Michaelmas Term
[2023] UKPC 35
Privy Council Appeal No 0011 of 2023

JUDGMENT

Stanford Asset Holdings Ltd and another (Appellants) v AfrAsia Bank Ltd (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Reed
Lord Briggs
Lord Hamblen
Lord Burrows
Sir Nicholas Underhill

JUDGMENT GIVEN ON
10 October 2023

Heard on 26 June 2023

Appellants
Sue Prevezer KC
Avinash Sunassee
Mushtaq Namdarkhan
Ben Woolgar
(Instructed by Sheridans (London))

1st Respondent
Rishi Pursem SC
Meghna Jeetah Singh
(Instructed by AfrAsia Bank Ltd)

2nd Respondent
Maxime Sauzier SC
Natasha Behary Paray
(Instructed by RWK Goodman LLP (London))

3rd Respondent
Did not appear and was not represented

SIR NICHOLAS UNDERHILL:

INTRODUCTION

1. The circumstances giving rise to this appeal are not in dispute and can be sufficiently summarised as follows:

(1) The First Appellant, Stanford Asset Holdings Ltd ("SAH") is a company incorporated in the Seychelles. It is wholly owned and managed by the Second Appellant, the Greenway PCC ("Greenway"), a private protected cell company incorporated in Mauritius.

(2) SAH has an account with the First Respondent, AfrAsia Bank Ltd ("the Bank"), in Mauritius.

(3) On 17 February 2022 the sum of US $11,145,000 was paid out of its account to another account at the Bank belonging to a company called Key Stone Properties Ltd ("Key Stone"). The payment was made on the purported authority of two SAH employees, Tayseer Goolbar and Mohammad Ah Seek, but it is common ground in these proceedings that they did not in fact enjoy the necessary authority and that the payment was fraudulent. This judgment accordingly proceeds on the basis that the money was indeed stolen, though that has not been definitively determined.

(4) There is reason to believe that Key Stone has paid all or most of the stolen monies to other parties either in Mauritius or abroad, but the Appellants have no knowledge of the identity of the payees.

2. Following two abortive applications which were dismissed on procedural grounds, on 15 April 2022 the Appellants filed a notice of motion with the Supreme Court seeking (among other things) an order that the Bank disclose to them the names and other particulars of the recipients of the stolen monies. Three co-respondents were joined in the application. The first, the Financial Services Commission ("the FSC"), is the regulator for non-banking financial services in Mauritius. The second, the Financial Intelligence Unit ("the FIU"), is the central agency in Mauritius responsible for, among other things, the request, receipt, analysis and dissemination of financial information regarding suspected proceeds of crime. The third, the Stanford Fund Manager Ltd ("SFM"), is a Mauritian company which owns the management shares in SAH. It has played no part in the proceedings.

3. The application was heard on 20 May 2022. The Appellants, the Bank and the FSC were each represented by counsel. The FIU indicated that it would abide by the Court's decision. There was no opposition to the making of the order, but the parties were not fully agreed as to the basis of the Court's jurisdiction, which was a question of potentially wider significance for both the Bank and the FSC.

4. By a judgment delivered on 29 September 2022 the Supreme Court (Mungly-Gulbul CJ and Aujayeb J) dismissed the application. This is an appeal against that decision, with the permission of the Supreme Court given on 19 October 2022.

5. The appeal was heard by the Board on 26 June 2023. The Appellants, the Bank and the FSC were represented by counsel. The FIU informed the Board that it did not wish to make submissions and it was not represented.

6. On 6 July 2023 the Board announced that the appeal would be allowed, with reasons to follow. These are its reasons for that decision. An order for disclosure of the information sought was made in terms agreed by the parties and is annexed to this judgment.

SECTION 64 OF THE BANKING ACT 2004

7. The effect of section 64 of the Banking Act 2004 ("the 2004 Act"), headed "Confidentiality", is central to this appeal. The provisions particularly in issue are subsections (1)-(3). It will be convenient to analyse these at this stage before proceeding to consider the issues in the appeal. An issue also arises about subsections (9)-(10).

Subsections (1)-(3)

8. This group of subsections has been the subject of a number of amendments, made at various dates from 2006. The process of amendment has complicated the structure and it is best to start by setting out the terms of subsections (1)-(2) as originally enacted:

> "(1) Subject to the other provisions of this Act, every person having access to the books, accounts, records, financial statements or other documents, whether electronically or otherwise, of a financial institution shall –

(a) in the case of a director or senior officer, take an oath of confidentiality in the form set out in the First Schedule; or

(b) in any other case, make a declaration of confidentiality before the chief executive officer or deputy chief executive officer of the financial institution in the form set out in the Second Schedule,

before he begins to perform any duties under the banking laws.

(2) Except for the purpose of the performance of his duties or the exercise of his functions under the banking laws or as directed in writing by the central bank, no person referred to in subsection (1) shall, during or after his relationship with the financial institution, disclose directly or indirectly to any person any information relating to the affairs of any of its customers including any deposits, borrowings or transactions or other personal, financial or business affairs, without the prior written consent of the customer or his personal representative."

Although the Act refers to a "financial institution" it is more convenient in this judgment generally to use the term "bank".

9. The terms of the oath set out in the First Schedule are as follows:

"I, ..., being appointed …, do hereby swear/solemnly affirm/declare that I shall maintain during or after my relationship with ... the confidentiality of any matter relating to the banking laws which comes to my knowledge in my capacity as … or in any other capacity with ... and shall not, on any account and at any time, disclose directly or indirectly to any person, any matter or information relating to the affairs of … otherwise than for the purposes of the performance of my duties or the exercise of my functions under the banking laws or when lawfully required to do so by a Judge in Chambers or any Court of law or under any enactment."

The third, fifth and sixth gaps are evidently intended to be filled by the name of the bank in question. The terms of the declaration in the Second Schedule are substantially identical.

10. Subsection (3) begins:

> "The duty of confidentiality imposed under this section shall not apply where – …"

A large number of exceptions follow, designated (a)-(p). It is only necessary to set out exceptions (d) and (h):

> "(d) civil proceedings arise involving the financial institution and the customer or his account;
>
> …
>
> (h) any person referred to in subsection (1) is summoned to appear before a court or a Judge in Mauritius and the court or the Judge orders the disclosure of the information;
>
> …"

11. The structure of those subsections is reasonably straightforward. Subsections (1) and (2) impose obligations on any "person having access to the books, accounts, records, financial statements or other documents of a financial institution". The obligation in subsection (1) is to take an oath/make a declaration of confidentiality in the prescribed form as regards the affairs of the institution. Subsection (2) imposes a duty of confidentiality as regards information relating to the affairs of the customers of the institution. Subsection (3) provides for exceptions to the obligation of confidentiality imposed by section (2). Any contravention of the duty imposed by subsection (2) constitutes a criminal offence: see section 97 (20) of the Act.

12. It is in the Board's opinion clear that subsections (1) and (2) impose obligations only on natural persons and not on the institution itself. That appears from the facts that only a natural person can take an oath, as required by subsection (1), and that an institution cannot have a "relationship", as referred to in subsection (2), with itself. Thus section 64 (2) does not impose an obligation of confidentiality on a bank (as opposed to on its employees or other individuals) as regards its customer's affairs; nor is such an

obligation imposed by any other provision of the section or the Act to which the Board was referred. It does not of course follow that banks are under no such obligation. On the contrary, it is well-established that an obligation of confidentiality is owed at common law. As the Supreme Court noted in its judgment in the present case:

> "It has been consistently held in Mauritius that in line with the well-established principles both in English common law and the approach adopted in French jurisprudence and doctrine, that there is an implied term of confidentiality between a banker and his customer (*vide* for instance *State Bank International Ltd. v Pershing Limited* [1996 SCJ 331]).
>
> The bank owes a duty of secrecy and confidence to its customer such that the bank is precluded from divulging or disclosing any information concerning the customer's account to any third party save in certain exceptional circumstances."

After referring to *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 and to the judgment of the Cour d'Appel de Paris in *Banque parisienne de crédit au commerce et à l'industrie c Mizon,* delivered on 6 February 1975 and reproduced in the *Recueil Dalloz-Sirey*, 1975, 183, it concludes:

> "It is therefore an implied term of the contract between the bank and its customer that the bank shall not disclose to any third party, except with the consent of the customer, any information relating to the state of the customer's account or any of his transactions with the bank unless the bank is compelled to do so by law or a Court order or the circumstances give rise to a public duty to disclose."

13. That conclusion does not mean that there is no role for section 64 (3) in cases where a party seeks an order requiring a bank to disclose confidential customer information. A bank can only act through natural persons, and it would be wrong for a court to order it to disclose confidential information about a customer if the order could not be complied with without the relevant employee or agent being in breach of their duty under section 64 (2). For the reasons given at para 34 below the Board considers that exception (d) under subsection (3) would apply in such a case.

14. The Board was referred to several authorities in which the Supreme Court appears to have treated section 64 of the 2004 Act (or its predecessor, section 39 of the Banking Act 1988) as the source of the obligation of confidentiality owed by banks: see, for example, *Rojoa v Rojoa* 2001 SCJ 323, *Drouin v Bank of Baroda* 2008 SCJ 304 and

Nundoosingh v Standard Bank (Mauritius) Ltd 2018 SCJ 122. However, not much weight can be attached to those decisions since the point was not in issue and the Court was not required to consider the statutory language.

15. Subsection (1) was amended by section 2 (g) of the Finance Act 2006 in order to extend its scope to "service providers" ("the service provider amendment"). As so amended, it read:

> "(a) Subject to this Act, every person, including a service provider who by virtue of his professional relationship with a financial institution, has access to the books, accounts, records, financial statements or other documents, whether electronically or otherwise, of a financial institution shall -
>
> (i) in the case of a director or senior officer, take an oath of confidentiality in the form set out in the First Schedule; or
>
> (ii) in any other case, make a declaration of confidentiality before the chief executive officer or deputy chief executive officer of the financial institution in the form set out in the Second Schedule,
>
> before he begins to perform any duties under the banking laws.
>
> (b) For the purposes of paragraph (a), 'professional relationship' means any relationship between a financial institution and a service provider of whom the central bank has been made aware of [*sic*]."

16. Further amendments have since been made to these provisions by statute. As regards subsection (1), these insert a new sub-sub-paragraph (ii) into sub-paragraph (a); introduce new sub-paragraphs (aa) and (ab); make some small changes to the wording of sub-paragraph (b) and add a (partial) definition of "the banking laws"; and add new subsections (1A) and (1B). They complicate the picture but they are immaterial for the purpose of this appeal and do not affect the essential structure as analysed at paras 11-12 above. Subsection (2) has not been amended. Various amendments have been made to subsection (3) but none that are material to this appeal.

17. The version of subsection (1) which was put before the Board at the hearing incorporated those statutory amendments and read (so far as material):

> "(a) Subject to this Act, every person, including a service provider who by virtue of his professional relationship with a financial institution, has access to the books, accounts, records, financial statements or other documents, whether electronically or otherwise, of a financial institution shall –
>
> (i) in the case of a director or senior officer, take an oath of confidentiality in the form set out in the First Schedule;
>
> (ii) in the case of a director or service provider who is a non-resident, take an oath of confidentiality before the competent court or authority in the country of residence of the director or service provider, in such form as the central bank may approve; or
>
> (iii) in any other case, make a declaration of confidentiality before the chief executive officer or deputy chief executive officer of the financial institution in the form set out in the Second Schedule,
>
> before he begins to perform any duties under the banking laws.
>
> (aa) …
>
> (ab) …
>
> (b) In this subsection –
>
> 'banking laws' includes the National Payment Systems Act;
>
> 'professional relationship' means any relationship between a financial institution and a service provider, of which the central bank has been made aware."

(There is a comprehensive definition of the term "banking laws" in section 2 of the Act, but it is unnecessary to reproduce it here.) It appears from the judgment of the Supreme Court that this was the version of the subsection which was before it as well.

18. It will be seen that in that version of subsection (1) something has gone wrong with the opening words of paragraph (a) as a result of the service provider amendment. There are two problems. First, if one ignores the interpolated phrase referring to the service provider, the primary provision reads "every person has access to [the books] shall …", which has two verbs without any evident relation between them. Second, the phrase "who by virtue of his professional relationship with a financial institution" has no verb.

19. It is not in fact necessary for the Board to resolve this difficulty for the purpose of the present appeal, but it was concerned to ensure that it understood the effect of the subsection. Accordingly, it raised the point with the parties in the course of oral submissions. Following the hearing the Appellants' solicitors supplied it with a version of the subsection in which the opening words read as follows:

> "Subject to this Act, every person, including a service provider, who, by virtue of his professional relationship with a financial institution, has access to the books, accounts, records, financial statements or other documents, whether electronically or otherwise, of a financial institution shall - …"

It will be seen that commas have been inserted after "service provider" and "who". The Appellants' solicitors informed the Board that this version appeared in the Revised Laws version of the text of the 2004 Act as published pursuant to the Revision of Laws (Revised Laws of Mauritius) (Supplement – Issue 10) Regulations 2021, and that it was their understanding that the changes had been duly made by the Law Revision Unit under the Revision of Laws Act 1974. The Respondents' solicitors agreed. The insertion of those commas appears to resolve the difficulty identified above. The Board proceeds on the basis that the revised version represents the authoritative text of the Act.

Subsections (9)-(10)

20. Subsections (9) and (10) read as follows:

> "(9) The Director-General under the Prevention of Corruption Act 2002, the Chief Executive of the Financial Services Commission established under the Financial Services Act

> 2007, the Commissioner of Police, the Director-General of the Mauritius Revenue Authority established under the Mauritius Revenue Authority Act, the Enforcement Authority under the Asset Recovery Act 2011, or any other competent authority in Mauritius or outside Mauritius who requires any information from a financial institution relating to the transactions and accounts of any person, may apply to a Judge in Chambers for an order of disclosure of such transactions and accounts or such part thereof as may be necessary.
>
> (10) The Judge in Chambers shall not make an order of disclosure unless he is satisfied that –
>
> (a) the applicant is acting in the discharge of his or its duties;
>
> (b) the information is material to any civil or criminal proceedings, whether pending or contemplated or is required for the purpose of any enquiry into or relating to the trafficking of narcotics and dangerous drugs, arms trafficking, offences related to terrorism under the Prevention of Terrorism Act 2002 or money laundering under the Financial Intelligence and Anti-Money Laundering Act 2002; or
>
> (c) the disclosure is otherwise necessary, in all the circumstances."

21. In the Board's opinion these two subsections form a pair and must be read together. Subsection (9) confers a jurisdiction, and subsection (10) sets out preconditions for the exercise of that jurisdiction: it is clearly not free-standing. That conclusion is reinforced by the reference in the opening words of subsection (10) to "the Judge in Chambers", which evidently relate to the reference to "a Judge in Chambers" in subsection (9). The result is that subsection (10) is concerned only with an application made by one of the persons identified in subsection (9).

THE JUDGMENT OF THE SUPREME COURT

22. Before the Supreme Court the Appellants advanced their application on two alternative bases – first, that the power to order the disclosure sought was contained in section 64 of the 2004 Act; and, secondly, that the Court had jurisdiction to make such

an order on the basis of the decision of the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

23. As to section 64, the Court, having referred to the common law duty of confidentiality as noted at para 12 above, observed that:

> "The issues relating to the duty of secrecy owed by a bank to its customer in Mauritius however is not governed solely by the common law but is closely regulated by the legislation which has been specifically enacted for that purpose."

It reviewed not only the terms of the section itself but also a number of provisions in other legislation permitting banks to disclose confidential information to statutory bodies on the basis of a Court order, namely the Commissions of Inquiry Act 1944, the Prevention of Corruption Act 2002, the Mutual Assistance in Criminal and Related Matters Act 2003, the Financial Services Act 2007, the Asset Recovery Act 2011, the Good Governance and Integrity Reporting Act 2015 and the Financial Intelligence and Anti-Money Laundering Act 2002. It summarised the position as follows:

> "It clearly emerges therefore that there is in Mauritius:
>
> (1) a strict duty of confidentiality prohibiting banks from disclosing any information relating to the banking transactions of any of its clients;
>
> (2) an explicit and special legal framework for the permissible disclosure of information to third parties by a bank. This is dictated essentially by the compelling public interest to safeguard the integrity of the national and international financial systems;
>
> (3) a legal framework which precludes banks from making any disclosure except by compulsion of law or following a Court Order;
>
> (4) a comprehensive and specific legislative framework which sets out the conditions in which confidential information relating to a customer's banking affairs may be disclosed to any of the designated authorities."

Against that background, it proceeded on the basis that it was necessary for the Appellants to identify a specific provision of the 2004 Act which authorised the disclosure which they sought.

24. As to that, counsel for the Appellants relied primarily on section 64 (10), arguing that the case fell within sub-paragraph (c) because it was "necessary" to order the disclosure in order to enable them to trace the stolen sums. The Court rejected that submission on the basis, corresponding to the Board's own analysis (see para 21 above), that the subsection applied only in the case of an application made under subsection (9).

25. Counsel for the Bank did not support the Appellants' case under section 64 (10). But they argued, with the support of counsel for the FSC, that section 64 (3) (h) should be read as conferring a power to make an order for disclosure in the circumstances of the present case. Counsel for the Appellants supported that approach as an alternative to its primary case. The Court rejected the submission on the basis that exception (h) only applies where a "person referred to in subsection (1)" has been summoned to appear and that no such person had been the subject of a summons in the present case.

26. Turning to the Appellants' alternative case based on *Norwich Pharmacal*, the Supreme Court noted that in two previous decisions – *Li Soop Hon Li Tung Sang & Co Ltd v Barclays Bank PLC* 2014 SCJ 242 and *Barclays Bank Mauritius Ltd v Karamuth* 2017 SCJ 313 – disclosure of information about the account of an alleged wrongdoer had been ordered, with the Court making reference to *Norwich Pharmacal* principles. But it went on to refer to the more recent decision in *Foondun MS v Banque des Mascareignes* 2019 SCJ 58, in which it had observed that:

> "Although reference to the *Norwich Pharmacal* principles has been made in a few cases in Mauritius, the question whether the common law principles enunciated in that case would apply in view of the provisions of The Banking Act, has never been frontally addressed."

It held that in neither of the earlier cases had the Court explicitly based its decision on a distinct jurisdiction derived from *Norwich Pharmacal* as opposed to the 2004 Act.

27. Those observations might suggest that the Court was minded to hold that in cases involving banking confidentiality the *Norwich Pharmacal* jurisdiction was excluded by the regime under the Banking Act 2004. However, it did not in the end proceed down that route. Instead it went on to hold that *Norwich Pharmacal* relief could not be justified in the circumstances of the present case. It cited English and Privy Council authority which it said showed that the jurisdiction was "exceptional and intrusive" and that "*Norwich Pharmacal* orders are not granted on the mere asking especially against

entities such as banks which are bound by a statutory duty of confidentiality to their customer": the cases to which it referred were *Collier v Bennett* [2020] EWHC 1884 (QB), [2020] 4 WLR 116; *Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd)* [2012] UKSC 55, [2012] 1 WLR 3333 ("the *RFU* case"); and *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, [2015] AC 1675. It continued:

> "In our view the particular circumstances of the present case do not justify the granting of a Norwich Pharmacal order. In the first place the applicants have already had recourse to several judicial remedies to secure their interests. These include:
>
> (a) a statutory demand which has been served upon Key Stone Properties requesting the repayment of the USD 11.145 Million. Key Stone has applied for the setting aside of the statutory demand, the application is still pending before the Court;
>
> (b) a Mareva order which has been granted against Key Stone Properties, Mr. Goolbar and Mr. Ah Seek up to the said amount of USD 11.145 Million;
>
> (c) a provisional attachment order which has been made against the bank in respect of the sums owed to it by Key Stone Properties up to an amount of USD 11.145 Million.
>
> Furthermore, there is at the instance of applicants an ongoing enquiry by both the Central Criminal Investigation Division [CCID] and the ICAC.
>
> There is not any complaint as regards the conduct of the ongoing enquiries either by ICAC or the CCID. Nor have the applicants justified how they would be in a better position to carry out an enquiry as opposed to the above authorities which are entrusted and empowered by law to conduct such enquiries and which are specifically vested with all the necessary statutory powers to obtain the information sought both under the Banking Act and the panoply of laws to combat financial crimes which have been explicitly set out earlier in this judgment.

> We consider that even in the context of the alleged wrong doing there are no sufficient valid reasons to justify the granting of a Norwich Pharmacal order which is of an exceptional nature. There is indeed a strong public interest element in allowing the law enforcement agencies to pursue their enquiries and obtain for that purpose any relevant and material banking information, subject to the stringent conditions which the Mauritian legislator has sought fit to impose by virtue of legislation which has been expressly enacted for that purpose, and which offers all the necessary safeguards and guarantees for the permissible disclosure of information which is secured by bank secrecy."

THE APPEAL

28. The Appellants advance five grounds of appeal. The first three are concerned with *Norwich Pharmacal* relief: ground 1 asserts that the Court enjoyed a free-standing jurisdiction to grant such relief irrespective of the provisions of the Banking Act 2004, and grounds 2 and 3 challenge the basis on which the Court declined to exercise that jurisdiction. Ms Prevezer for the Appellants made it clear that that represented her primary case. Grounds 4 and 5 proceed on the alternative basis that jurisdiction to grant the necessary disclosure has to be found in the 2004 Act: on that basis they challenge the Court's rejection of the Appellants' case based on, respectively, section 64 (3) (h) and section 64 (10).

29. Consistently with their stance below, the Bank and the FSC do not oppose the appeal, but they do not adopt the Appellants' submissions at all points. The Bank's primary position is that the Court had jurisdiction to make the order sought under section 64 (3) (h), though not under section 64 (10); but if the Board were to hold that jurisdiction did not arise under section 64 at all it would support the Appellants' case that the Court had a free-standing *Norwich Pharmacal* jurisdiction. The FSC does not accept that the Court had any jurisdiction under section 64, whether under subsection (3) (h) or under subsection (10), but it accepts that it had a *Norwich Pharmacal* jurisdiction.

THE CASE BASED ON *NORWICH PHARMACAL*

30. Before addressing the substance of this issue, the Board makes one preliminary observation. Although the Appellants' case has been framed by reference to the principles in *Norwich Pharmacal*, it would seem that it could equally have been advanced as a claim for disclosure in support of a proprietary claim of the kind exemplified by *Bankers Trust Co v Shapira* [1980] 1 WLR 1274. As Neuberger J

observed in *Murphy v Murphy* [1999] 1 WLR 282, the two jurisdictions are formally distinct despite their similarities. However, for the purposes of the issue before the Board the differences do not appear to be material, and what is said in this judgment about *Norwich Pharmacal* relief can be treated as applying equally to the *Shapira* jurisdiction.

31. It is well established that the Mauritian courts enjoy the same jurisdiction to grant equitable remedies, exercised in accordance with the same principles, as the High Court in England and Wales. Any uncertainty about that question was authoritatively resolved by the Supreme Court in *Banymandhub v Kwan Chung Woo* 1965 MR 102, relying on sections 15-17 of what is now the Courts Act. The Court said:

> "There are numerous reported cases to show that this Court has, for over a century, granted injunctions in the exercise of its equitable jurisdiction whether or not a legal remedy existed at law and has repeatedly stated that this Court would, in the exercise of its equitable jurisdiction, follow the same principles as are applicable in England (see *Jacquin vs Khadaroo*, 1957 MR 150 and *Ramdenee vs Ramdenee and Ors*, 1961 MR 93."

More recently, in *Dupont v Société Résidence St Clément Court* 1998 SCJ 365 the Court observed that "our Supreme Court has the same power as an English High Court to grant equitable remedies". That jurisdiction has been exercised in the grant of interim relief in the commercial field including *Anton Piller* and *Mareva* injunctions (i.e. search orders and freezing injunctions): see, for example, *PR Ltd v Woventex Ltd* 1994 SCJ 383 and *Air Mauritius Ltd v Tirvengadum* 2002 SCJ 325.

32. In the Board's opinion it plainly follows that, subject to the point addressed at paras 33-34 below, the Mauritian Courts have jurisdiction to make interim orders for disclosure in accordance with *Norwich Pharmacal*, whether as the sole relief sought or as adjuncts to freezing orders. Indeed on the face of it that has been recognised in at least four decisions of Judges of the Supreme Court to which the Board was referred – the cases of *Li Tung Sang* and *Karamuth* to which the Court itself referred, in which disclosure orders were made, and *Drouin* and *Global Aluminium Ltd v Mauritius Revenue Authority* 2016 SCJ 117, in which the Court acknowledged the existence of the *Norwich Pharmacal* jurisdiction although it declined to make an order on the facts of the case.

33. As noted at paras 27-28 above, the Supreme Court in the present case expressed concern about whether the *Norwich Pharmacal* jurisdiction was available in a case where disclosure was sought from a bank of information relating to the affairs of a

customer, although it did not express a concluded view. The reason for that concern is more fully developed in the earlier case of *Foondun*, a decision of Mungly-Gulbul J herself. At p 12 of her judgment she posed the following questions:

> "- Is The Banking Act a comprehensive statutory regime which covers exhaustively the whole question of confidentiality so that it precludes the application of any alternative common law remedy such as the Norwich Pharmacal Relief?
>
> - Has Parliament legislated to delimit the only situations wherein disclosure of confidential information in a banker's possession, is permissible?
>
> - Would the application of the *Norwich Pharmacal* principles be tantamount to circumventing the intention of Parliament and would it be incompatible with or in violation of, the statutory scheme under The Banking Act?"

At p 13 she expressed the view that "the present matter stands governed essentially by the express and detailed provisions of section 64 of the Act which section has been invoked in support of the application", although (as in the present case) she went on to find that in any event the conditions for making a *Norwich Pharmacal* order were not satisfied.

34. By their ground 1 the Appellants contend that, if the Supreme Court intended to hold that the provisions of section 64 have the effect of excluding the *Norwich Pharmacal* jurisdiction in cases where disclosure is sought from a bank of information about the affairs of a customer, it was wrong to do so. As appears at para 27 above, that is not how the Board understands the Court's reasoning. But in view of the doubt expressed in its judgment, and more particularly in *Foondun*, it should take this opportunity to make clear that in its opinion the Act has no such effect. The starting-point is that section 64 does not impose a duty of confidentiality on banks themselves (as opposed to on individual employees and agents): see para 12 above. That duty arises, rather, at common law and there is accordingly no difficulty about giving effect to a common law (or, strictly, equitable) exception to it of the kind recognised in *Norwich Pharmacal*. It is true that it would be wrong to make an order for disclosure if compliance could only be achieved by requiring an individual employee or agent to break their duty of confidentiality under section 64 (2): see para 13 above. But in the Board's view such a case is covered by the exception in subsection (3) (d), since a *Norwich Pharmacal* application clearly constitutes "civil proceedings … involving the financial institution and the customer *or his account*". Counsel suggested that that

exception only applied to proceedings between a bank and its customer, and Mr Pursem for the Bank told the Board that that is how it was generally understood in Mauritius. However, the statutory language contains no such limitation. It is true that as drafted the scope of the exception is apparently very wide, and it may be necessary to imply some limitations to it; but the Board is satisfied that it must at least extend to a situation where the disclosure in question has been ordered by the court. (It also notes, with regard to Mr Pursem's observation, that in *Drouin* the Court referred to disclosure being potentially permissible under exception (d), though it also referred to exception (h).)

35. It would in truth be remarkable if the 2004 Act had the effect of preventing the Court from exercising what is an important and salutary jurisdiction to assist victims of fraud and other wrongdoing from recovering their property or obtaining other appropriate redress in cases where the relevant information was held by banks. It seems clear to the Board that that was not the purpose of section 64.

36. The question then is whether the Court was right to refuse *Norwich Pharmacal* relief in the circumstances of the present case. It is unnecessary to review the relevant principles in any detail. The Board is content to adopt the helpful summary analysis at para 35 of Saini J's judgment in *Collier v Bennett*, where he suggested the following fourfold test:

> "(i) The applicant has to demonstrate a good arguable case that a 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 respondent 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')."

At paras 36-41 he goes on to offer some glosses on that summary, but it is unnecessary to reproduce them here. It seems clear, and the Supreme Court did not suggest otherwise, that the first three conditions identified by Saini J are satisfied in the present case.

37. As regards the fourth condition, the most recent and authoritative review of the potentially relevant factors appears at paras 14-17 of the judgment of Lord Kerr in the *RFU* case. Again, it is unnecessary to reproduce those paragraphs, but the Board notes Lord Kerr's observation at para 16 that:

> "The test of necessity does not require the remedy to be one of last resort: *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, para 94."

Lord Kerr also observes at para 17 that "The essential purpose of the remedy is to do justice".

38. In the Board's view the essential question as regards the fourth condition is, as Saini J rightly frames it, whether an order for disclosure is an appropriate and proportionate response in all the circumstances of the case, albeit bearing in mind that the jurisdiction is "exceptional but flexible". It is necessary to say something about the latter phrase, since the Court in the present case clearly placed weight on what it characterised as the "exceptional and intrusive" nature of the jurisdiction, and the Appellants by their ground 3 contend that it appears to have proceeded on the basis that special weight must be accorded to the importance of customer confidentiality in cases involving a bank. The reason why the *Norwich Pharmacal* jurisdiction is referred to as exceptional is that it involves an innocent third party being required to supply (typically confidential) information to an apparent victim of wrongdoing to whom they would otherwise owe no duty. But it does not follow from the fact that the jurisdiction itself is in that sense exceptional that it will only exceptionally be appropriate or proportionate to grant relief in a case where the first three conditions are satisfied; nor, more particularly, does the Board believe that there is some specially high hurdle to be surmounted before a *Norwich Pharmacal* order can be made against a bank. Depending on the circumstances of the case, such relief may well be appropriate and proportionate, and it is regularly ordered in the Business and Property Courts in London, either as free-standing relief or as an adjunct to a freezing order.

39. In the Board's opinion the making of the order sought by the Appellants was indeed an appropriate and proportionate response in the circumstances of the present case and was necessary in order to do justice. The Board does not, with respect, regard the reasons given by the Court, set out at para 27 above, as justifying the contrary view.

Those reasons were referred to by the Appellants in their ground 2 under the label of "alternative remedies". The remedies to which the Court referred are, in summary, (a) that the Appellants had brought the various proceedings against Key Stone and Messrs Goolbar and Ah Seek which it identifies; and (b) that at their instance the Central Criminal Investigation Division ("the CCID") and the Independent Commission against Corruption ("ICAC") had initiated enquiries into the fraud.

40. As regards the former reason, the fact that an applicant can readily obtain the information sought by another means is indeed relevant in principle to the decision whether to grant *Norwich Pharmacal* relief. As Lord Bingham and Lord Hoffmann put it in giving the opinion of the Board in *President of the State of Equatorial Guinea v Royal Bank of Scotland International* [2006] UKPC 7 (at para 16):

> "*Norwich Pharmacal* relief exists to assist those who have been wronged but do not know by whom. If they have straightforward and available means of finding out, it will not be reasonable to achieve that end by overriding a duty of confidentiality such as that owed by banker to customer. If, on the other hand, they have no straightforward or available, or any, means of finding out, *Norwich Pharmacal* relief is in principle available if the other conditions of obtaining relief are met."

However, the proceedings brought by the Appellants against Key Stone and Messrs Goolbar and Ah Seek are not an alternative means of finding out what has happened to the stolen monies if they have been paid away in whole or in part. They may establish liability on the part of the defendants and secure any funds still in their hands, but they will not enable any moneys that have been paid away to be traced into the hands of the onward payees, which is essential in case full recovery from the defendants in the existing proceedings proves impossible. The only straightforward and available means of finding out where the moneys have gone is by a disclosure order against the Bank.

41. As for the latter reason, it is of course the case that the CCID and ICAC are investigating the alleged fraud in this case and that they enjoy a wide range of statutory powers to obtain information for that purpose. But it is not the case that it is wrong for the Court to afford appropriate and proportionate assistance to the victim of a fraud to pursue their own civil remedies, or that it should only do so where it can be shown that there is cause for complaint about how the public agencies are performing their duties. The role of a public authority investigating a suspected fraud is not the same as that of the victim of the fraud seeking to recover their money, and their interests and priorities are unlikely to be identical; nor in any event may the authority's special powers be relevant where the proceeds of the crime are no longer in the jurisdiction. Those differences may indeed be illustrated by the fact that in this case, while, as the Court

says, no criticism is advanced of the efforts of the CCID and ICAC, those efforts have not to date led to the recovery of the stolen monies or to the Appellants being supplied with any information about where they have gone.

42. The Board was addressed by counsel about the reasoning in the earlier cases of *Li Tung Sang* and *Karamuth* to which reference has already been made. As noted above, the Supreme Court held that the disclosure orders made in those cases were not explicitly based on the *Norwich Pharmacal* jurisdiction. The analysis of the reasoning in those cases is not straightforward, but there is no need to pursue the exercise for the purpose of this appeal.

THE CASE BASED ON THE 2004 ACT

43. For the reasons already given, the jurisdiction to grant relief of the kind sought in the present case does not have to be sought in the provisions of section 64 of the 2004 Act. Furthermore, the Board is satisfied that the Bank's employees can comply with an order made against it, by virtue of subsection (3) (d). Accordingly, the question whether the Appellants' application fell within the terms of subsections (3) (h) or (10) does not arise. However, the Board should say that it respectfully agrees with the Court's conclusions. In the circumstances it need only state its reasons briefly.

44. As regards subsection (3) (h), the exception applies explicitly only where a "person referred to in subsection (1)" is summoned to appear; and, as the Board has already explained, that phrase only applies to natural persons. On the face of it, that is conclusive against its applying in the present case, since the application for relief is directed against the Bank, and Mr Sauzier for the FSC so submitted. Ms Prevezer and Mr Pursem submitted that in reality any application for disclosure would be made against the institution rather than an individual and that in order to give the exception any effect it should be construed as covering such a case notwithstanding its literal language. A highly purposive construction of that kind might be arguable if the duty of confidentiality imposed by subsection (2) applied to the bank itself, so that section 64 constituted a complete and exclusive statutory scheme; but the Board has held that that is not the case. The circumstances in which, on the Board's construction, subsection (3) (h) might be engaged were not explored at the hearing and it may be that they may only occur quite rarely, but it is certainly not inconceivable that a court might wish to order disclosure of a customer's confidential information in the context of a summons against an individual employee or service provider.

45. Ms Prevezer and Mr Pursem referred to the previous decisions of the Court identified at para 14 above in which section 64 (3) (h) (or its predecessor, section 39 (2) (d) of the 1988 Act) had been treated as justifying disclosure in the case of an application against a bank. But, again, no real weight can be attached to those decisions

since in none of them was there any issue about the scope of subsection (3) (h) – and, as already noted, in *Drouin* the Court referred to exception (d) as well as exception (h).

46. As regards subsection (10), the Board has already expressed its opinion that this must be read with subsection (9) and consequently that it has no application in the present case: see para 21 above. Mr Sunassee, as junior counsel for the Appellants, advanced an argument based on the difficulty of treating sub-paragraphs (a)-(c) under subsection (10) (b) as alternatives. But, however that difficulty is resolved, the fundamental point based on the structural relationship of the two subsections is unaffected.

CONCLUSION

47. It is for those reasons that the Board concluded that the appeal should be allowed and the disclosure order sought by the Appellants should be made. Although its analysis of the role of section 64 of the 2004 Act differs from the approach taken in the earlier authorities, it does not in fact believe that it is likely to lead to different outcomes in substance.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

21 July 2023

JCPC 2023/0011

Before:

Lord Reed
Lord Briggs
Lord Hamblen
Lord Burrows
Sir Nicholas Underhill

Stanford Asset Holdings Ltd and another

Appellants

v

AfrAsia Bank Ltd

Respondent

UPON the Motion Paper dated 15 April 2022 being filed before the Supreme Court of Mauritius by the Appellants on 2 May 2022;

AND UPON the Judgment of the Supreme Court of Mauritius dated 29 September 2022 setting aside the Motion;

AND UPON final leave to appeal being granted to the Appellants by the Supreme Court of Mauritius on 6 December 2022;

AND UPON hearing Sue Prevezer KC and Avinash Sunassee for the Appellants, Rishi Pursem SC for the Respondent and Maxime Sauzier SC for the First Co-Respondent;

AND UPON the appeal of the Appellants/Applicants to the Judicial Committee of the Privy Council being allowed;

IT IS ORDERED that:

1. The Respondent shall disclose, in the form of an affidavit, to the Applicants by seven days from the date of this Order the full name(s), addresses, account numbers and particulars of the recipient(s) of any of the US$11,145,000, as from 17th February 2022, from bank account no. MU58AFBL25010826910000000034USD held at the Respondent, including but not limited to any account(s) to which such transfers may have been made and the exact location(s) in which such recipient(s) may be situated, and

2. The Appellant shall pay the Respondent's reasonable costs of complying with Paragraph 1 of this Order, and

3. There be no order as to the costs of the appeal before the Board.