

# Mishcon Injunctions

Issue 5 - February 2010

## Editor's Note

### God Bless the Norwich

The ability and continued willingness of the English High Court to grant injunctions (Norwich Pharmacals) forcing third parties to divulge otherwise confidential or private information, which claimants need in order to identify either a defendant or the whereabouts of stolen assets, means that the UK remains head and shoulders above any other jurisdiction when it comes to protecting victims of fraud or other wrong doing. With the paranoia (mostly unjustified) that most organisations have about releasing information which might expose them to Data Protection sanctions, the Norwich Pharmacal Order is often the only way that victims can secure the critical evidence they need in order to determine who has ripped them off or which Bank or other financial institution has been used to launder misappropriated monies.

My recent experience in obtaining Norwich's in places such as Cayman, BVI, Jamaica, Canada and Hong Kong has yet again reminded me of the huge respect with which all these (and other) common law jurisdictions treat decisions of the English Courts. The English judiciary's unflinching commitment and flexibility to adapt the Norwich Pharmacal jurisdiction to deliver justice to victims of all wrongdoing where the critical evidence they need is in the hands of third parties who are reluctant or afraid to provide it, resonates both here and internationally. The recent decisions in the Mohamed Binyan Torture cases stand as a testament to this.



My thanks and admiration to Richard Trainer and Edwin Chik for their hard work and contributions to this issue.

A handwritten signature in black ink that reads "Gary Miller".

**Gary Miller**  
**Partner**  
**Mishcon's International**  
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## Disclosure Orders

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### Wikimedia forced to disclose IP address of potential blackmailer

The English High Court granted Norwich Pharmacal relief to a claimant seeking disclosure of information from Wikimedia, a US company which operates the online encyclopaedia, Wikipedia. The claimant, whose identity was protected by the Court, asserted that an amendment to an article appearing on Wikipedia contained confidential

information that she was entitled to protect and was also part of an attempt to blackmail her. The Court ordered Wikimedia to disclose the IP address of the registered user who had edited the article. Wikipedia had agreed to comply with the Court's order on the basis that it did not accept that the UK Court had jurisdiction over Wikimedia which was based in Florida.

*Cherney v Neuman [2009] EWHC 1743 (Ch), 22 July 2009*

[\[http://www.bailii.org/ew/cases/EWHC/QB/2009/3148.html\]](http://www.bailii.org/ew/cases/EWHC/QB/2009/3148.html)

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### Debtor fails to injunct RBS from making adverse credit report

Customer A borrowed funds from the Defendant bank B. B eventually sought to recover the funds under the loan agreement and notified A of its intention to provide relevant credit reference agencies with information as to A's outstanding indebtedness. A subsequently requested a copy of the original loan agreement from B pursuant to the Consumer Credit Act 1974. B was unable to locate the original but maintained that A should meet his obligations nevertheless and still intended to report the non-payment to credit agencies.

A sought an injunction to either prevent the reporting or to require any reporting to refer to the lack of enforceability of the debt. The Commercial Court declined the injunction finding that B's reporting to credit agencies was for the legitimate purpose of promoting responsible lending. The Court also found that the effect of B's inability to provide a copy of the original agreement meant that the obligations and duties of the parties continued to exist, but were unenforceable; B's rights were not extinguished. A had no cause of action and so was not entitled to an injunction.

*McGuffick v Royal Bank of Scotland Plc [2009] EWHC 2386, 6 October 2009*

[\[http://www.bailii.org/ew/cases/EWHC/Comm/2009/2386.html\]](http://www.bailii.org/ew/cases/EWHC/Comm/2009/2386.html)

## Anti-Suit

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### Skype gets Anti-Suit injunction to stop US copyright proceedings

The English High Court granted an anti-suit injunction in favour of internet telecommunications company, Skype, domiciled in Luxemburg. Skype was party to a license agreement with software company (J), a BVI entity. The agreement contained an exclusive English Court jurisdiction clause applying to 'any claim arising' under the agreement. J alleged that Skype had breached the terms of the license and purported to terminate it. Skype brought proceedings in England and asserted it would continue to use the software.

When J registered its copyright in the US and brought proceedings there, Skype applied to the English High Court for an anti-suit injunction.

J argued that its claim in the US proceedings did not 'arise out of' the agreement but was predicated on the assumption that the agreement had been terminated. The Court held that such an interpretation would require an unduly narrow reading of the exclusive jurisdiction clause. J further argued that the matter had certain links to the US which was therefore the convenient forum. The Court held that the standard considerations of forum non conveniens should have little weight against the exclusive jurisdiction clause so as not to deprive of its intended effect. The parties had chosen a neutral forum and must be taken to have contemplated that a breach could occur anywhere, and any witnesses and documents could be located worldwide.

*Skype Technologies SA v Joltid Ltd and others [2009] EWHC 2783 (Ch), 6 November 2009*  
[<http://www.bailii.org/ew/cases/EWHC/Ch/2009/2783.html>]

## Freezing

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### Creation of 'sham loan' breached worldwide freezer and constituted contempt

E secured a worldwide freezer against C whose assets included a Latvian property. The property was subsequently charged as part of a settlement of litigation in Latvia in relation to a purported loan agreement between C and a third party. E argued that this was a breach freezing order and applied to the English

High Court for C to be committed for contempt. The High Court found that the loan agreement was not genuine and had been devised as a means of removing property from the scope of the freezing order and, therefore, C had acted in contempt of court. The fact that the form of order served on C omitted the standard penal provisions was found to be of no consequence as, on the facts, the Court held that C was aware of the potential penal consequences as the letter of service had referred to this.

*C v E [2009] EWHC 2718 (QB), 3 November 2009*  
[\[http://www.bailii.org/ew/cases/EWHC/QB/2009/2718.html\]](http://www.bailii.org/ew/cases/EWHC/QB/2009/2718.html)

### Kazakh Bank retains unlimited freezer against ex-Directors

The English High Court continued freezing injunctions and disclosure orders obtained by a major Kazakh bank against several of its former senior officers, and an associated English company which had received funds, in connection with a US\$295 million misappropriation claim.

The Defendants requested that the freezers be discharged on the basis that there was insufficient risk that assets would be dissipated, there had been material non disclosure, and that it was not just and convenient. They further submitted that these considerations should fall for analysis against the background that Kazakhstan was a country where the rule of law was not observed, state-owned enterprises such

as the Bank had no independence from the State, and there was a record of politically motivated charges.

The Court disagreed on each point and considered that the Bank had made a fair presentation of a good and arguable case and the parties were all before the English Court. The Defendants argued against the disclosure order on the basis that the information revealed to the Claimant could be used by the Kazakhstani authorities in criminal proceedings against them. The Court refused this aspect of their submission too. The Bank had already agreed for the disclosure to be provided only to its legal advisors to minimise the possibility of the information being released to the Kazakhstani authorities.

*JSC BTA Bank v Ablyazov [2009] EWHC 2840 (Comm), 12 November 2009*  
[\[http://www.bailii.org/ew/cases/EWHC/Comm/2009/2840.html\]](http://www.bailii.org/ew/cases/EWHC/Comm/2009/2840.html)

### Use of monies frozen by proprietary freezer strictly controlled

The Defendant was alleged to have forged a will and fraudulently used monies belonging to the estate of the deceased. The Trustees obtained both an ordinary freezer as well as a proprietary freezer against the

Defendant in respect of the assets of the estate. The Defendant applied for permission to draw on the estates assets for both legal and living expenses. The Trustees resisted on the grounds that the Defendant had still not properly accounted for missing monies belonging to the estate. The Judge was disinclined to prevent the Defendant from using monies where the result would be to effectively prevent him from defending the action but fortunately the parties had agreed a formula where a loan would be made available to the Defendant to cover

## Freezing (continued)

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his immediate legal expenses. The Judge however refused to allow the Defendant to draw any monies for his living expenses as he had not fully accounted for the missing monies.

*Ikin (Deceased), Also known as: Court v Despalieres [2009] EWHC 2789 (Ch); 6 October 2009*

## Intellectual Property

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### France turns heat up on eBay for selling infringements

French company, Moët Hennessy Louis Vuitton SA (LVMH), the world's biggest luxury goods group, secured a victory in its ongoing battle with eBay, relating to sale of its perfume and beauty products. The Commercial Court in Paris fined the American online auction giant £1.55 million for breaching an injunction LVMH had previously obtained which stopped French users from auctioning

its brands, including Dior, Givenchy and Guerlain, on the site. eBay argued that it had done everything humanly and physically possible to comply with the injunction, but the French Court said it must impose fines as long as the illicit practices continue because eBay had no legal right to allow the sales where LVMH had exclusive contractual distribution arrangements in place. The decision emphasises the different stance taken in France from that of England and America in such cases.

*LVMH v eBay, 30 November 2009*

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### Evidence obtained by Police search warrant also available for private prosecution

The Court of Appeal allowed an appeal by the Police and FACT against an order of a judge compelling them to return documentation to S that the Police had obtained via a Search Warrant and handed over to FACT for the purposes of a private prosecution. S ran a search engine website which linked to file sharing websites. FACT is an organisation representing the rights of the audio-visual industry. FACT complained to the Police about S's activities which they alleged were in breach of the Copyright Act 1988. The Police searched and seized numerous items of S's property but the CPS subsequently decided not to prosecute. During its investigation, the Police had already released certain of the seized property to FACT. FACT

now wished to retain the property to bring its own private prosecution. A High Court judge held that, once a decision not to prosecute had been made by the CPS, the police had no power to retain property under section 22 of the Police and Criminal Evidence Act 1984 against the wishes of the person otherwise entitled to it.

The Court of Appeal noted that it was well established that a number of private bodies prosecuted actions in addition to the Police and the Appellants were entitled to retain evidence under PACE whilst they themselves investigated the matter. The Court held that the power to retain evidence pending prosecution did not exclude private prosecutions such as that commenced by FACT.

*Scopelight Limited v Chief Constable of Northumbria [2009] EWCA Civ 1156, 5 November 2009*  
[<http://www.bailii.org/ew/cases/EWCA/Civ/2009/1156.html>]

## Freedom of Expression

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### Undercover filming by BBC protected by Article 10

A care home operator applied for an injunction to restrain the broadcast of a documentary produced by the BBC filmed covertly by an undercover reporter. The BBC stated aim was to document ineffectiveness in the regulation of care homes and it asserted that its programme identified a number of failings at the home. The care home operator argued the filming infringed the rights to privacy and family life of the care home residents (Article 8 ECHR - European Court of Human Rights). The High Court's reasoning was a fine

balancing act between the reasonable expectation of privacy of the residents and the clear public interest in care home standards and the BBC's conflicting rights to freedom of expression. The Court refused the injunction and permitted the programme to be aired; whilst residents' rights could potentially be seriously infringed by secret filming, the BBC had minimised that risk by undertaking to obscure the identity of the residents in the broadcast, and its rights to freedom of expression (Article 10 ECHR) were, on balance, stronger and overriding.

*BKM Limited v BBC [2009] EWHC 3151 (Ch) 2 December 2009*  
[<http://www.bailii.org/ew/cases/EWHC/Ch/2009/3151.html>]

### Norwich forcing FT to disclose source breached ECHR

The European Court of Human Rights (ECHR) has ruled that a disclosure order in the proceedings *Interbrew SA v Financial Times Ltd* in the English High Court in 2002 infringed the FT's right of freedom of expression (Article 10 ECHR). The FT amongst other newspapers were ordered in 2002 to disclose information and documentation relating to a market sensitive document prepared by Goldman Sachs, which they had received from an anonymous source and which related to the takeover by Interbrew of SAB. The Court of Appeal rejected the FT's appeal and the House of Lords refused leave to appeal. Neither the FT nor any other paper complied with the disclosure order and Interbrew did not pursue any enforcement proceedings against any

paper. The FT and other papers took the case to the European Court which agreed that the disclosure order was a breach of the FT's rights under Article 10 of ECHR. A critical fact influencing the European Court was that although Interbrew had been aware of the impending publication by the newspapers before it had occurred it had not sought an injunction to prevent it. Further, the ECHR considered that a disclosure order would only be justified in exceptional circumstances where there was no reasonable and less draconian alternative available to discover the source of the leak. The ECHR ruled that the protection of journalistic sources outweighed any threat of damage to Interbrew by the possible future publication of confidential information and the disclosure order was therefore unjustified in these circumstances.

*Financial Times Ltd and Others v United Kingdom, (Application No 821/03), 15 December 2009*

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## Disclaimer

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