

## Jersey pre-action disclosure orders:- Discovery as to fraud methodology

### **Macdoel & others -v- Federal Republic of Brazil & others [2007] JCA 069**

This is Jersey's first substantive Court of Appeal judgment on disclosure orders against third parties applying the Jersey approach to the legal principle which arose in the English case of Norwich Pharmacal -v- Customs & Excise (1974).

#### **The facts**

The Federal Republic of Brazil and the Municipality of Sao Paulo sought disclosure of documents from banks in Jersey in connection with the investigation of civil claims against a former mayor of Sao Paulo. The allegations against him involve conspiracy, corruption, embezzlement of public funds and money laundering. The disclosure sought was of documentation relating to accounts held with the respondent banks in the names of the appellant companies and certain other individuals and entities. The appellants opposed the application and appealed against the Royal Court's decision to order such disclosure. The claimants sought the orders on the basis that they wished to investigate and, if justified, bring proprietary and/or personal civil claims against some or all of the connected persons in whatever jurisdiction appeared to be the appropriate one, when all the facts are established. They also claimed that the disclosure orders which they sought were just and necessary in order to give effect to their equitable right to trace their money.

#### **The Decision**

The Court of Appeal noted the principles regarding the

court's power to order pre-trial discovery as expounded in English authorities including *Plummer -v- May* (1750) (the "mere witness rule") and *Norwich Pharmacal -v- Customs & Excise* (1974) ("if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing 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") as previously applied in Jersey cases.

The Court of Appeal held that:

- the scope of the principle is not extended if the purpose of the disclosure which is sought in any particular case is, for example, to determine the location of embezzled funds or the methodology of the fraud, rather than the identity of the wrongdoer.
- whilst the English cases provide useful guidance on how the principle may be applied, the courts of Jersey are in no sense bound by the scope of the jurisdiction that may have been delineated de facto by the circumstances of those cases. Nor are the Jersey courts constrained by the limits which may be placed on the application of the principle in the different social and economic conditions that may prevail from time to time in England and Wales. The courts of Jersey will have regard to, amongst other things, the policy considerations which shape the law of Jersey and the social and economic context in which it operates. The Court observed that Jersey has a reputation as a major financial centre which might suffer



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if it were not willing to assist victims of wrongdoing to obtain redress.

- the Royal Court had to be satisfied (i) that the respondents were the victims of wrongdoing and (ii) that the banks had become mixed up in the wrongdoing.
- a duty to disclose should arise where the court is satisfied that there is a reasonable suspicion that the third party has been mixed up in the wrongdoing.

### Commentary

Jersey will grant disclosure orders against third parties in cases where such orders would probably not be made by an English Court. Such orders can be a vital adjunct to disclosure in related English or other overseas litigation.

If you would like to receive a copy of the full judgment of the Court of Appeal or talk to our asset recovery team, please do not hesitate to contact us.

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