

Unidentified applicants denied Norwich Pharmacal relief and pre-action disclosure (Zeus Investors v HSBC Bank plc)

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Dispute Resolution analysis: Unnamed investors sought disclosure from HSBC in order to ‘assist in the formulation and assessment of the proposed claim’. The court held that the application was a ‘fishing expedition’ and would not even have been justifiable on standard disclosure. It would have fallen within model E of the disclosure pilot which is only to be ordered in exceptional cases. The fact that it was not clear who the claimants were was unsatisfactory and was a relevant factor in assessing whether this was an appropriate case for Norwich Pharmacal relief to be ordered in the interests of justice. Written by Natalie Todd, partner, at PCB Litigation LLP.

Zeus Investors v HSBC Bank plc [\[2020\] EWHC 3273 \(Comm\)](#)

What are the practical implications of this case?

It should be remembered that ‘[a]pplications for pre-action disclosure in the Commercial Court are relatively rare’ (*Carillion plc (in liquidation) v KPMG LLP & another* [\[2020\] EWHC 1416 \(Comm\)](#), at para [15]). There are no recent examples of successful applications and this case is a further such example.

For the following reasons, the claimant to an application should be identified (at paras [54]–[56]):

- it needs to be clear who is applying for and would be receiving likely confidential information which can only be used for a specific purpose. This is so that it can be assessed whether they are entitled and whether it is appropriate to give them such information
- identification is necessary to enforce undertakings and in respect of liability to pay costs
- identification is necessary to enable the court to assess the undertaking in damages
- [CPR PD 23A, para 2.1](#) requires the full name of the applicant to be stated in the application notice as must be done in the case of a Part 7 claim form. [CPR PD 16, para 2.6](#), specifies that the full name of each party should be stated and what amounts to a full name is identified. By [CPR PD 8A, para 4.1](#), the rules and directions in relation to Part 7 claim forms are to be applied, where appropriate, to Part 8 claim forms
- costs are normally summarily assessed at the end of the hearing. It is necessary to know at that time who is liable to pay

Applications for Norwich Pharmacal relief and pre-action disclosure must be brought by claim form under [CPR 8](#) rather than by application notice. This is so as to enable the court to case manage them.

What was the background?

The ‘Zeus Investors’ are investors in a series of tax mitigation schemes. An agreement was entered into in 2007 between ‘Zeus partners’ and HSBC. Importantly for this application, the investors in the schemes were not parties to the agreement and third-party rights had been expressly excluded. Despite considerable inter-parties’ correspondence on the subject, the Zeus Investors refused to identify the identity of the applicants to this application.

It is alleged that the schemes were devised by HSBC and HSBC provided ongoing services in respect of the schemes. HMRC brought (and discontinued) criminal proceedings against six investors in the scheme alleging that the schemes were designed to illegally evade tax. The claimants allege that HSBC became aware that the schemes were ineffective and incredibly high risk from a legal and regulatory perspective, but did nothing. Internal HSBC emails were disclosed in the criminal proceedings (when the Zeus Investors became aware of them) which displayed HSBC employees’ concerns as to the scheme and yet HSBC chose not to take action. The Zeus Investors sought a wide ranging disclosure order against HSBC for internal emails and other documents.

The applicants' prospective claim was for breach of contract and negligence. It was alleged that HSBC assumed duties not just to Zeus, but to the 'customers' (investors) who were referred to in the contract, but not named.

The issues before the court were whether the Zeus Investors had to be identified by name in order to seek Norwich Pharmacal relief and whether such relief was vital to a decision to sue or an inability to plead.

What did the court decide?

The court considered the applicable principles of Norwich Pharmacal relief (at para [61], *Collier v Bennett* [2020] 4 WLR 116, at para [35])

- the 'arguable wrong condition' was lacking given that the claims in contract were not understood as the 'Zeus Investors' were not parties to the contract. The claims in tort faced 'formidable hurdles' (at para [108])
- the court did not consider in great detail the 'mixed up in condition' or the 'possession condition' given that HSBC is the proposed defendant and the real issue is the 'overall justice condition'
- the 'overall justice condition' was not met. The information sought was not necessary in the interests of justice in circumstances where, if a claim is brought, disclosure would be given. The court gave weight to the fact that the claim had third party funding which will have inevitably included an assessment as to the merits and viability of a claim. The information sought was not vital to a decision to sue or an inability to plead and was not necessary to ensure that justice is done. The issues as to the identity of the claimants were also relevant to this stage and the overall exercise of discretion

The court summarised the authorities on the scope of the information that may be ordered as set out by Judge Flaux in *Ramilos* (at para [65]).

The claimants failed to meet the requirements for Norwich Pharmacal relief and did not therefore pursue the application under [CPR 31.16](#).

Case details

- Court: Business and Property Courts of England and Wales, Commercial Court (Queen's Bench Division)
- Judge: Judge Bryan
- Date of judgment: 24 November 2020

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