calls made by Mr Taktouk and JMT did not in fact receive those funds. The

solicitors expressed the hope that Mr Farah would verify statements that he had made during his telephone conversation with them on 16 June 2017 to the effect that he had not issued and had not seen the invoices bearing the name of Jofa which Mr Taktouk had produced in support of cash calls. Edmonds Marshall McMahon also asked that Mr Farah complete authorisations permitting the investors to obtain his and Jofa's bank statements covering the period during which the works were being undertaken at the property. They acknowledged that Mr Farah and Jofa were under no obligation to complete these authorisations but said that they might take into account any failure to do so in deciding whether to commence proceedings. They also said that any material obtained pursuant to the authorisations might be used in any prosecution. The solicitors repeated the invitation to attend an interview under caution and asked for a response within 14 days, failing which they would assume that Mr Farah did not intend to deal with the allegations.

10. No response was received to this letter. On 30 October 2017 a solicitor from Edmonds Marshall McMahon spoke on the telephone to Mr Zeaiter, who said that he hoped to be in a position to respond some time in November. Again, however, he failed to do so, and attempts made to contact Mr Zeaiter at the end of November were ignored by him.

11. At this point the investors' solicitors changed course. They gave up on the proposal to interview Mr Farah under caution and wrote a letter dated 8 December 2017 to Mr Zeaiter described as a "pre-action letter" sent prior to seeking a *Norwich Pharmacal* order in the High Court. The letter was no less than 17 pages long with a further two page appendix listing all the previous correspondence. It went through again all the history of the property redevelopment, the cash calls, the works allegedly carried out and actually carried out and the invoices relied on by Mr Taktouk which were purportedly issued by Jofa. The letter listed 12 categories of documents which the investors were now asking Jofa and Mr Farah to provide. It set out arguments that a *Norwich Pharmacal* order was a necessary and proportionate remedy and was extremely likely to be granted. The solicitors asked for a response within 14 days and said that, if a substantive response was not received within that time, the investors intended to issue an application in the High Court for an order compelling production of the documents sought. They said that they presumed that there was no intention to volunteer any information but wished to emphasise that the investors were ready to receive voluntary disclosure of the relevant items at any time so as to avoid a High Court application and would pay the reasonable costs of such disclosure.

12. No response to this letter was received within 14 days, nor in the weeks that followed. Ultimately, at the beginning of March 2018 the investors issued an application for a *Norwich Pharmacal* order. It was supported by a 42 page witness statement. The witness statement ended by saying that the investors were seeking their costs of making the application in circumstances where Mr Farah and Jofa could and should have acceded to their requests on a voluntary basis.

13. It was, I infer, in response to the service of this application that Mr Zeaiter finally telephoned Edmonds Marshall McMahon on 16 March 2018. There is no attendance note of that call but it was followed by a letter dated 19 March 2018 signed by Mr Farah on behalf of Jofa saying that they were happy to cooperate with any enquiries provided that they were reimbursed fully for all costs. The letter from Mr Farah further stated:

> "Please bear in mind that we are not represented and we fail to understand on what basis you expect us to disclose private information belonging to a third party."

14. Edmonds Marshall McMahon replied the next day pointing out that the basis on which they were seeking disclosure of information had been set out in their letter dated 8 December 2017 and also in the witness statement filed in support of the application. They repeated that at the hearing, which was listed for 22 March 2018, the investors would be seeking their costs of making the application from Jofa and/or Mr Farah. They asked whether the terms of their draft order were accepted.

The hearing of the investors' application

15. There was no further communication before the hearing on 22 March 2018. At the hearing the investors were represented by leading counsel, Mr Jonathan Cohen QC, who also represents them on this appeal. Mr Farah attended in person with his wife. We have been provided with a transcript of the hearing from which it is apparent that Mr Farah does not speak English well and that communicating with him was difficult, despite the best efforts of Mr Cohen QC and the judge. It was, however, ascertained through discussion with Mr Farah that, if the court ordered Jofa and Mr Farah to disclose the documents listed in the investors' draft order, he was happy to provide them.

16. Another application made by the investors for *Norwich Pharmacal* relief was also heard at the same time. This was an application for an order requiring National Westminster Bank plc to disclose bank statements and other documents relating to the bank accounts of Mr Taktouk and JMT. No one attended court on behalf of the bank, which had indicated in correspondence that, although it did not consent, it would not oppose the order sought. The court was told that it had been agreed between the investors and the bank that the investors would pay the bank's costs of complying with any order for disclosure but that there should be no order for costs in respect of the application itself.

17. As previously foreshadowed, however, Mr Cohen QC for the investors asked the judge to order Jofa and Mr Farah to pay the costs of the investors' application for a *Norwich Pharmacal* order against them on the basis that they could and should have provided the documents requested from them voluntarily without the need for the investors to go to court.

18. The judge gave an extempore judgment dealing with both applications. She explained why she considered it appropriate to make the *Norwich Pharmacal* orders sought in each case. The judge then turned to the question of costs and said:

> "The usual order would be for no order to be made for the costs of the applications. None is sought by the applicants against the third respondent, National Westminster Bank plc. Costs are sought by the applicants against [Jofa Limited and Mr Farah] and that is because of the history that I have gone through that there was extensive discussion and negotiation with [them] through their solicitors at the time they were represented, the

> failure of which resulted in the pre-action letter of 8 December 2017."

The "history" to which the judge referred in this passage had been described earlier in her judgment as follows:

> "I have been shown a schedule setting out a number of instances of correspondence and contact between the solicitors acting for the applicants and the solicitors acting for [Jofa Limited and Mr Farah], in which the applicants sought voluntary disclosure of various documents by [Jofa Limited and Mr Farah]. That did not get anywhere, as far as the applicants were concerned. As a result, the applicants wrote their pre-action letter of 8 December 2017 …"

19. The judge observed that there was no response to that letter and accepted a submission made by Mr Cohen that the absence of a response meant that the investors had to produce two large bundles of documents and a much more extensive witness statement than they would have done if Jofa and Mr Farah "had taken a neutral position, for example". The judge also accepted that, in that event, it was likely that more junior, less expensive counsel would have been instructed to represent the investors at the hearing.

20. The judge said that in these circumstances she was satisfied that it was appropriate to make a costs order against Jofa and Mr Farah, albeit only for such proportion of the costs reasonably incurred by the investors as would have been avoided if Jofa and Mr Farah had taken a "neutral position" in response to the letter of 8 December 2017.

21. After giving judgment, the judge examined the statement of costs prepared by the investors' solicitors for the hearing. This statement quantified the costs claimed in a total amount of £72,642. Having questioned Mr Cohen about various items, the judge delivered a further short extempore judgment giving her reasons for summarily assessing the amount of costs which Jofa and Mr Farah were ordered to pay in the sum of £23,000. In explaining her decision about what sum Jofa and Mr Farah should have to pay, the judge said that:

> "if they had simply agreed to take a neutral position in advance then a hearing would still have been required but the overall costs (including counsel's fees) would be lower for the reasons that I have given. Those costs would not have been sought from [Jofa and Mr Farah]; they would have been costs for the applicant."

Did the judge adopt the wrong starting point?

22. Permission to appeal against the order for costs was granted by Lewison LJ on the sole ground that, in deciding what order to make about costs, the judge adopted the wrong starting point. As stated in the passage of her judgment quoted at paragraph 18 above, the judge's starting point was that the usual order would be that no order should be made as to the costs of the application. In this court it is common ground between the parties that the correct starting point on an application for *Norwich*

Pharmacal relief is that the applicant should normally be ordered to pay the costs of the party ordered to give disclosure, including the costs of the application. The Court of Appeal so held in *Totalise Plc v The Motley Fool Ltd* [2001] EWCA Civ 1897; [2002] 1 WLR 1233. That decision has recently been approved by the Supreme Court in *Cartier International AG v British Sky Broadcasting Ltd* [2018] UKSC 28; [2018] 1 WLR 3259. On behalf of the appellants, Mr Graeme Kirk submitted that, as the judge approached the question of costs on the wrong legal basis, her costs order should be set aside.

23. On behalf of the investors, Mr Cohen QC has pointed out that at the hearing before the judge, although he did not refer the court to the decision of the Court of Appeal in the *Totalise* case, he showed the judge a note in the White Book on Civil Procedure at 31.17.6 which summarises the effect of CPR 46.1, and then took the judge to CPR 46.1 itself. This rule is not directly applicable to applications for *Norwich Pharmacal* orders, but it applies in the analogous situations where either (a) an application is made under CPR 31.16 before proceedings have started for disclosure of documents from a person who is likely to be a party to subsequent proceedings or (b) an application is made under CPR 31.17 in the course of proceedings for disclosure of documents from a person who is not a party to the proceedings. CPR 46.1(2) provides that, on an application of either of these kinds, the general rule is that the court will award the person against whom the order is sought their costs (a) of the application and (b) of complying with any order made on the application. This is qualified by rule 46.1(3), which states:

> "The court may however make a different order, having regard to all the circumstances, including –
>
> (a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and
>
> (b) whether the parties to the application have complied with any relevant pre-action protocol."

24. In this court Mr Cohen submits that, in circumstances where he drew the judge's attention to these provisions in making his submissions, it is obvious that the judge had the correct test in mind when making her decision. Although in her judgment the judge used what Mr Cohen describes in his skeleton argument as "infelicitous language" indicating that the starting point was no order as to costs, rather than costs to be paid by the investors, he invites us to conclude that this was not what the judge meant to say but was a slip made under the pressure of formulating her reasons extempore which did not reflect any actual misunderstanding of the legal position. Mr Cohen sought to buttress this submission by referring to the passage in the judge's further judgment assessing the quantum of costs which I have quoted at paragraph 20 above. He suggested that the judge was there saying that, if Jofa and Mr Farah had agreed at an earlier stage to take a neutral position, they would not have been liable to pay costs incurred by the investors; instead, the appellants' costs of the hearing would have been costs for the applicants (i.e. the investors) to pay.

25. I am wholly unpersuaded by these submissions. The judge's statement that "the usual order would be for no order to be made for the costs of the applications" was unequivocal and is not reasonably explicable as merely "infelicitous language" or a

slip of the tongue. It shows plainly that the judge either had not taken on board, or at some point before she came to give her decision had lost sight of, the proposition that the costs of the application should normally paid by the applicant. It is possible that the judge was confused by the fact that, as she had been told, it was agreed that there should be no order for costs made in respect of the investors' application against National Westminster Bank. She may have formed the impression that this was the usual order. But whatever the explanation for the judge's error regarding the normal order for costs on an application for a *Norwich Pharmacal* order, error it undoubtedly was.

26. I would add that the passage in the judge's second judgment on which Mr Cohen sought to rely, far from supporting his submission that the judge had the correct test in mind, further confirms the opposite conclusion. What I read the judge as saying in that passage is that, if Jofa and Mr Farah had agreed at an earlier stage to take a neutral position, the costs incurred by the investors (including counsel's fees) in making their application would have been lower and the investors would not have sought (or at any rate would not have been entitled to recover) any costs from Jofa and Mr Farah; instead, the investors would have had to bear all their costs themselves. In other words, the judge was assuming that the normal or default position was that each party should bear its own costs of the application. Even if that is not what the judge meant, it is plain that the costs to which she was referring in the second sentence of the passage relied on were costs incurred by the investors, and not any costs incurred by Jofa and Mr Farah. It is therefore impossible to read the judge's words as indicating that, in other circumstances, any costs incurred by Jofa and Mr Farah in connection with the application would have been payable by the applicants.

27. Because the judge approached the investors' application for costs on an incorrect legal basis, it follows that this court must exercise its own discretion in the matter.

How should the discretion be exercised?

28. Although the parties are agreed that in a normal case and as a general rule the applicant for a *Norwich Pharmacal* order will be required to pay the other party's costs of the application (as well as that party's costs of complying with the order), they disagree as to the extent of this presumption and the circumstances which justify departure from the general rule.

29. For the appellants, Mr Kirk has argued that where, as in this case, a person from whom information has been requested has not opposed the making of a *Norwich Pharmacal* order but has required the applicant to obtain such an order from the court rather than providing the information voluntarily, there can be no justification for departing from the general rule. At all events, Mr Kirk submitted, there is no justification for doing so here, as Mr Farah cannot be said to have acted unreasonably in failing to give disclosure before the court ordered him to do so – particularly against the background that he had been threatened by the investors' solicitors with criminal prosecution and repeatedly cautioned that any information that he provided might be used in evidence against him in criminal proceedings.

30. For the investors, Mr Cohen has argued that there can be no hard and fast rule that a person from whom information is sought under the *Norwich Pharmacal* principle is entitled to decline to provide the information unless ordered to do so by the court on

an application made at the expense of the applicant. Mr Cohen submitted that there may be cases where the justification for a *Norwich Pharmacal* order is plain and where the person mixed up in wrongdoing from whom information is requested is not under any obligation of confidentiality or other impediment to providing the information. In such cases, always depending on the particular facts, it may be unreasonable to require an application to the court to be made and a person who puts the applicant to that expense may, in an appropriate case, be ordered to pay part or even all of the applicant's costs of making the application.

31. While accepting that there can be no absolute rule in the matter, I find it hard to envisage circumstances in which it would be just to award costs against a respondent to a *Norwich Pharmacal* application who, before agreeing to disclose documents, has done no more than require the applicant to satisfy the court that such an order is appropriate.

32. The starting point, as I see it, is that a person from whom disclosure of documents or other assistance is sought under the *Norwich Pharmacal* principle does not owe any legal duty to the party seeking assistance to provide information without a court order. It is true that in the *Norwich Pharmacal* case itself Lord Reid stated that a person who gets mixed up in wrongdoing, albeit without being at fault or incurring personal liability, "comes under a duty to assist the person who has been wronged by giving him full information …": see [1974] AC 133, 175. However, as explained by Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 165, para 22, the "duty" referred to by Lord Reid in this statement was "not a legal duty in the ordinary sense of the term" but was "simply a way of saying that the court would require disclosure." Lord Sumption returned to this point in his judgment (with which all the other Justices agreed) in *Cartier International AG v British Sky Broadcasting Ltd* [2018] UKSC 28; [2018] 1 WLR 3259, para 11, where he said:

> "As Lord Reid himself put it in *Norwich Pharmacal* [1974] AC 133, 175, the intermediary came under the duty without incurring personal liability. This is really only another way of saying that the court had an equitable jurisdiction to intervene. Lord Kilbrandon put the point very clearly in his own speech. Citing the South African decision in *Colonial Government v Tatham* (1902) 23 Natal LR 153, 158, he said that "the duty is said to lie rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff": [1974] AC 133, 205."

33. In the *Norwich Pharmacal* case two members of the House of Lords made observations about how the costs of applications should be dealt with in future cases. Lord Reid said (at 176):

> "If the respondents have any doubts in any future case about the propriety of making disclosures they are well entitled to require the matter to be submitted to the court at the expense of the person seeking the disclosure."

Lord Cross expressed a similar opinion, stating (at 199) that:

> "… in any case in which there was the least doubt as to whether disclosure should be made the person to whom the request was made would be fully justified in saying that he would only make it under an order of the court. Then the court would have to decide whether in all the circumstances it was right to make an order. … The full costs of the application and any expense incurred in providing the information would have to be borne by the applicant."

34. In *Totalise Plc v The Motley Fool Ltd* [2001] EWCA Civ 1897; [2002] 1 WLR 1233, para 33, Aldous LJ, giving the judgment of the Court of Appeal, expanded on the circumstances in which the applicant should be ordered to pay the costs of the party making the disclosure. While recognising that there may be cases where the circumstances require a different order, he expressed the court's view that these do not include cases where:

> "(a) the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it; (b) the party was under an appropriate legal obligation not to reveal the information, or where the legal position was not clear, or the party had a reasonable doubt as to the obligations; or (c) the party could be subject to proceedings if disclosure was voluntary; or (d) the party would or might suffer damage by voluntarily giving the disclosure; or (e) the disclosure would or might infringe a legitimate interest of another."

Contrary to a submission made by Mr Cohen, it is clear that the Court of Appeal was not seeking to limit the circumstances in which the normal order should be made to the cases mentioned in this list.

35. The Court of Appeal also made the point (at para 29 of the judgment) that *Norwich Pharmacal* applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party, and that in general it is just that the applicant should recover its costs of obtaining the information that it needs from the wrongdoer rather than from an innocent party. It is relevant in that regard that, if the party from whom disclosure is sought is ordered to bear its own costs, or even to pay costs incurred by the applicant, it has no means (unlike the applicant) of recovering those costs from the wrongdoer.

36. There is also an analogy, as the Court of Appeal noted in the *Totalise* case, with applications under CPR 36.16 for pre-action disclosure, where costs are governed by what is now CPR 46.1 (quoted at paragraph 23 above). The effect of that rule was considered by the Court of Appeal in *SES Contracting Ltd v UK Coal Plc* [2007] EWCA Civ 791. At para 17 of the judgment, Moore-Bick LJ (with whom the other members of the court agreed) expressed the view that, by laying down a general rule that the person against whom the order is sought will be awarded their costs:

> "I think that the Rules implicitly recognise that it will not usually be unreasonable for [that person] to require the applicant to satisfy the court that he ought to be granted the relief which he seeks. The reason for that (if it be necessary to

> find one) lies, I think, in a recognition that a private person who is not a party to existing litigation which brings with it an obligation of disclosure is entitled to maintain the privacy of his papers unless sufficient grounds can be shown for overriding it and that it is for the person seeking to invade that privacy to justify doing so."

37. In the *SES Contracting* case the applicant sought pre-action disclosure under CPR 31.16 on the basis that it had a prospective claim against the respondent, UK Coal, for participating in a dishonest conspiracy to steal the applicant's business. UK Coal actively and unsuccessfully opposed the application. The Court of Appeal set aside the judge's order requiring UK Coal to pay the costs of the application, holding that it had not been unreasonable for UK Coal to oppose the application, albeit that the manner of its opposition had been unreasonable. The latter fact was held to justify departure from the general rule, but only to the extent of making no order as to costs.

38. It does not follow that a party which may have committed a crime or tort and which resists disclosure of documents that would evidence its complicity will never be required to pay the other party's costs: see the *Totalise* case at para 31. Where a successful application is made for pre-action disclosure under CPR 31.16 and the applicant has a prospective claim against the respondent for alleged wrongdoing, it seems to me that – as suggested by the Master of the Rolls in the course of argument – it may often be appropriate to make the award of costs dependent on the outcome of any subsequent litigation. As indicated in *Hollander on Documentary Evidence* (13th Edn, 2018) at 1-31, this can be done by ordering the applicant to pay the respondent's costs unless a claim is brought within a specified period, in which case the costs of the application and of complying with the order will be costs in the subsequent proceedings (or alternatively will be reserved to the trial judge in the subsequent proceedings). Such an order would not be inconsistent with CPR 46.1, as subsequent demonstration that the applicant had a good claim against the respondent for substantive relief and that the documents ordered to be disclosed were reasonably required to assist in establishing that claim would be a circumstance warranting departure from the general costs rule. I note that in *Bermuda International Securities Ltd v KPMG (a firm)* [2001] EWCA Civ 269 the Court of Appeal thought it impossible to impugn the judge's exercise of discretion in ordering that the costs of an application for pre-action disclosure which had been resisted "root and branch", and of giving the disclosure, should be costs in the case if an action was brought but that, if no action was brought, there be no order as to costs.

39. Such an approach, however, would not be appropriate in the present case where the investors' application for disclosure was based solely on the *Norwich Pharmacal* principle and was made on the footing that Jofa and Mr Farah had been innocently mixed up in the alleged wrongdoing of Mr Taktouk. The application was not made under CPR 31.16 on the footing that the investors had a prospective claim against Jofa and Mr Farah themselves. Although, as I have recounted, the investors initially made allegations of wrongdoing against Jofa and Mr Farah in correspondence, by the time of the application to the High Court those allegations were no longer maintained.

40. Mr Farah and Jofa did not oppose the investors' application. To the contrary, after the application had been served on them, Mr Farah said in the letter dated 19 March 2018 mentioned earlier that he and Jofa were happy to cooperate with any enquiries

provided they were fully reimbursed for their costs. At the hearing Mr Farah effectively adopted the same position as the bank: that is, although he did not formally consent to the order sought by the investors, he did not object to it (except in so far as the investors were seeking their costs of the application).

41. I accept that the legal position of Jofa and Mr Farah was not identical with that of the bank, which owed a duty to its customer to keep the customer's affairs confidential. A bank's duty of confidentiality does not require it to oppose an application to disclose information about its customer where such information is sought for use in criminal or civil proceedings: see *Barclays Bank Pic v Taylor* [1989] 1 WLR 1066. But if a bank were to give such disclosure without an order from the court, it would be acting at its peril, as it would be exposed to a potential claim by its customer for breach of confidence. By contrast, a building contractor, such as Jofa, does not generally owe a duty to its client to keep information about work done for the client confidential.

42. Nevertheless, the documents sought by the investors were documents belonging to Mr Farah and his company, including for example bank statements, which Mr Farah and Jofa were *prima facie* entitled to keep private. In my view, it was not unreasonable for Mr Farah and Jofa to require the investors to satisfy the court that an order for disclosure should be made and to insist that any order should include, as an undertaking to the court and not merely as a promise made in correspondence, a requirement to reimburse Mr Farah and Jofa for any costs reasonably incurred in complying with it.

43. It is also relevant to take into account the obvious disparity that existed between the parties in this case in terms of their sophistication, resources and legal representation, as well as the background of the earlier communications from the investors' solicitors summarised at paragraphs 3 to 10 above. The second passage quoted from her judgment at paragraph 18 above shows that the judge had the impression that the "pre-action" letter of 8 December 2017 was the culmination of a long series of requests made by the investors' solicitors for voluntary disclosure of documents from Mr Farah and Jofa. In fact, apart from the letter of 12 October 2017 which asked whether Mr Farah would sign forms to authorise release of his and Jofa's bank statements, none of the previous contacts listed in the schedule to the letter of 8 December 2017 – which is all that the judge was shown – was a request for voluntary disclosure of documents. Rather, the investors' solicitors had adopted a heavy-handed approach of accusing Mr Farah and Jofa of committing numerous criminal offences, threatening him with prosecution and confiscation proceedings, and seeking to interview him under caution as a suspect in a criminal investigation. In the course of these communications the investors' solicitors had repeatedly told Mr Farah that he did not have to answer any questions and that any information he provided might be used in criminal proceedings against him. Against that background, no criticism can in my view be made of Mr Farah for not accepting the invitation made in the solicitors' letter of 8 December 2017 to disclose a long list of documents on a voluntary basis and for requiring the investors to satisfy the court that an order for disclosure of the documents sought should be granted.

44. Where Mr Farah can be criticised is in not replying to the letter of 8 December 2017. Although there is no pre-action protocol that applies to *Norwich Pharmacal* applications, it is reasonable to expect a person who receives a request to provide

information, supported by evidence that the person has been mixed up, albeit innocently, in wrongdoing and that the information is needed for the purpose of proceedings against the wrongdoer, at least to indicate his position and to say whether he is prepared to provide the information voluntarily and, if not, whether and on what grounds he will oppose an application for a *Norwich Pharmacal* order. Mr Farah did not do this and instead ignored the letter sent to AMZ Law on 8 December 2017. The absence of a reply meant that the investors had to make the application to the court which their solicitors had said that they intended to make if no substantive response to the letter was received within 14 days. That, however, is what the investors would also have had to do to if Mr Farah or AMZ Law on his behalf had replied to the letter to state expressly that he and Jofa were not willing to disclose the documents sought by the investors unless and until ordered to do so by the court. Since, as already discussed, that was in my view a reasonable position for Mr Farah to adopt, I find it hard to see how his failure to respond to the letter of 8 December 2017 caused any prejudice to the investors.

45. Although the judge was persuaded by counsel that the absence of a response to the letter had made it necessary to produce more extensive evidence in support of the investors' application, I do not accept this. Such a suggestion might have had force if Mr Farah had intimated at some point a basis on which he might actively oppose the making of a *Norwich Pharmacal* order which required evidence to address it. But he had not. As noted in the letter of 8 December 2017 itself, Mr Farah had told the investors' solicitors that Jofa had done some work for Mr Taktouk but that he had not issued or seen the "huge" invoices purportedly from Jofa which Mr Taktouk had produced in support of the cash calls on the investors. In these circumstances the investors needed to adduce evidence of the cash calls and payments made, the invoices produced in support of the cash calls, the extent of the work actually done to redevelop the property, their communications with Mr Farah, and the reasons why disclosure the documents sought was warranted, in order to satisfy the court that an order for disclosure ought to be made. Exactly the same evidence would have been required for this purpose, no more and no less, if Mr Farah had communicated expressly the position that he conveyed through his silence that he was not prepared to provide disclosure voluntarily.

46. I am also sceptical of the suggestion that the absence of any response from Mr Farah and Jofa to the letter of 8 December 2017 and to the investors' application until shortly before the hearing on 22 March 2018 justified instructing more senior and expensive counsel to represent the investors at the hearing than would have been justified if Mr Farah and Jofa had expressly indicated their position sooner. But even if there were substance in that suggestion, it does not in my view begin to warrant departing from the general rule as to costs to the extent of ordering Mr Farah and Jofa to pay a proportion of the investors' costs of applying for a *Norwich Pharmacal* order. At most, it might provide a reason to decline to make an order for costs in favour of Mr Farah and Jofa.

47. It has not been suggested on behalf of Mr Farah and Jofa that they incurred any costs of legal advice or assistance in connection with the investors' application which they ought to have been awarded. Mr Kirk in his oral submissions in this court contended that Mr Farah should have been awarded his costs of attending the hearing in the High Court, assessed at the rates for litigants in person. In circumstances, however, where

no such contention was advanced in the notice of appeal nor in the appellants' skeleton argument, no attempt has been made to quantify the costs claimed, and there was in any event some fault on the appellants' part in ignoring the letter of 8 December 2017, I would make no order as to the costs of the application.

Conclusion

48. For these reasons, I would allow the appeal, set aside the costs order made by the judge and substitute for it no order as to the costs of the investors' application for *Norwich Pharmacal* relief.

Postscript on costs

49. As the successful party, the appellants should be paid their costs of this appeal which, as the preparation was straightforward and the hearing lasted less than two hours, should be summarily assessed. For the purposes of summary assessment, the appellants have filed a statement of costs with the court in the usual way and each party has made brief written submissions on costs after receiving the judgment in draft. Remarkably, the amount of costs claimed by the appellants – for an appeal against a costs order for £23,000 – is £71,072. To say, as counsel for the appellants does, that this figure "may be seen as slightly higher than anticipated" is a mastery of understatement.

50. Counsel's own fees for advice on the appeal and for the hearing amount to £6,662.50 in total, and in my view are reasonable and proportionate. The costs claimed by the appellants' solicitors, AMZ Law, however, include very large sums which appear, on their face, to be manifestly unreasonable as between themselves and their clients, let alone as costs claimed from the respondents. To give some glaring examples, costs are claimed for: (i) three solicitors each attending on Mr Farah for 5 hours; (ii) 15 hours spent "considering" the witness statement filed by the investors in support of their *Norwich Pharmacal* application, most of which was of little relevance to the issues on this appeal; (iii) 14 hours of "legal research" by two solicitors; (iv) another 14 hours spent preparing a 5 page witness statement from Mr Farah, although no application was ever made (or could realistically have been made) to introduce this statement as evidence on the appeal; (v) 18 hours spent preparing a straightforward bundle of documents (of some 200 pages), with a further 14 hours then spent "reviewing" the bundle; and (vi) 8 hours of attendance by each of two solicitors at a hearing for which the time estimate was one hour, with a further two hours each of travelling time.

51. As indicated in the Guide to the Summary Assessment of Costs, para 65, where both counsel and solicitors have been instructed on a short appeal, the reasonable fees of counsel are likely to exceed the reasonable fees of the solicitor, the main element of the solicitor's work is to instruct counsel and prepare the appeal bundle, and there is usually no reason for the solicitor to spend many hours perusing papers or to work on legal submissions when the legal argument is being handled by counsel. In my view, a reasonable allowance for the costs incurred by the appellants' solicitors on this appeal is £4,500 (representing 20 hours of work at an hourly rate of £225). Taking into account court fees of £1,727 and some other minor expenses incurred, I would summarily assess the costs recoverable by the appellants in a sum of £13,000.

Sir Terence Etherton MR:

52. I agree.