Neutral Citation Number: [2007] EWHC 330 (QB)

Case No: IHQ07/0049

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2007

Before:

MR JUSTICE KING

- -

Between:

Campaign Against Arms Trade (an unincorporated association, claiming by its authorised officer, Ann Feltham)	**Applicant**
- and -	
BAE Systems PLC	**Respondent**

- -
- -

Miss Dinah Rose QC and Mr. Ben Jaffey (instructed by **Leigh Day & Co**) for the **Applicant**
Miss Clare Montgomery QC and Mr. Antony White QC (instructed by **Allen & Overy LLP**) for the **Respondent**

Hearing date: 2nd February 2007

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Judgment

Mr Justice King:

1. The Applicant is a long established unincorporated association engaged in research into and campaigning against the international arms trade. The Respondent is a well known major arms manufacturer based in this country. On any view they are in opposing camps in the arms trade world.

The Norwich Pharmacal Application

2. I have before me an application dated the 24th of January 2007 seeking *Norwich Pharmacal* relief against the Respondent for disclosure pursuant to the principles established in Norwich Pharmacal Co v. Customs and Excise Commissioners [1974] AC 133 and developed in subsequent case law.

The Protective Costs Order granted by Underhill J.

3. Prior to the issue of this application the Applicant obtained an order for interim relief from Underhill J. dated the 24th January 2007 made on a without notice application. The relief granted was in two parts. The first was for the preservation of documents. This has proved uncontroversial. The second was a protective costs order directed to the hearing of this present application and made having regard to the limited financial resources of the Applicant. Under its terms no order for costs of the application for the interim relief, or for the costs of the hearing on the return date, should be made that would require the Applicant to pay the Respondent, or the Respondent to pay the Applicant, more than the sum of £10,000.

4. This second aspect of the order has proved highly controversial. Although no application to vary or discharge the costs order has ever been made, the Respondent, in its written skeleton and orally before me, pursued the submission that the costs order was outside the jurisdiction of the court and should never have been made. The thrust of that submission was that the present application could not be characterised as proceedings brought to pursue a public interest but were private law proceedings "concerned with the Applicant's private concerns about confidentiality within its organisation" and as such fell outside the principles governing the grant of such a protective costs order established in R (Corner House Research) v. Secretary of State for Trade and Industry [2005] 1 WLR 2600, at 2625, para.74, in the context of public law proceedings. Nor it was said could the order come within the principles governing costs capping orders in the context of private law proceedings, exemplified in those laid down by Gage J. in Smart v. East Cheshire NHS Trust [2003] EWHC 2806 para. 22 (cited at page 86 of current White Book Civil Procedure volume 1). Underhill J. himself however at paragraph 32 of his judgment considered that he had jurisdiction to make the order he did, relying upon the Court of Appeal's decision in King v. Telegraph Group Ltd [2005] 1WLR 2282, describing the court's powers as regards cost-capping as "extremely wide." He no doubt had in mind the principles set out in King at paras. 92 – 93.

5. I shall deal first with the *Norwich Pharmacal* application, leaving my consideration of the costs issue to the end of this judgment.

The Norwich Pharmacal Jurisdiction

6. Under the principles referred to, the court in exercise of its discretionary equitable jurisdiction has the power to order a person who has become involved or mixed up in some way in the wrongful acts of others, to assist the person wronged by providing information as to the identity of the wrongdoers. In the case of a wrongful leak of privileged or otherwise confidential information to an innocent third party, which is how this present application was originally presented, the court if it is mindful to grant the relief in principle, has a general discretion which must of course be exercised judicially, as to the manner in which the assistance should be rendered. It is for example not uncommon for the court to order that the appropriate person file an affidavit containing the relevant information. This is particularly the case where the original source materials leaked to the third party have been destroyed or mutilated but it is not confined to such a situation. All will depend upon the view of the court as to the sort of information in the possession of the Respondent likely to assist in the identifying of the wrongdoer. See for example the orders made in X Ltd. v. Morgan-Grampian (Publishers) Ltd. [1991] 1 AC 1, HL, and in Ashworth Hospital Authority v. MGN Ltd. [2002] 1 WLR 2033, HL.

The Requirements for exercise of the Norwich Pharmacal Jurisdiction

Wrongdoing

7. The authorities establish that although the exercise of the discretion does require evidence of wrongdoing, there is no requirement that the respondent to the application should himself be an actual wrongdoer. This was reiterated by Lord Woolf CJ in Ashworth at 2039E:

> "*The Norwich Pharmacal* case clearly establishes that where a person, albeit innocently, and without incurring any personal liability, becomes involved in a wrongful act of another, that person thereby comes under a duty to assist the person "….." by giving any information which he is able to give by way of discovery that discloses the identity of the wrongdoer. While therefore the exercise of the jurisdiction does require there should be wrongdoing, the wrongdoing is the wrongdoing "…." of the person whose identity the claimant is seeking to establish".

8. The wrongdoing is not confined to tortious acts. It can extend to breach of contract or even criminal conduct. See Lord Woolf in Ashworth at 2041G-H; 2048E-F. Moreover, it is sufficient if the evidence establishes only an arguable case of such a wrong:

> "A wrong must have been carried out or arguably carried out by an ultimate wrongdoer", per Lightman J. in Mitsui & Co Ltd. v. Nexen Petroleum UK Ltd. [2005] EWHC 625 (Ch) at para 21(i).

The purpose of the application

9. Nor is it now necessary (if it ever was) that in order that disclosure be ordered, the Applicant intends to bring legal proceedings against the wrongdoer, provided some other legitimate purpose in seeking disclosure is identified. This was established in

Ashworth itself where the applicant hospital authority intended to dismiss the source of the leak once identified from its employment. In that case the leak had been to the press and concerned the medical records of a notorious convicted murderer who was a secure patient in the Applicant's hospital (see Lord Woolf at 2045-6). In the course of his judgment Lord Woolf emphasised that *Norwich Pharmacal* relief was a flexible remedy capable of adaptation to new circumstances (p.2049F).

The threshold requirement: the Respondent to be more than a mere bystander

10. It remains a fundamental requirement to the exercise of this jurisdiction that the person against whom disclosure is ordered, is shown to have been more than a "mere bystander or witness".

11. In Norwich Pharmacal itself their Lordships expressed the test to be applied in a number of different ways.

12. Lord Reid (at p.175B-C) spoke of a "very reasonable principle that if through no fault of his own a person gets mixed up (my emphasis) in the tortious acts of others so as to facilitate their wrongdoing (again my emphasis) he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers." The key phrase here in my judgment is that which describes the innocent third party as a "facilitator" of the wrong. The third party has to have some connection with the circumstances of the wrong which enables the purpose of the wrongdoing to be furthered. Similarly, Lord Kilbrandon and Lord Cross focussed on the relationship between the respondent to the application and the wrongdoer (Lord Kilbrandon at p.203H; 204B; Lord Cross p.197C). This in my view is the context in which Lord Reid's earlier statement at p.174F, heavily relied on by the Respondent in this case, namely "It is not available against a person who has no other connection with the wrong than that he was a spectator or has some other document relating to it in his possession", has to be interpreted.

13. Whether receipt of a confidential document wrongfully disclosed will in itself be sufficient "involvement or participation in the wrong" (to use the test formulated by Viscount Dilhorne in Norwich Pharmacal when saying at 188C, "someone involved in the transaction is not a mere witness", a test adopted by Lord Woolf in Ashworth at 2041H when saying "it is sufficient if "..." there was "involvement or participation") must depend on the nature of the wrong itself and its purpose. There may in my judgment be circumstances where the mere receipt of a piece of information wrongfully sent, whether in documentary form or not, may be sufficient involvement for these purposes because that in itself facilitates the wrong. In X Ltd. the journalist Mr. Goodwin was required to deliver up his notes and disclose the source of the leaked document concerning the financial affairs of the plaintiff companies, albeit no article based on that information had yet been published. Clearly the purpose and plan of the wrongdoer in that case was to send the information to the newspaper so that it could be published. The very receipt of the leaked document by the newspaper's journalist facilitated the plan. Hence this court at least can see why Lord Bridge in that case was able to say as follows at 39G - 40G:

> "In the *Norwich* case the plaintiffs alleged that the Customs and Excise Commissioners, were in the exercise of their official duties, handling goods

> which infringed the plaintiffs' patent and which were being illicitly imported into this country. They sought discovery of documents in the possession of the commissioners which would enable them to identify the importers "…" Although the commissioners had acted "…" innocently, they were required to make disclosure. Just as in the *Norwich* case the commissioners had innocently come into possession of goods tortiously imported, so here the defendants, whether innocently or not, came into possession of confidential information tortiously obtained and tortiously imparted to them "..." Just as the commissioners in the *Norwich* case were, in Lord Reid's phrase, "mixed up" in the tortious acts of others from the moment that they received the infringing goods tortiously imported, so the defendants here were "mixed up" in the tortious acts of the source from the moment Mr. Goodwin in the course of his employment by the publishers received the confidential information tortiously disclosed",

albeit I fully accept there was evidence in that case of the journalist's "participation" which went beyond mere receipt (that of the journalist using the disclosed information to question the plaintiff and prepare an article, see Lord Donaldson MR in the Court of Appeal at 24B – "it is not the case that Mr. Goodwin simply received the article and did nothing about it"), so strictly speaking Lord Bridge's remarks are obiter. Equally this court at least is of the view that counsel's submission in Interbrew S.A. v. Financial Times Ltd and others [2002] 2 Lloyd's Rep 229, to the effect that Interbrew would have been entitled to an order for delivery up "even if the defendants had published nothing", was not as unpromising as the undoubtedly obiter remarks of Lord Justice Sedley in the Court of Appeal at 238 para.40, would suggest.

14. Whatever the precise formulation of this requirement, its rationale is the need to justify what would otherwise be an unjustifiable intrusion upon an innocent third party, and this must always be borne in mind. Lord Woolf in Ashworth put the matter thus:

> "Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement (the reference to participation can be dispensed with because it adds nothing to the requirement of involvement) is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion" (p.2042A-B).

The exercise of the discretion: necessity

15. Even if this requirement is satisfied, this is not the end of the matter. It is only a threshold requirement to the exercise of what is a discretionary jurisdiction. Its satisfaction merely "triggers" the jurisdiction. The fact there is involvement enables the court to consider whether it is appropriate to make the order sought. In this regard I do have in mind again the words of Lord Woolf in Ashworth at 2049F to the effect that the jurisdiction is an "exceptional one" which is only to be exercised by the court when it is satisfied that it is necessary it should be exercised. At p.2042C Lord Woolf referred to this as meaning that the disclosure sought had to be a "necessary and proportionate

response in all the circumstances" referring to the Court of Appeal decision in John v. Express Newspapers [2000] 1 WLR 1931. In Mitsui at para. 24, Lightman J. referred to the exercise of the jurisdiction against a mere innocent witness, as a "remedy of last resort" to be exercised if the innocent third party is "the only practicable source of information".

16. This "necessity" requirement will however vary in its impact according to the circumstances in which the application is being made. Where for example (but not the case here) the disclosure sought would involve the disclosure of a journalist's sources of information, the court will have to have regard to the protection given to those sources by section 10 of the Contempt of Court Act 1981. This requires that the disclosure be "necessary in the interests of justice or national security or for the prevention of disorder or crime". See the observations of Lord Woolf in John at p.1937, para.21:

> "It is not in dispute that, but for the fact that we are concerned here with a journalist's source of information, this is a situation where it would be appropriate for the court in the exercise of its discretionary equitable jurisdiction, to order a person who has become involved in the tortious acts of others to assist the person who has been wronged by providing information as to the identity of the wrongdoers "..." A statutory fetter is, however, placed on the exercise of this equitable jurisdiction by section 10 of the Contempt of Court Act 1981. Absent section 10, the common law would have been developed to provide a similar protection to that provided by section 10 because it also accepts that a high level of protection should be attached to the freedom of the press".

17. Similar considerations would apply in other cases where Article 10 of the European Convention on Human Rights is engaged.

18. None of these observations as to an additional statutory fetter can apply to the present case. Although Miss Montgomery QC on behalf of the Respondent asserts that the joint concession referred to above by Lord Woolf in John, that *Norwich Pharmacal* relief would otherwise have been available on the facts of John, was wrongly made, the principle I extract from that particular case is that when exercising its discretion and determining whether disclosure is a necessary and proportionate response in all the circumstances, the court should always have in mind any particular counterbalancing public interest which militates against disclosure. In a case such as John, the court will always have to put in the balance against any established need of the Applicant to obtain disclosure, the countervailing public interest in the freedom of the press bolstered by the longstanding journalistic principle not to reveal sources of confidential information. In such circumstances a court may well expect far more of an Applicant by way of taking independent steps to protect its position, whether for the purpose of discovering the identity of the source or protecting itself against further leaks, before being prepared to order disclosure as a necessary and proportionate response, than might otherwise be the case, absent such countervailing public interest.

19. In the present case the Respondent has not sought to identify or rely upon any particular countervailing public or even private interest which militates against disclosure peculiar to the present circumstances. This in my judgment is a matter the court is entitled to

have in mind when considering whether the requirement of necessity and proportionality has been satisfied.

20. Miss Montgomery in her skeleton argument, relying on the authority of Mitsui, at para. 24, asserts that the test of necessity required for the exercise of the *Norwich Pharmacal* jurisdiction is not met where the Applicant has failed to exhaust "other available avenues" through which the information might be obtained. In my view this is to put the matter too high and to put the discretion of the court into too much of a straitjacket. Of course as Lightman J. said in the passage cited above, the court must always have in mind the public interest in not involving innocent third parties if this can be avoided and "a necessity required to justify exercise of this intrusive jurisdiction is the necessity arising from the absence of any other practicable means of obtaining the essential information". But when determining what is practicable for these purposes the court in my judgment is entitled to have regard to all the circumstances prevailing in the particular case, including for example the size and resources of the Applicant as an organisation, and the urgency of its need to obtain the information it requires, and any public interest in it having its need satisfied.

The Present Application

21. The Application is supported by evidence from Ann Feltham, the Applicant's Parliamentary Co-ordinator, given in two witness statements. The Respondent has chosen to lay no evidence before the court other than copies of extracts from the Applicant's publicly accessible website.

22. The order sought is designed to assist the Applicant discover the source of the leak to the Respondent of an email sent from Ann Feltham on the 29th of December 2006 ("the 29th December email") to those on the Applicant's steering committee internal email list (caatcommiteee@lists.riseup.net), a private list not open to the members of the public and comprising only the 12 members of the steering committee and seven members of the Applicant's staff.

23. I have not considered it necessary to read the email itself and no-one has asked that I should. For present purposes it is sufficient that I simply record and accept the evidence of Ann Feltham as to what the email contained and its purpose. No submission has been made that this is not a proper course for me to take.

24. The email contained privileged legal advice which the Applicant had received from its solicitors on tactics and costs, including the question of a protective costs order, in relation to proposed judicial review proceedings which the Applicant intends to initiate against the Government and in respect of which the Respondent is an interested party with an interest adverse to that of the Applicant. By the review proceedings the Applicant seeks to challenge the decision of the Serious Fraud Office to discontinue its investigation into alleged corruption and bribery on the part of the Respondent in the securing of a number of arms supply contracts from the Government of Saudi Arabia (the "Al Yamamah contracts"). The purpose of the email was to inform the committee of the advice given and to seek instructions to proceed.

The leak to the Respondent

25. There is no dispute that the email was leaked to the Respondent. Indeed it was actions taken on its behalf by its own solicitors, Allen and Overy LLP, in returning the email to the Applicant's own solicitors, Leigh Day & Co., by letter dated the 9th of January 2007, received on the 10th of January, that the Applicant came to know of the leak.

26. I set out that letter in full:

> "Dear Sirs,
>
> Email from Ann Feltham
>
> Our client, BAE Systems plc, recently received electronically an email which appears to have been sent from and to one of your clients, the Campaign Against the Arms Trade. This email was not solicited by our client and we enclose a copy for your information.
>
> Save for the copy enclosed with this letter, both we and our client have undertaken all reasonable efforts to destroy any paper or electronic copies of this email that we or our client hold."

The Respondent's dealings with the email

27. It is a reasonable inference from the contents of that letter, and there is no counter evidence put against it, that upon receipt, the contents of the email must have been reviewed by a person or persons within the Respondent and the decision made to pass it to the Respondent's lawyers dealing with the Applicant's proposed judicial review proceedings to which the email related. Those lawyers then, as we have seen, returned it to the Applicant's own solicitors, instructed themselves in the proposed judicial review. Further it is a reasonable inference that paper copies of the email were made by the Respondent and that it passed through a number of active email accounts within the Respondent. This is supported by paragraph (2) of the Respondent's Solicitor's letter of the 31st January 2007 where it is said that:

> "our client can confirm that the only other copies of the 29 December email in its possession, if recovery is possible, were created for the purpose of obtaining legal advice or ensuring deletion of the 29 December email from active email accounts (point 3.1(2)(i) of the draft order)".

28. Although by correspondence the Respondent says it has taken "all reasonable efforts" to destroy copies of the email, I accept what is said on behalf of the Applicant that it is almost impossible to delete electronic data. A "deleted" email can normally be recovered by a competent professional. Computer imaging and data recovery orders are routinely granted to enable 'deleted' information to be recovered.

29. In subsequent correspondence with the Applicant's solicitors prior to the issue of proceedings, the Respondent's solicitors also say that "we ceased reading it as soon as it became apparent what it was and have little idea of what it contains. We confirm that neither we nor BAE will use the email in any way" (letter 11th of January 2007).

30. It is noteworthy however that they do not say that the Respondent, from whom of course the solicitors must have been taking instructions before entering into the correspondence, had not itself read the email or were ignorant of its contents. The inference must be, again in the absence of any evidence of the Respondent to the contrary, that the Respondent has read the email and is fully aware of its import. Given what this court understands the email contained, this must mean that the Respondent is now privy to the tactical advice given to the Applicant on amongst other matters protective costs orders in the proposed judicial review proceedings in relation to which it is an opposing interested party, albeit not a proposed respondent.

31. The copy of the email returned to the Applicant's solicitors was the entirety of the 29 December email as sent out by Ann Feltham to the intended recipients on the Applicant's internal list, but was no more than that. It was a redacted version of that which had come into the possession of the Respondent and/or its own solicitors. All the routing information, the header address and so forth, which would give details of the email accounts through which the email had been received and sent before arriving at the Respondent and its solicitors, had been removed. Such removal must have been done either by the Respondent or by its solicitors acting on its instructions.

32. The effect of the redaction has been to conceal the circumstances in which the email was received by the Respondent and to deny the Applicant information which would assist in discovering the source of the leak.

33. No explanation has been given by the Respondent -although questioned about the matter in the pre issue correspondence - for this redaction and deletion of part of the email chain, other than to assert that "the copy of the email returned to you was the entirety of your client's email. BAE is not required to provide anything further" (para.6, solicitors' letter of 15th January 2007), and that "it is for your client to establish how the email came to be sent out of its organisation" (para.6, solicitors' letter of 11th of January 2007), and that "we do not accept that BAE Systems plc (BAE) or we are under any obligation to assist you in any investigations you may wish to conduct as to the circumstances in which the email was sent. "…" Authorities concerning the grounds on which a *Norwich Pharmacal* order will be granted do not establish an independent duty to provide cooperation unless and until an order is made" (para. 1 of letter of 15th of January).

<u>The alleged effect of the disclosure of the email upon the proposed judicial review: the Applicant's need to discover the source of the leak</u>

34. As explained, the email contained privileged legal advice on tactics and costs which the Applicant had obtained from its own solicitors in connection with proposed judicial review proceedings to challenge, it is said in the public interest, the lawfulness of the decision of the Serious Fraud Office to discontinue its investigations into corruption in relation to the Al Yamamah contracts secured by the Respondent from the Government of Saudi Arabia. That decision had been announced on the 14th of December 2006. The Applicant had instructed its solicitors jointly with another anti-corruption watchdog known as Corner House.

35. A letter before claim was sent to the SFO, the Attorney General and the Prime Minister by the Applicant's solicitors. The letter was also served on the Respondent as an interested party. Patently the Respondent has an interest in the outcome of the judicial review which has the potential for effecting a reopening of a criminal investigation into its own conduct by a prosecuting authority. This court cannot accept the assertion made in the Respondent's skeleton argument at para.13 that it has no significant interest in the proposed judicial review proceedings.

36. A copy of the letter before claim is before me as is the Government's response of the 19th of January. The basis of the challenge reflects classic principles upon which administrative decisions of the executive can be attacked in the courts, namely either by seeking to establish that decision was in itself contrary to law or by seeking to attack the decision making process itself as being tainted by improper considerations or improper input. Thus it is alleged that the decision was reached by reference to considerations of damage to diplomatic relations rendered unlawful by Article 5 of the OECD convention, and further or in the alternative the advice given by the Prime Minister to the Attorney General and the SFO purportedly on the public interest, was itself tainted by similar improper considerations and amounted to an unlawful direction not to prosecute.

37. It is right I record that the Applicant has already put the basis of its proposed challenge into the public domain by posting it on its website.

38. In the light of the Government's response the intention of the Applicant is to proceed with an application for permission to bring judicial review proceedings. Under the material procedure rules and the practice of the Administrative Court such application must be issued promptly and in any event within three months of the decision or the court may refuse the application or relief.

39. However – and this is the key asserted starting point for the present application challenged by the Respondent - the Applicant says that it cannot safely initiate proceedings unless and until the source of the leak to the Respondent is discovered and stopped. Otherwise it is said it can have no confidence that further leaks of its privileged or other confidential information may not occur whether to the Respondent or to the Defendant to the review proceedings themselves, namely the Government. Unless the leak has been stopped the Applicant says it will be hampered in the obtaining and the discussing of full and frank legal advice. Further, since one of the obvious candidates for the leak is a member of the steering committee or staff, then absent the discovery and stopping of the leak, the whole basis of trust upon which the Applicant organisation operates continues to be undermined which in itself inhibits the institution of the review proceedings.

40. The evidence of Ann Feltham is that although the Applicant has taken what steps it can to protect itself in the future by reducing the group dealing with the litigation to only 4 members of the steering committee and the CAAT staff and by stopping using the riseup.net organisation which hosts the email group, these steps will not obviate the risks of future leaks, given that one of the reduced group may be the culprit or the Applicant's emails may still be being intercepted by or read by hackers, and in any event the undermining of the trust within the organisation will not thereby disappear.

41. In his judgment of the 24th of January 2007 when granting the interim relief, Underhill J. expressed his view of the Applicant's need to discover the identity of the source of the leak thus:

> "3. CAAT is understandably very concerned that so highly confidential a document should have come into the hands of what is in practice an opposing party in projected litigation. Quite apart from the breach of confidence involved in the disclosure of the contents of this particular email, which could be highly relevant to the tactics to be adopted by such an opposing party, it seems either there is within CAAT's own organisation a "mole" who is inimical to its aims, or some hostile person who is able to access their emails from outside. In either case, such a person may very well seek to act against CAAT's interests in future, whether by disclosure of other confidential information or otherwise. Such a state of affairs is profoundly concerning to it. The prejudice done by the disclosure itself may be serious, but no doubt equally damaging is the state of internal tension and uncertainty which it is calculated to engender.
>
> 4. The evidence is that CAAT does not feel able to proceed with its substantive proposed judicial review application until it has discovered the source of the leak. If it turns out that proceedings - on the merits of which I need form no view, but which are proposed to be taken on the basis that they are in the public interest, have been stifled by the conduct of the wrongdoer that would be a serious interference with the process of justice."

The basis of the present application: as ancillary to the judicial review proceedings

42. This application is accordingly put on the basis that it is a necessary precursor to the judicial review proceedings and is ancillary to them.

43. And at the heart of the application, again challenged by the Respondent, is the Applicant's further assertion that it has done everything practicable it can do without the cooperation of the Respondent to investigate the source of the leak but has failed, that the Respondent must know how the email was obtained by it and must have information which would assist in the identifying of the source including the records of its IT systems and active email accounts, but has refused to give that assistance. The Applicant does not even know for example the date upon which the leak occurred.

44. Before proceeding with my conclusions on the merits of this application, I should at this stage rehearse (i) the steps the Applicant has in fact taken independently of the Respondent (ii) the precise terms of the order being sought (iii) the stance taken by the Respondent to date to the Applicant's requests for assistance.

The independent steps taken by the Applicant to discover the source

45. As Ann Feltham says, there are really only two broad possibilities: either the source is one of the authorised recipients of the email, i.e. a member of the Applicant's steering committee or staff, or the email was intercepted or retrieved by other means by a person or persons unknown, be it by improper access to the Applicant's or a recipient's computer system, interception at riseup.net or at some point whilst the email was sent

over the internet. In her first witness statement she explains how she made enquiries of each of the authorised recipients who each denied forwarding the email on. Her second witness statement was made in response to that part of the Respondent's skeleton argument in which it is said that the Applicant has not done enough and that before seeking the present order the Applicant should have (skeleton para.27.) "examined the electronic data available to it on its own computer systems and those of 'riseup.net' and further should have asked any authorised recipients to provide it with access to their personal electronic data for purpose of determining whether their denials of involvement in the copying are accurate".

46. In this later statement Ms Feltham says she did check the 'sent folders' on the personal computers of the staff based in the Applicant's office, but explains that there was a major practical and logistical problem as regards access to the computers used by members of the steering committee. Unlike the staff they are not employees of the Applicant but volunteers who do not work in the office or use computer systems belonging to the Applicant. Some are members of other organisations who access emails from accounts and equipment owned by their employers. Some are based outside London. This all means that to have investigated further on the lines suggested by the Respondent, the Applicant would have needed access to computers to which the Applicant has no right of access and in any event the Applicant would have needed the "costly services of a computer expert to go on a fishing expedition for emails which might or might not have been sent which moreover would have been very time consuming.

47. In these circumstances the Applicant says, through Ann Feltham, that it considered the only realistic and practical way in which the matter could be resolved, given the constraints imposed by the size and resources of the Applicant and by the need to commence the proposed judicial review promptly, was to secure the co-operation of the Respondent without more ado. The practical cost and the cost of the necessary legal authority to access computers which do not belong to the Applicant, would it is said be brought within the Applicant's reach if the Respondent were to co-operate and disclose the information concerning the leak which the Applicant seeks, and the whole investigatory exercise would consume far less time.

The Terms of the Order Sought

48. The material terms of the order sought are as follows:

> '3. The Respondent shall forthwith:
>
> 3.1. Provide full and complete copies of the following documents to the Applicant:
>
> (1) Copies of the email sent from Ann Feltham to the CAAT Steering Committee on 29 December 2006 ("the 29 December email").
>
> (2) Any document containing:
>
> (i) part or all of the 29 December email; and/or

(ii) routing and addressing information for (a) the 29 December email; and/or any document containing part or all of the 29 December email; and/or

(iii) any information showing how the email came to be received by the Respondents; and/or

(iv) any information tending to identify the person or persons who have seen any of the documents or information referred to in sub-paragraphs (i) – (iii) above.

(3) Any other non-public document or copies thereof prepared by any of the members, employees or officers of the Applicant.

3.2. Where a document that would otherwise fall to be preserved under paragraph 5.1 has been deleted, the respondent shall take all reasonable steps to reconstruct such documents using a qualified independent computer professional, instructed by and under the supervision of Allen and Overy LLP.

4. The Respondent shall write to the Applicant's solicitors, Leigh Day & Co, setting out the steps that have been taken to comply with this order by 4.30pm on [ ] 2007.

5. The responsible officer of the Respondent shall by [ ] 2007 swear an affidavit and serve it on the Applicant's solicitors giving full and complete particulars as to how the 29 December email came to be received by the Respondent and Allen & Overy LLP, identifying all persons who have had sight of the email or made aware of its content or who were involved in the Respondent acquiring possession or control of the 29 December email.'

The order sought at para. 3.1(3): the allegation of collateral motive

49. The order in terms of 3.1(3) is particularly controversial, providing as it does in effect for the disclosure of any other confidential information belonging to the Applicant which the Respondent may have obtained, apart from the 29 December email. In its form as applied for, it is without limit of date or qualifying circumstance.

50. The Applicant has however indicated to this court in oral submission that which it put in writing to the Respondent by letter of the 1st of February 2007, (the day before this hearing began), namely that it is content that the order should be limited to confidential information obtained by the Respondent after the 29th of September 2003.

51. The proposed limitation is designed to meet the point raised by the Respondent in its skeleton argument that the Applicant's true motive in seeking this part of the order (and indeed the whole of the order, having regard to the Applicant's rejection of the Respondent's offer to provide part of the disclosure sought, an offer to which I return below) is an improper collateral one – unconnected with the current leak -, namely to secure an investigation into historic allegations of misconduct made in a Sunday Times article of September 2003 which are the basis of the Applicant's belief deposed to by Ann Feltham in support of the present application (first witness statement at paras. 35-

41), that the Respondent has previously sought to infiltrate the Applicant and obtain its confidential information by covert means.

52. The points made by the Respondent are that these allegations concern events of some antiquity, relating to the alleged infiltration of the Applicant by the Respondent between 1995 and 1997 using a consultancy company run by a lady called Le Chene, which according to the Sunday Times had been paid by the Respondent to place agents within the Applicant to collect and pass on to the Respondent highly confidential information about the Applicant's workings and activities; that the Applicant chose not to pursue the Respondent about these matters at the time of the article or since, by for example issuing proceedings or seeking pre-action disclosure which it could have done so if it had thought appropriate; that the link between these matters and the current leak is tenuous, given on the Applicant's own evidence, it had dismissed the person whom in 2003 its own internal investigations had led it to suspect as the mole; and in any event according to the Applicant's own website, the Information Commissioner, to whom the Applicant made complaint, had failed to confirm a connection between Le Chene and the Respondent.

53. As indicated, the Applicant now meets this complaint of improper collateral motive by expressly limiting this part of the draft order to information obtained by the Respondent after the 29th September 2003, which is the date of the Sunday Times article.

54. The Applicant justifies this part of the proposed order by reference to what it describes as the carefully worded responses of the Respondent both in its skeleton argument and in recent correspondence, which never expressly deny that the Respondent holds other confidential information belonging to the Applicant beyond that contained in the 29 December email, albeit this question has been expressly raised with it. Particular emphasis is put on section 13 of the Respondent's skeleton argument with its reference only to <u>privileged</u> information:

> "CAAT's evidence does not establish that BAE was involved in the disclosure of privileged information relating to CAAT. The evidence of Ann Feltham points the other way. (1) The receipt of the email was promptly disclosed (2) BAE has no significant interest in the judicial review proceedings. (3) There has been no further disclosure of privileged information. It is to be assumed that BAE would have reported any. (4) Even Ann Feltham accepts (at para 46 of her witness statement) that BAE is an innocent party."

55. In its letter to the Respondent of the 1st of February the Applicant's solicitors put the case for this part of the order in this way:

> "The inference to be drawn from this evasion is obvious. In these circumstances, and in light of the matters referred to above, CAAT is fully justified in seeking disclosure from BAE of all CAAT's confidential information which it has wrongly obtained. This is not an attempt (cynical or otherwise) to re-investigate the allegations in the 2003 *Sunday Times* article. For the avoidance of doubt, CAAT is content for the order it seeks to be limited to confidential information obtained by BAE after the date of publication of that article."

The Respondent as more than a mere innocent party

56. I should add however that the Applicant as a quite separate matter does rely upon the failure of the Respondent expressly to deny involvement in the alleged historic spying, saying (in its solicitors' letter of the 11th of January) no more than that "an article appearing in a newspaper over three years ago does not constitute evidence that our client has sought to infiltrate yours, in support of the submission made orally to the court that the Respondent should no longer be regarded as an innocent third party as the Applicant was originally prepared to concede despite its suspicions to the contrary. In further support the Applicant relies upon the alleged strength of the inferences to be drawn from the source material for the Sunday Times article which the Applicant has obtained from the newspaper and which is exhibited to Ann Feltham's first witness statement, together with the Respondent's reluctance to disclose information which might lead to the identification of the person responsible for the current leak, and its failure to provide any evidence to this court explaining how it came into possession of the 29 December email or its dealings with it. It is pointed out that the Respondent has not take the opportunity to respond to the served evidence of the Applicant, by expressly asserting that it was an innocent recipient of the email.

57. In her first witness statement at para.46 Ann Feltham had originally said this on this issue of the innocence or otherwise of the Respondent:

> "It has been deeply upsetting to discover that once again CAAT are faced by an apparent betrayal of trust whatever BAE's role in this may or may not be. At present, I view BAE as an innocent third party, somehow caught up in wholly improper conduct by some person or persons who wishes to damage CAAT. However, given BAE's past history of using agents to infiltrate CAAT (which BAE does not seek to deny) and its current wholly obstructive attitude, I am concerned that BAE's true level of involvement might be greater than is presently known. Although I am perhaps being overly cynical, I wonder why BAE are not prepared to tell CAAT the source of the email, if they truly have nothing to hide. It seems to me that the proper and responsible thing for a public company to do would be to provide full, immediate and complete cooperation to help discover the wrongdoer, and stop further breaches of our confidential and privileged information"

This original concessionary although suspicious stance, is reflected in the Applicant's skeleton argument of the 22nd of January at para.8 where it is said "although the present case is based on the *Norwich Pharmacal* jurisdiction and no allegation of wrongdoing is at present made against BAE, CAAT has reason to believe that BAE has previously sought to infiltrate CAAT and obtain its confidential information by covert means "..."

58. I deal with my conclusions on this issue below.

The stance taken by the Respondent: the offer of the 31st January 2007

59. Upon receipt of the returned email by the letter of the 10th of January, the Applicant's solicitors embarked upon correspondence with the Respondent's solicitors seeking (in summary) information about the way in which the email had been obtained and the

source of the leak, as well as information about the use to which the email had been put and various discrete matters to which I have already referred, and further seeking various undertakings concerning preservation of documents and costs. I have already in effect identified the limits of the assistance proffered in response by or on behalf of the Respondent prior to issue of the application itself. In summary it was to confirm that all reasonable efforts had been made to destroy copies of the email apart from that returned, that neither the Respondent nor its solicitors would use the email in any way, and in particular that they had not and would not communicate it to the respondents to the proposed judicial review proceedings, i.e. the government.

60. Beyond this however, the Respondent in pre-issue correspondence would not go. I have already set out those passages of the Respondent's solicitors' letters in which it was said that it was for the Applicant to establish how the email came to be sent out of its organisation and that it was not accepted that either the Respondent or its solicitors were under any obligation to assist in any investigations which the Applicant wished to conduct as to the circumstances in which the email was sent. There was it was said no independent duty to provide co-operation unless and until an order was made.

61. Further, as to the prospects of the Applicant obtaining such an order for assistance, the Respondent through its solicitors took the robust position that any application for *Norwich Pharmacal* relief would be "bound to fail" and "if you proceed, BAE will resist and seek its costs of doing so from your client" (letter 11th of January). They explained their position on the grounds that there was no evidence of (i) wrongdoing or (ii) involvement by the Respondent to the extent required or of (iii) any loss caused to the Applicant, given that BAE was not a respondent to the prospective judicial review, that the email would not be disclosed to those who were such respondents, and that all reasonable efforts to delete all copies of the email had been made. (See the letter of the 15th of January)

62. This robust stance against the making of any order both under the head of jurisdiction and that of discretion was maintained by Miss Montgomery on behalf of the Respondent in the hearing before me.

63. However, I ought to refer to the offer to compromise the application made by the Respondent in its solicitors' letter of the 31st of January, 2 days before the return date, since although the offer was rejected by the Applicant, the content of the offer is relied on by the Respondent in support of the submission that I should in any event refuse an order in exercise of my discretion.

64. By the offer (which also made proposals as to costs) the Respondent offered to provide part but only part of that which the Applicant is now seeking by way of assistance in discovering the identity of the source of the leak. The material part of the offer is as follows:

> " (1) our client will, as soon as practicable, seek to recover the email it received (the original email) containing the email sent from Ann Feltham to the CAAT steering committee on 29 December 2006 (the 29 December email) and will, if recovery is possible, provide an unredacted copy to you (point 3.1(1) and 3.2 of the draft order);

> (2) our client can confirm that the only other copies of the 29 December email in its possession, if recovery is possible, were created for the purpose of obtaining legal advice or ensuring deletion of the 29 December email from active email accounts (point 3.1(2)(i) of the draft order);
>
> (3) our client will provide any routing and addressing information for the original email and the 29 December email, to the extent that the information is available from the original email and the 29 December email (point 3.1(2)(ii) of the draft order);
>
> (4) as previously indicated, our client will undertake not to use any information contained in the 29 December email or pass it to any other party".

65. The offer in effect was to provide the full version of the email which the Respondent had received in so far as it was capable of retrieval, together with any routing and addressing information for the original email and the 29th of December email, to the extent available from the emails themselves.

66. The Applicant rejected the offer on the grounds it did not go far enough. In particular it was and still is said on the Applicant's behalf that there is no justification for the suggested limitation on the provision of the routing information, since if the Respondent is able to give that information from sources other than the identified emails themselves, it should do so. Further, the Applicant says that in any event a witness statement in the terms of para. 5 of the draft order is still a justifiable request since (to quote the Applicant's solicitors' letter of the 1st of February), "there can be no good reason for your client agreeing to provide routing and addressing information which is derived from the email itself, but no further information to assist CAAT in identifying the source of the leak, where that information is within BAE's knowledge".

67. In her skeleton argument Miss Montgomery says that the offer would have provided CAAT with the means of tracing the source of the disclosure if necessary through enquiries of the ISP from which the email was transmitted to BAE.

68. Miss Rose in response emphasises that there has been no guarantee given by the Respondent to date that the complete unredacted original email will be retrievable, but that even if it proves recoverable, it may provide information only as to the hotmail account to which and through which the email came which will inevitably be of limited use to the Applicant since the ISP provider may not itself co-operate. My attention was drawn to the restrictions on disclosure imposed on such a provider by the Data Protection Act in the absence of any authorising court order. The point was made that such court order by way for example of *Norwich Pharmacal* relief may not necessarily be available against such provider if it turns out to be based outside the jurisdiction. She says that in contrast an order to the full extent sought will be of real use to the Applicant, since the Respondent must have information from its own knowledge and sources, other than the routing information available from the emails themselves, which would assist the Applicant in discovering who the wrongdoers were and that there has been no justification put forward by the Respondent for limiting its assistance in the way suggested.

The Court's Conclusions on the merits of the Norwich Pharmacal Application

69. I must now give my conclusions on the merits of this application.

Wrongdoing

70. I am satisfied that the evidence establishes the requirement of wrongdoing on the part of the person whose identity the Applicant is seeking to discover, within the *Norwich Pharmacal* principles. Indeed no submission was made to me by the Respondent, either in its skeleton argument or orally, to support the contrary suggestion made in its solicitors' letter of the 31st of January. As already explained, it is sufficient that on the evidence a wrong may arguably have been carried out by the ultimate wrongdoer. I accept that which is said in this regard on behalf of the Applicant in para. 13(a) of its skeleton argument:

> "Wrongdoing: CAAT has undoubtedly been the victim of serious wrongdoing. The exact nature of the wrongdoing is unclear and will remain so until an order is granted. It may involve a breach of contract (the implied term of trust and confidence and/or the implied term of fidelity), breach of confidence or breach of fiduciary duty by a member of CAAT's Steering Committee or one of its employees. Alternatively, CAAT may have been the victim of unlawful use of its computer facilities or interception of its email, offences contrary to the Computer Misuse Act 1990".

The threshold requirement of involvement on the part of the Respondent.

71. I am equally satisfied that the evidence establishes the required involvement of the Respondent in the wrong within the principles discussed at the outset of this judgment. For these purposes I am prepared to accept that the Respondent has been an innocent third party but I am quite satisfied that the Respondent has nonetheless become mixed up in the wrongdoing so as to facilitate the wrong. In my judgment the Respondent cannot be characterised as a mere bystander or witness. My reasoning is as follows.

72. The receipt by the Respondent of this email was no accident. It was patently the very plan and purpose of the wrongdoer that confidential privileged information belonging to the Applicant connected with its proposed application for judicial review should be disclosed to a party with an interest in those proceedings adverse to that of the Applicant, and who would be thereby enabled if it chose to use that information to the Applicant's disadvantage and detriment. As I have already found, the Respondent was such a party.

73. In any event this is not in my judgment a case of the mere receipt of a document wrongly disclosed. As I have also found, it is a reasonable inference that the Respondent has read the email and is fully aware of its contents. This means that the Respondent has now made itself privy to the tactical advice given to the Applicant in connection with the proposed proceedings and has thereby brought about a state of affairs which was a fundamental step in the furtherance of the plan of the wrongdoer if not in its completion. The Respondent has thereby facilitated the wrong in my judgment, albeit innocently.

74. It is quite irrelevant in my judgment to this question of the Respondent having already become mixed up in the acts of the wrongdoer so as to facilitate his wrong, that the Respondent says (as it has in correspondence although not in any evidence) that it will not seek to use the information or pass it on to anyone else, just as it was irrelevant in X. v. Grampian on the issue of involvement, that the newspaper had not published any article containing the information wrongfully disclosed to it. Equally, I for myself find nothing wrong with the joint concession made in John recorded in the passage in the judgment of Lord Woolf at [2000] 1 WLR 1937, para.21 to which I have already referred and which was not adversely commented upon by Lord Woolf.

75. Moreover, the Respondent has had further dealings with the email it received, albeit innocent. On the evidence the email has passed through more than one active email account within the Respondent's computer systems and must have been the subject of review within the Respondent before the decision was made to send a copy to the Respondent's solicitors. Copies of the email were made (it is said solely for the purposes set out in the letter of the 31st of January although again not confirmed by any evidence).

76. The Respondent through its solicitors then returned the email to the Applicant in a redacted form which thereby concealed the identity of the wrongdoer from the Applicant. This in itself has facilitated the continuation of the wrong since, by so enabling the wrongdoer to remain undetected, it allows the wrongdoer to effect further disclosure in the future of the same information wrongfully purloined, to for example a different party opposed to the Applicant. In other words the very process of the redaction and the deletion of the material routing information has in my judgment facilitated the wrong in this case.

77. In all these circumstances I find quite impossible to accept the Respondent's submission that the evidence establishes no more than that the Respondent has been and is a mere bystander to the wrong or a mere witness, so as to prevent the *Norwich Pharmacal* jurisdiction being triggered.

The Respondent as more than an innocent third party.

78. I turn at this stage to the submission orally put forward by the Applicant rehearsed above in paragraph 56 and 57, that the Respondent should no longer be regarded as an innocent third party as hitherto conceded by the Applicant.

79. I have carefully considered the Applicant's submissions in this regard but have decided that it would not be proper for me so to conclude. Despite the Applicant's understandable suspicions, I accept Miss Montgomery's point that the Respondent had no legal obligation to answer the questions raised with it in the correspondence which followed its return of the email to the Applicant's solicitors, and that absent any grant of *Norwich Pharmacal* relief it had no such obligation to answer what were in effect a series of pre-trial interrogatories. The failure to answer and the generally uncooperative attitude of the Respondent, can in itself go only towards providing support (which in my judgment it undoubtedly does) for the asserted need of the Applicant to obtain *Norwich Pharmacal* relief against the Respondent as an innocent third party if the

Applicant is to discover the identity of the source, rather than towards establishing the Respondent's guilty involvement in the wrongdoing.

80. Equally I do not consider that the evidence relied on and exhibited to Ann Feltham's witness statement in support of the Applicant's belief that the Respondent has previously infiltrated the Applicant to obtain its confidential information, goes beyond the establishment of suspicion, credible though it may be for that purpose. The documentation in the exhibit is described in the Applicant's witness statement as being in the form of a database record of reports provided to the Respondent by a third party, with numbered entries running into thousands and references to documents appended to the original reports. The Applicant invites me to conclude that the documentation demonstrates that the information was prepared for the Respondent (referring for example to a report header at exhibit p.326) and that the information was directly solicited by the Respondent (referring to the statement "Responding to the Targeting request" at exhibit p.195). Miss Montgomery however asks me to approach this evidence of infiltration with some caution observing that this documentation which has been provided by the Sunday Times as part of the material upon which its article of September 2003 was based, originated not from the Respondent but rather the firm Le Chene, and that the material does not in itself prove the alleged contractual link between the Respondent and Le Chene, which moreover the Information Commissioner himself was apparently unable to find established.

81. In his judgment at para. 8, Underhill J. said of these allegations and the evidence produced by Ann Feltham in support, that "I can and need make no finding on these allegations, save to say that they appear to me to be *prima facie* credible. They are reasonably circumstantial and supported by a detailed newspaper article to the same effect". I find myself in no better position than Underhill J. on this issue. The Applicant has undoubtedly established reasonable cause for the suspicion that the Respondent has previously been party to the infiltration of its organisation and the obtaining of its confidential information by covert means, but the evidence in my view goes no higher.

Discretion: the issue of necessity and proportionality

82. Notwithstanding my inability to regard the Respondent as other than an innocent party, my earlier finding of the Respondent's involvement in the wrongdoing, albeit as an innocent party, means that the jurisdiction of the court to grant *Norwich Pharmacal* relief has been triggered. I proceed therefore to consider whether in all the circumstances it would be appropriate for the court to exercise its discretion in favour of such grant.

83. On this question I am satisfied despite what has been forcefully said by Miss Montgomery on behalf of the Respondent, that in principle the requirement of disclosure which is sought in this case, has been established to be "a necessary and proportionate response in all the circumstances" (see again Lord Woolf in Ashworth at p.2042C, para.36), and the only issue is as to the extent of the disclosure which should be ordered. My reasoning on the question of principle is as follows.

84. First, I accept what is said on behalf of the Applicant in relation to its urgent need to discover and stop the source of the leak if it is to be able safely and timeously to

institute the proposed judicial review proceedings. I refer in this regard to what I have set above in paragraphs 39 and 40.

85. It is no answer in my judgment for the Respondent to say, as it does, that the judicial review application raises issues of law the merits of which would be wholly unaffected by even a wholesale disclosure of the Applicant's legal advice to the parties or the court, and that the respective factual and legal contentions on the challenge to the decision making process have already been crystallised in pre-action protocol exchange of letters, and put into the public domain by the Applicant on its website. This is wholly to ignore in my judgment the tactical use which to which an opposing party may put any knowledge of the equally tactical advice which the Applicant has obtained on costs, in particular protective costs. Further it equally ignores the chilling effect of the risk of continuing disclosure on the basis of trust within the organisation such as the Applicant, without which it cannot realistically be expected to pursue any litigation.

86. Nor in my judgment is it any answer for the Respondent to say as it does that the Respondent has returned the email, destroyed all other copies, and undertaken in correspondence not to take any advantage itself from the disclosure of the privileged information or to disclose the same to any one else, in particular the other parties to the proposed judicial review, or to say, as it does in its skeleton argument (although not in any evidence), that it will play no role in the judicial review proceedings. This in my judgment wholly ignores the risk of future leaks and the need to prevent future similar wrongdoing by the same source by disclosure for example to the government itself. I agree with the submission of Miss Rose that the Applicant cannot "fairly pursue (the judicial review) claim in circumstances where wrongdoer(s) are providing copies of its privileged legal advice to its opponents". I also agree with the sentiments expressed by Underhill J. in the passages I have cited above in paragraph 41.

87. Put another way I cannot accept that no loss to the Applicant has arisen as a result of the email being sent to the Respondent, as suggested by the Respondent in correspondence.

88. Secondly I accept the bona fides of the Applicant in claiming to be putting forward this application on the basis that it is a necessary precursor to the judicial proceedings and is ancillary to them. I accept that this is the basis of the application.

89. Despite what is said on behalf of the Respondent as to the Applicant having an improper collateral motive, I accept the validity of that which is asserted on behalf of the Applicant in Miss Rose's skeleton argument (page 15): "the interest CAAT is seeking to protect by seeking a Norwich Pharmacal order is not a private commercial or financial interest but the preservation of the integrity of the flow of privileged information between its lawyers and its steering committee, for the purposes of conducting public interest litigation".

90. The foundation of the collateral motive allegation disappeared in my view once the Applicant before this hearing began, put the indicated limitation on the terms of the order sought under para.3.1(3), by reference to the date of the Sunday Times article.

91. Next, I am satisfied that in the context of this case the Respondent is the only practicable source of the information being sought, having regard to the independent

steps already taken by the Applicant which have failed to disclose that information by, the urgency of the need to discover the source of the leak and the limited resources of the Applicant. In this regard I accept the validity of what is said by Ann Feltham in her second witness statement, which I have already summarised above at paragraphs 45 to 47, as to the impracticability of any other investigative measures.

92. When considering this issue of necessity and proportionality I consider I am entitled to take into account, which I do, that the Respondent has not sought to put forward any particular countervailing public or even private interest peculiar to itself which would support no disclosure in this case (other than the general public interest in not involving innocent third parties if it can be avoided, to which Lightman J. referred in Mitsui para. 24, and which is common to all *Norwich Pharmacal* respondents). This is not a case like John where considerations concerning the freedom of the press were highly relevant or where the provisions of section 10 of the Contempt of Court Act 1981 or those of Article 10 of the ECHR were engaged. Moreover I also have regard to the factor that this application is a necessary precursor to intended public law proceedings which prima facie raise issues of public importance which ought to be resolved in the public interest as a matter of urgency.

93. Equally this is not a case like Mitsui where the identity of the wrongdoer was known (EnCana) and there was a very obvious practicable route which could and should have been utilised in preference to the application for *Norwich Pharmacal* relief.

94. In all these circumstances I am quite satisfied that in principle *Norwich Pharmacal* relief should be granted in this case. The offer made by the Respondent does not in my view go to defeat this conclusion. The Respondent must know how the email was obtained by itself, it must have information which would assist the Applicant in discovering who the wrongdoers are, and I can see no sensible justification for the proposed limitation in the offer, confining as it does that assistance to the disclosure of routing information only to the extent that it is available from the emails themselves, always assuming the emails currently said by the Respondent to be deleted prove to be retrievable, and declining to swear an affidavit along the lines of that sought in para. 5 of the draft order. I accept the points made by the Applicant in rejecting the offer, which I have detailed at paragraphs 66 to 68 above. It is noteworthy that Lord Reid in his landmark statement of principle in Norwich Pharmacal itself in the passage at 175B which I set out at the beginning of this judgment (para.12 above) spoke of the third party coming under a duty to assist the person wronged by giving him **full** information.

The Terms of the Order: the Extent and Form of the Disclosure

95. I am prepared to grant an order in the terms sought under paragraphs 3.1(1), 3.1 (2), 3.2,4 and 5 of the draft order subject to one caveat, and any submissions on time for compliance, and subject always to any necessary redrafting to ensure sense and tidiness. No submission was made to me that assuming it were proper to grant an order in terms of 3.1(1) or (2), an order in terms of 3.2, dealing with the problem that documents have purportedly been deleted by the Respondent, should not be made.

96. The caveat relates to the disclosure under 3.1 (2). The Respondent by correspondence has asserted that at least some of the documents which it holds or held before deletion, and which would fall into this part of the order, were created for the purpose of

obtaining legal advice. I heard no submissions directly on this issue of disclosure of privileged documents. My present view is that the disclosure ordered should not extend to and should exclude any material protected by legal professional privilege belonging to the Respondent. This is a matter which can be finalised on the occasion of the handing down of this judgment.

The Order sought under 3.1 (3)

97. I am not however prepared to grant an order under this head which as indicated seeks disclosure of any other confidential information belonging to the Applicant obtained by the Respondent, apart from that relating to the 29 December email.

98. I have already found that I cannot find that the Respondent should be treated as being more involved in the 29 December email leak than hitherto conceded by the Applicant. I equally have found that the evidence that the Respondent was involved in the alleged historic infiltration of the Applicant does not go beyond the establishment of suspicion. There is in fact no direct evidence that the Respondent has been in receipt of the Applicant's confidential information since the 29 of September 2003 (the suggested limitation date to this part of the draft order), the 29 December email apart. At best there is suspicion, said to arise from the uncooperative attitude of the Respondent to assist the Applicant in discovering the source of the 29 December leak and its refusal to answer questions in correspondence, which I have already held it had no legal obligation to answer, coupled with what has been described as the carefully worded skeleton argument on behalf of the Respondent, referring only to privileged information.

99. The above matters are an inadequate foundation in my judgment for the grant of this part of the order which as an overall order is being sought in principle to assist the Applicant to discover the identity of the wrongdoer involved in a specific and discrete wrong, namely that relating to the wrongful obtaining of and disclosure of the 29 December email, and is being expressly sought as ancillary to the proposed judicial review proceedings. This part of the draft order goes in my judgment beyond what is necessary and proportionate to achieve this proper aim of the Applicant, and would go in effect to assist in the identity of other wrongdoers who have committed other wrongs, without there being before the court adequate evidence to support the proposition that other such wrongs may have been committed or that the Respondent has become involved and mixed up in those other wrongs.

The Protective Costs Order granted by Underhill J.

100. Fascinating and interesting though I found the submissions made in respect of the protective costs order to be, I have decided that in the absence of any formal application by the Respondent to vary or discharge this order prior to the substantive hearing of the *Norwich Pharmacal* application, or indeed at all, it would be quite wrong of me to make any decision on the appropriateness of the order made, albeit I am prepared to make some observations on the question of jurisdiction.

101. The application for this costs order was put before Underhill J. on the basis, supported by evidence, that the Applicant was of extremely limited resources who could not afford to risk the bringing of any claim for injunctive relief against a major company,

let alone that of the intended claim for judicial review against the Government (albeit this aspect of the matter did not form part of the costs application before Underhill J.) to which the relief being sought was a necessary precursor, unless an order were made in advance, capping the Applicant's liability for costs.

102. Underhill J. duly made such order relying on his understanding of the court's wide cost capping powers even in the context of private law proceedings, made clear by the Court of Appeal in King v. Telegraph Group Ltd., to which I have already referred. He expressly found, at para.24 of his judgment, that the effect of his refusing an order would be to inhibit the Applicant from pursuing the application for *Norwich Pharmacal* relief which it would otherwise wish to pursue. He gave his reasons for exercising his discretion in favour of such an order follows:

> "I believe a capping order is appropriate in the unusual circumstances of the present case, notwithstanding that the claim arises in connection with an infringement of CAAT's private law rights. CAAT has been "…." the victim of a particularly serious wrong. It is not simply a matter of lost money or infringement of contractual rights. The perpetrator has, by obtaining and sending to BAE the email of 29th December, taken action aimed at the heart of CAAT's *raison d'étre* and calculated to create internal tensions and damage morale, quite apart from its potential effect on the contemplated proceedings. BAE is not of course, on the evidence before me, implicated in that wrongdoing but it has become mixed up in it".

103. The Applicant then duly relied on that order in issuing the present application on the 24th of January. I myself accept that it would not have done so if that order had not been made in the first place and that it would not have pursed the application to the full hearing which has now taken place, had the order been subsequently discharged prior to the hearing.

104. The judgment of Underhill J. expressly contemplated that the Respondent might wish to apply to vary or discharge the order on the basis that the order made in its absence was wrong. The order made expressly provided for such application. Underhill J. in his judgment explained his thoughts on this aspect thus:

> "The order has been sought *ex parte*. Ms. Rose submits that this is necessary in the present case because CAAT cannot prudently initiate the *Norwich Pharmacal* proceeding without knowing that their risk is capped. The *Corner House* procedure, under which the application for a protective costs order is considered on paper as part of the consideration of the application for permission and a hearing ordered only if necessary, is not available because of the particular nature of the present proceedings. I see that, but I am bound to say that I do not see how I can make a definitive order in BAE's absence. This is an *ex parte* - hearing and they have the right to come back and argue that the order made in their absence was wrong.
>
> It seems to me that the course that is most likely to avoid the need for a further hearing, and thus to be most effective and economical in the circumstances here, is that I should indeed consider the position *ex parte* recognising that BAE may wish to apply to vary or discharge the order I

> make, even in advance of the substantive *Norwich Pharmacal* hearing, but to warn them that if they do so the court is likely to apply what I might call the *Corner House* regime to the costs of any such application. It would be a pity and contrary to the spirit of the CPR generally and the *Corner House* guidance in particular, if a procedure designed to limit costs in the interests of proportionality and access to justice were in fact to produce satellite litigation that served only to increase costs. BAE therefore should consider carefully whether they need to make such an application and should not do so without having had whatever discussions seem appropriate with CAAT's solicitors."

105. In these circumstances where no application to vary or discharge the order has been made and where the Applicant has patently relied upon the continuing existence of the order both to issue and to pursue the application for *Norwich Pharmacal* relief to a full and completed hearing, it would in my judgment be quite wrong and contrary to justice for this court at this stage even to contemplate varying or discharging the order, whatever the merits of the rival submissions on the correctness of that order as an exercise of the court's discretion.

106. It might have been different had I had formed the view that the order had been made without jurisdiction. However I am quite satisfied on the authorities cited to me and the provisions of section 51 of the Supreme Court Act 1981 as substituted by section 4 of the Courts and Legal Services Act 1990, together with rules of the CPR at r.1.1 (1); r. 1.1 (2); r.1.2; r. 3.1(2) (m), that the court had the power to make the order it did in this case.

107. Whether the learned Judge's exercise of discretion in favour of making the order fell outside existing guidelines laid down in the current caselaw for the making of such an order, is another matter. I can quite see the force of the submission that this order does not fall easily within the existing guidelines applicable to either public law or private law proceedings. However, I can see equal force in the submission that given this is an application ancillary to an intended set of public law proceedings in which the public interest requirement laid down in *Corner House* at para.74 is likely to be satisfied, then the court in a private law context should not be inhibited from making a *Corner House* type order, albeit *ex hypothesi* the Applicant in whose favour the order is made, cannot say he has no "private interest in the outcome of the case" within the meaning of the third Cornerhouse requirement as presently applied by the Court of Appeal (but see the comments of the Court of Appeal in R (England) v. Tower Hamlets London Borough Council [2006] EWCA Civ.1742,at para.14,and the observations of the Court of Appeal in Goodson v. HM Coroner [2005] EWCA Civ.1172, CA at para.14 speaking of the wide discretion given to the court under section 51 of the Supreme Court Act, and stressing that Corner House should not be treated as laying down hard and fast rules for all circumstances).

108. However, for the reasons stated, this interesting debate as to how the discretion of the court should be exercised when confronted with an application for a protective costs order or a costs capping order in circumstances such as these, need not and indeed should not be resolved by this court. In my judgment, absent any application to discharge or vary, the order must stand for present purposes.

109. In so ruling however, I am confident that no prejudice is being done to the Respondent. No submission was made to me that the size of the cap which of course goes to limit the potential liability for costs of each party, was in fact likely to cause any prejudice to the Respondent.

Conclusion

110. Accordingly I will grant the Applicant *Norwich Pharmacal* relief in this case to the extent indicated, to include the continuation of the order of Underhill J. Necessarily however in the light of the contents of this judgment the court will require further submissions from the parties before the final form of the order can be determined.