



Vincent Nelson QC

FINDING OUT WHO TO SUE

As a service industry, the law can provide its customers with financial compensation, restraints on the activities of those who would interfere with their rights and declarations as to the existence of those rights. It has often been overlooked that the law can also provide, as a valuable remedy in its own right, information. In *Norwich Pharmacal Co. v Commissioners of Customs and Excise* [1974] AC 133 the claimants, as a result of reading returns published by Customs, realized that unknown persons had been importing a chemical covered by the claimants' patent, without its permission. The claimants applied to Customs for the names and addresses of the importers in order to sue them. Customs refused to cooperate. The claimants commenced an action against the Commissioners of Customs claiming disclosure of the names of the wrongdoers. The House of Lords held that Customs had to disclose the names; that this was so in spite of the fact that Customs were themselves in no way at fault. It is worth emphasizing that the claimants' right to the names of the wrongdoer did not depend on a right to claim other relief from Customs. The claimants' action against Customs was solely to obtain information to decide who it should sue for the infringement of its patent. The remedy granted by the House of Lords has now become known as a Norwich Pharmacal Order.

In *Ashworth v MGN* [2002] 1 WLR 2033, a case in which I was involved, the House of Lords was persuaded to extend and modernise this ‘valuable remedy’. It is now available where the identity of the defendant is known, but where the claimant requires disclosure of crucial information in order to bring its claim or where the claimant requires a missing piece of the jigsaw. It is also available against a person who holds an account which contains the proceeds of the sale of product wrongfully dealt with. Where the account is held by a bank, however, the court will be slow to order disclosure which involves a breach of confidence between a bank and its customer. The remedy is even available against a journalist or newspaper in circumstances where information has been given to them in breach of a duty of confidence owed by the wrongdoer to the claimant.

The categories are not, however, closed. In *Ashworth v MGN* the House of Lords made it clear that new situations are inevitably going to arise where it will be appropriate for the Norwich Pharmacal jurisdiction to be exercised where it has not been exercised previously and that the limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.

Three conditions have to be fulfilled before an order will be granted. First, a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer. Secondly, there must be the need for an order to enable action to be brought against the wrongdoer. Thirdly, the person against whom the order sought must be ‘mixed’ up in the wrongdoing so as to have facilitated it and be able to provide the information necessary to enable the ultimate wrongdoer to be sued. It requires very little to be ‘mixed up’ in a wrongdoing. For example, in *Norwich Pharmacal v Commissioners of Customs and Excise*, Customs became ‘mixed up’ by the mere fact that they were performing their

statutory duty of inspecting and passing documents for the importation of goods. They were wholly innocent of any wrongdoing.

It is clear that this is an evolving area of law which provides a valuable tool for the protection of rights. In the United Kingdom it has become an invaluable tool in the armoury of lawyers against wrongdoers who believe that they can hide behind innocent intermediaries.

Vincent Nelson QC

Vincent Nelson Q.C is Counsel at Myers, Fletcher & Gordon and a member of the Firm's Litigation Department. Vincent may be contacted at vincent.nelson@mfg.com.jm