

**HOW *HICKOX V DICKINSON* [2020] EWHC 2520 (CH) (RE)OPENS THE DOOR
FOR NORWICH PHARMACAL ORDERS**

A INTRODUCTION

1. *Hickox v Dickinson* [2020] EWHC 2520 (Ch) is a classic fraud case. Ms Hickox’s case was that Mr Sammons, a convicted fraudster, had “*stolen*” her Paul Signac painting by selling it without her authority via an art dealer – Simon Dickinson Ltd – to a third party. Ms Hickox wanted to recover her painting, entitled “*Calanque de Canoubier (Pointe de Bamer)*”, by commencing proceedings against the third party purchaser.
2. However, the problem Ms Hickox faced was that she did not know the identity of the third party purchaser. Ms Hickox therefore applied for Norwich Pharmacal relief against Simon Dickinson Ltd and its founding director, Simon Dickinson (“the Defendants”). Ms Clare Ambrose, sitting as a Deputy High Court Judge in the Chancery Division, granted Ms Hickox’s application and ordered the Defendants to disclose the identity of the purchaser of the painting to Ms Hickox.
3. The decision raised two interesting issues, discussed further below. The first issue concerned the first of the conditions for the granting of Norwich Pharmacal relief identified by Lightman J in *Mitsui v Nexen Petroleum* [2005] EWHC 625 (Ch), namely that the applicant must show a good arguable case that a wrong has been committed by an ultimate wrongdoer.¹ The issue was whether it was possible for Norwich Pharmacal relief to be granted in circumstances where the applicant was unable to articulate precisely what wrong had been committed by the “*ultimate wrongdoer*”, in this case the third party purchaser.
4. The second issue was the weight to be accorded to the fact that the information sought was confidential. The confidentiality of information sought was identified by Lord Kerr

¹ The other two conditions are (i) there must be the need for an order to enable action to be brought against the ultimate wrongdoer, and (ii) the person against whom the order is sought must (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued. In light of the decision of Andrew Baker J in *Burford Capital Limited v London Stock Exchange Group plc* [2020] EWHC 1183 (Comm) at [40], limbs (ii) and (iii) may now be more appropriately considered as a single test which raises “*the question... whether, in the circumstances of a particular case, justice requires from the facilitator the particular cooperation demanded of him by the claimant, with a view to righting facilitated wrongdoing.*”

in *Rugby Football Union v Consolidated Information Ltd* [2012] 1 WLR 3333 at [17] as a relevant factor which the Court should take into account when exercising its discretion to grant Norwich Pharmacal relief. The Defendants submitted that the art-world custom of not disclosing the names of private buyers of art works was a paramount reason against the granting of a Norwich Pharmacal order, especially where, as in this case, the extent of the buyer's wealth was not publicly known and discretion was of importance to them.²

B GOOD ARGUABLE CASE OF WRONGDOING

5. One of the key issues in *Hickox v Dickinson* was said to be that Ms Hickox was unable to specify what wrong had been committed because she did not know whether the information that she was seeking would reveal whether the wrong committed against her was actionable. Counsel for Ms Hickox submitted that this inability was not a bar to Norwich Pharmacal relief being ordered, citing the judgment of Sir Richard Scott V-C in *P v T Ltd* [1997] 1 WLR 1309.
6. The circumstances of *P v T Ltd* – as was pointed out by Sir Richard Scott V-C himself³ and by other judges in several subsequent judgments⁴ – were very unusual. A Norwich Pharmacal order was granted against the applicant's former employer. The order required the former employer to disclose precise details of allegations made against the applicant which formed the basis for the applicant's dismissal and the identity of the person who made those allegations.
7. Sir Richard Scott V-C noted that at the time of the application

² At [77].

³ *P v T Ltd* at 1310.

⁴ For example, Rimer J in *Axa Equity and Life Assurance PLC v National Westminster Bank PLC* [1998] P.N.L.R. 433 emphasised the “special nature of the facts in the case” of *P v T Ltd*, which Rimer J said “turned on its own very unusual facts.” Similarly, Mr Justice Flaux in *Flaux J in Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) at [16] described *P v T Ltd* as “an exceptional case, generally recognised as being at the outer limits of the Norwich Pharmacal jurisdiction.” See also *Arab Satellite Communications Organisation v Saad Al Faqih* [2008] EWHC 2568 (QB) at [24] and Charles Hollander Q.C., *Documentary Evidence* (13th Edn., Sweet & Maxwell, 2018) at §4-07 (“this was a truly exceptional case”).

*“it is not possible for the plaintiff to know for certain whether he does or does not have a viable cause of action against the informant. He does not know what was the information that was supplied... he is confident that he had committed no act justifying the description of gross misconduct, but until he knows what it is that he is said to have done his position in that regard will remain inchoate.”*⁵

8. The applicant therefore did not know for certain whether the allegations were false, one of the essential elements for a claim for defamation or malicious falsehood. Nevertheless, Sir Richard Scott V-C granted the order because

“justice demands that the plaintiff should be placed in a position to clear his name if the allegations made against him are without foundation. It seems to me intolerable that an individual in his position should be stained by serious allegations, the content of which he has no means of discovering and which he has no means of meeting otherwise than with the assistance of an order of discovery such as he seeks from me.”

9. Sir Richard Scott V-C was clearly influenced by the fact that the former employer had failed to provide to the applicant any details of the allegations which had been made against him. Sir Richard Scott V-C described this lack of information as “*grossly unfair*”.⁶
10. Prior to 2020, *P v T Ltd* had only been cited by the courts a handful of times. In those decisions in which *P v T Ltd* was followed (which was not every case, as mentioned above), it was cited in respect of situations where the applicant knew some but not all of the particulars of the alleged wrong – and thus at least could establish a good arguable case that a wrong had occurred.⁷ The decision in *Hickox v Dickinson* therefore was the first decision since *P v T Ltd* in which the applicant said that she was unable to identify

⁵ *P v T Ltd* [1997] 1 WLR 1309 at 1318.

⁶ *P v T Ltd* at 1311.

⁷ For example, *Sarayiah v Williams* [2017] EWHC 2915 (Ch) at [28] (where the applicant had “*some idea of what the allegations in general terms were about but no idea of their particulars*” and seemed aware that he had a claim in defamation); *Carlton Film Distributors Limited v VCI Plc* [2003] EWHC 616 (Ch); and (obiter) *Axa Equity and Life Assurance PLC v National Westminster Bank PLC* [1998] C.L.C. 1177.

the specific wrong committed, nor, according to the Defendants, did she have any evidence that anyone other than Mr Sammons had done anything wrong.⁸

11. Counsel for the Defendants therefore submitted that, since Ms Hickox was unable to establish the existence of nature of a tort, Ms Hickox's application was speculative and did not satisfy the good arguable test. However, Mrs Clare Ambrose disagreed and found that an application for Norwich Pharmacal relief will not be speculative, even if the existence and nature of the wrong cannot be identified, where there is evidence other than the applicant's belief or speculation. In *P v T Ltd*, that additional evidence, she reasoned, was the unusual history of the case, including the employer's admission that its dismissal was unfair.⁹
12. On the facts, Mrs Clare Ambrose held that Ms Hickox had a good arguable case against any person who had taken possession of the Painting. Mrs Clare Ambrose added that this was not speculative as Mr Sammons had wrongfully and dishonestly sold the painting without authority and, furthermore, the painting was delivered following that sale such that the purchaser did not take better title than Ms Hickox and is therefore liable in conversation,¹⁰ unless the purchaser were able to show they acquired good title in their purchase by an exception to *nemo dat* (which could not be known when the identity of the purchaser was unknown).
13. Therefore, Mrs Clare Ambrose held that Ms Hickox had a good arguable case that there had been a wrong, although she noted at [63] that

“the submissions made by the Claimant as to whether Mr Sammons was in possession of the Painting at the date of sale, as to whether he made the sale, as to the possible dates of sale and as to who received the proceeds of sale suggested

⁸ At [43].

⁹ At [49].

¹⁰ The Defendants submitted that Ms Hickox's evidence was that she also consigned the painting personally to Mr Sammons. At [59] Mrs Clare Ambrose held that *“the Defendants were unable to show that the Claimant's evidence was decisive in showing that she consigned the Painting personally to Mr Sammons”* and that *“the contemporaneous evidence... showed that Mr Sammons used corporate entities rather than contracting personally.”* At [60] Mrs Clare Ambrose therefore held that Mrs Hickox had a good arguable case that Mr Sammons converted the Painting. Mrs Clare Ambrose added that this was *“supported by his convictions in relation to his dealings with the Painting, and the extended correspondence with the Claimant, which is all consistent with dishonesty in his dealings with the Painting.”* It is not clear why the latter point is relevant to whether Mr Sammons converted the Painting or whether he stole only the proceeds.

that the Defendants uniquely hold the information essential to establishing the merits of any claim in conversion.”

14. Mrs Clare Ambrose added, however, that “*it is insufficient if there is no good arguable case for an essential element of that cause of action*”.¹¹ Mrs Clare Ambrose clearly considered that this was consistent with *P v T Ltd*. Indeed, although Sir Richard Scott V-C found that “*the question whether there has been a tort has not clearly been answered*”, it can be inferred from his judgment that he considered nonetheless that given the circumstances of the case there was a good arguable case that wrongdoing had been committed (even though the applicant could not provide evidence which showed each element of the cause of action was satisfied).
15. The facts which made *P v T Ltd* exceptional were the gross unfairness of the plaintiff having no knowledge of the allegations made against him personally which led to his dismissal and the fact that without knowledge of the allegations the applicant would be unable to clear his name. That sort of exceptional circumstance was not present in the facts underlying *Hickox v Dickinson*. Indeed, the Defendants’ counsel emphasised in submissions that *P v T Ltd* was only justified as an exceptional case and therefore did not apply to the facts of *Hickox v Dickinson*.¹²
16. *Hickox v Dickinson* is thus an example of the ability of the courts to expand the scope of the Norwich Pharmacal test where justice so requires. Admittedly, Mrs Clare Ambrose in her judgment did not acknowledge that she was expanding the law and instead tried to suggest that applying *P v T Ltd* was consistent with case law; however, none of the decisions which Mrs Clare Ambrose cited went as far as her judgment. For instance:
 - a. While *P v T Ltd* was referred to by the House of Lords in *Ashworth Hospital Authority v MGN* [2002] 1 WLR 2033, it was only cited as an example of how new circumstances arise for the appropriate use of Norwich Pharmacal relief.

¹¹ At [51].

¹² At [45].

Importantly, Lord Woolf did not clarify whether it would be appropriate to grant Norwich Pharmacal relief outside the specific factual circumstances in *P v T Ltd*.

- b. Mrs Clare Ambrose also referred to Flaux J’s judgment in *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) and suggested that Flaux J was simply “warning against speculative applications but he was not suggesting that an application was impermissible in order to establish whether a wrong has been committed”. However, Mrs Clare Ambrose did not expressly consider paragraphs 16 and 17 of Flaux J’s judgment in which Flaux J clearly indicated that he considered the application of *P v T Ltd* was limited to the exceptional circumstances of that case.
17. The effect of *Hickox v Dickinson* on the good arguable case test is therefore as follows:
- a. First, it appears to be permissible to issue an application for Norwich Pharmacal relief in order to establish whether a wrong in fact has been committed, provided the claimant can show that it has a good arguable case that there has been wrongdoing;¹³ and
 - b. Second, the explanation that the approach in *P v T Ltd* only applies in exceptional circumstances is now much weaker. *Hickox v Dickinson* is a classic fraud situation, where the applicant’s aim was to commence proceedings to trace and recover a stolen painting (for financial and/or sentimental reasons) rather than to protect her reputation and clear her name (as in *P v T Ltd*). It now appears that where the material which the applicant needs in order to be able to establish the merits of the claim lies exclusively in the hands of the defendant, the courts may be prepared to find that there is a good arguable case of wrongdoing nonetheless.

C CONFIDENTIAL INFORMATION

18. The second issue raised by *Hickox v Dickinson* was the weight to be accorded to the fact that the information sought was confidential.

¹³ At [50].

19. The Defendants gave evidence that the details of the sale were “*confidential by reason of a general custom in the art world that the identity of clients of art dealers remain undisclosed.*” The Defendants pointed out that they acted “*for wealthy individuals who place great emphasis on privacy and security.*”
20. Ms Clare Ambrose disagreed with the Defendants’ contention that the art world custom of keeping the identities of buyers confidential was a reason why the Norwich Pharmacal order should not be granted. In particular, Ms Clare Ambrose held that
 - a. The general custom of confidentiality had not been shown to be an absolute legal obligation but merely a market custom adopted by art dealers regarding voluntary disclosure;¹⁴
 - b. Ms Hickox had offered undertakings of confidentiality and had “*a similar interest in preserving the security of the Painting*” such that there was no reason to consider that Ms Hickox would not respect the sensitivity of the information; and
 - c. The risk of jeopardising international market expectations and the Defendants’ own industry reputation did not tip the balance against ordering disclosure.
21. Mrs Clare Ambrose’s decision was consistent with recent decisions concerning Norwich Pharmacal orders in which considerations of confidentiality rarely override the public interest in the victim of fraud obtaining disclosure, outside of the journalism context.¹⁵ The main question which the courts consider when faced with assertions from the defendant that the information is confidential is whether disclosure of the information is necessary, which generally requires the applicant to have “*no*

¹⁴ At [78].

¹⁵ See, e.g. *I.F.T. S.A.L. Offshore v Barclays Bank Plc* [2020] EWHC 3125 (Comm) at [12] (in which Sir Michael Burton GBE held that the public interest in the protection of the confidentiality of the relationship between a bank and its customers was plainly overridden in the event of fraud).

straightforward or available, or any, means of finding out” the information¹⁶ and the information is likely to have a perceptible benefit for the applicant.¹⁷

22. Provided that an applicant is prepared to offer undertakings or propose a confidentiality club, the mere fact the information is confidential appears to have very little bearing on whether Norwich Pharmacal relief should be granted.¹⁸
23. As a result, should defendants seek to rely on the confidentiality of the information as a reason against disclosure, they should anticipate an uphill struggle and be prepared to provide evidence as to how disclosure of the confidential information would cause harm even if undertakings were given by the applicant. Applicants should also bear in mind that the Defendants’ mere assertion, which appears from the judgment not to have been supported by independent evidence, that disclosure would affect its industry reputation was also insufficient to prevent an order being made.

D CONCLUSION

24. *Hickox v Dickinson* seems to establish that it is a general principle that Norwich Pharmacal relief can be granted where an applicant does not know whether he or she has a viable cause of action, provided that the application is not a fishing expedition. As a result, the scope of the first limb of the Norwich Pharmacal test now appears to be significantly broader. In future, it is likely to be sufficient if there is a good arguable case of wrongdoing, even the applicant is not able to produce evidence of each of the elements of the cause of action because such evidence is in the defendant’s possession.

¹⁶ *Equatorial Guinea v Royal Bank of Scotland International* [2006] UKPC 7 at [16]. See also *R (on the application of Omar) v The Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 1737 (Admin) at [83]-[85], in which Mr Justice Burnett held that the test set out by the Privy Council required that there are no legal means of finding out the information other than through Norwich Pharmacal proceedings.

¹⁷ See e.g. *The Right Honourable the Countess of Caledon v Commissioner of Police for the Metropolis* [2016] EWHC 2214 (QB) at [62], in which Mrs Justice Slade DBE held, obiter, that “*little perceptible benefit would be likely to be gained from disclosure and public policy considerations*” where much of the relevant information had already been obtained by the applicant.

¹⁸ See, e.g. *Burford Capital Limited v London Stock Exchange Group plc* [2020] EWHC 1183 (Comm) at [212] and [216(vi)]; see also *Various Claimants v News Group Newspapers Ltd (No.2)* [2013] EWHC 2119 (Ch) at [64] in which Mann J held that the confidentiality of the information was protected by confidentiality undertakings and redaction and therefore considered that not to be a significant factor.

25. *Hickox v Dickinson* is also likely to be relied upon in future as an example of how the confidentiality of information is rarely a significant factor in preventing Norwich Pharmacal relief and of how the Norwich Pharmacal jurisdiction is capable of being expanded beyond its previous limits. As Lord Woolf CJ remarked regarding the Norwich Pharmacal jurisdiction in *Ashworth Hospital Authority v MGN Limited* [2002] UKHL 29, “the limits which applied to its use in its infancy should not be allowed to stultify its use now”.¹⁹

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¹⁹ At [57].