

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
FINANCIAL LIST**

Before Mr Justice Andrew Baker

15 May 2020

**Burford Capital Limited -v- London Stock Exchange Group plc
[2020] EWHC 1183 (Comm)**

CASE SUMMARY

Burford's Norwich Pharmacal claim was rejected as the evidence did not make out a good arguable case of "market manipulation" under the EU Market Abuse Regulation and, in any event, justice did not require that the Stock Exchange provide the assistance sought.

Burford Capital Limited ("**Burford**") is a litigation funder whose shares are listed on the Alternative Investment Market, a market maintained and operated by a subsidiary of London Stock Exchange Group plc (the "**Stock Exchange**") (and on another associated trading platform, Turquoise). On 6 and 7 August 2019, there was a run on Burford's shares following a series of tweets and reports by US investment firm Muddy Waters, which held a short position in the shares (the "**Muddy Waters Attack**"). Burford did not, in this claim, allege that the Muddy Waters Attack was unlawful in itself; rather, it argued that the fall in its share price was or may have been caused or contributed to by other trading activities constituting unlawful market manipulation. These allegations were independently investigated and rejected by the Stock Exchange and its regulator, the Financial Conduct Authority ("**FCA**").

Burford claimed *Norwich Pharmacal* relief from the Stock Exchange so that it might (a) pursue claims against any alleged wrongdoers in tort, (b) bring a private prosecution for financial crimes, (c) seek to persuade the FCA and/or Crown Prosecution Service to bring a prosecution, or (d) seek to persuade the FCA to re-consider its decision not to take further action. The relief sought was disclosure of de-anonymised trading data, including the identities of those who placed buy and sell orders for Burford's shares on 6 or 7 August 2019.

Purpose of the disclosure sought: an open question

It was not necessary to decide (and so Mr Justice Andrew Baker left open, at [38]) the question of whether *Norwich Pharmacal* relief requires wrongdoing that (if proved) would involve a civil cause of action vested in the *Norwich Pharmacal* claimant against the wrongdoer (such that, on this claim, relief could not be granted in support of aims (b), (c) and (d) above). This remained relevant to the issue of vindication (on which, see below).

No good arguable case of market manipulation

Burford claimed that it was the victim of market manipulation as defined in Art. 12(1)(a)(i) of the Market Abuse Regulation, Regulation (EU) No.596/2014 (“**MAR**”). This concerns the giving (or likelihood of giving) false or misleading signals as to supply, demand or price. Specifically, Burford alleged this occurred through the practices of “spoofing” and/or “layering”, which broadly involve the repeated placement, cancellation and replacement of limit orders in a high volume at incrementally reducing prices with no intention to execute them. Burford’s allegation relied principally on the expert evidence of Prof Joshua Mitts. Prof Mitts analysed anonymised order book data provided to Burford by the Stock Exchange and, from this data, identified patterns of repeated placing and cancelling of orders in a short period of time which, he concluded, provided strong evidence of market manipulation.

Mr Justice Andrew Baker rejected these conclusions noting, in particular, the “*inherent weakness*” that there is no true control for comparison in Prof Mitts’ analysis (at [71]). At its highest, Prof Mitts’ analysis identified patterns that sellers behaving manipulatively could have created. Such patterns do not, however, prove that manipulation occurred.

The evidence of Mr Smith for the Stock Exchange showed that the patterns identified by Prof Mitts could equally have been consistent with genuine market activity in response to dramatic falls in Burford’s share price following the Muddy Waters Attack. Prof Mitts’ suggestions to the contrary were rejected as being “*overly simplistic*” (at [93]). As they were consistent with both genuine and unlawful market activity, the patterns alone could not found a conclusion that there had been market manipulation. There remains a question of the sellers’ intentions to trade and of the falsity of the impressions given to the market, which might involve an element of subjective enquiry (at [50], [80]). Prof Mitts could not draw the necessary conclusions as to the sellers’ intentions based only on the anonymised data.

Support for this finding was provided by Mr Smith who, with the benefit of access to the full trading data, showed that specific order examples relied on by Prof Mitts as indicative of market manipulation were actually genuine trading activity. Not only were the examples themselves therefore not sufficient evidence of market manipulation to support Burford’s claim, but they also illustrated why it not possible to draw the conclusions Prof Mitts had from the data available.

Finally, Mr Justice Andrew Baker rejected (at [135]) Prof Mitts’ conclusion that a correlation between high intra-minute net sell-side cancellation rates and particularly sharp intra-minute falls in Burford’s share price was evidence of the former causing the latter. It could equally be said that a lack of demand for the shares (resulting from the Muddy Waters Attack) caused a drop in price and, in turn, high order cancellations, as sellers lowered or withdrew their offers.

MAR does not exclude the operation of the *Norwich Pharmacal* jurisdiction

Mr Justice Andrew Baker held (at [151]) that the regulatory regime under MAR for investigating and taking action in relation to suspected market manipulation does not “oust” the court’s *Norwich Pharmacal* jurisdiction. The MAR regime is not analogous to the Crime (International Co-operation) Act 2003 and Evidence (Proceedings in Other Jurisdictions) Act

1975, as it does not purport to legislate in the territory of an investor's rights to obtain information to enable it to pursue a private law claim.

Justice does not require that the Stock Exchange provide the assistance sought

In the alternative that Burford did have a good arguable case, Mr Justice Andrew Baker turned to address the factors identified by Lord Kerr in *Rugby Football Union v Consolidated Information Ltd* [2012] UKSC 55. Mr Justice Andrew Baker favoured (at [41]) characterising this stage of the process as one of discerning whether justice requires that relief be given, rather than one of judicial discretion. In this case, justice would not have demanded that the Stock Exchange provide the assistance sought (or, adopting the discretion analysis, it would not have been just and convenient to exercise the discretion in Burford's favour) (at [216]).

The key factor, merits aside, is the public interest in the vindication of the *Norwich Pharmacal* claimant (at [217]). This weighed heavily against granting the relief sought.

Burford had no private cause of action to vindicate its rights. Mr Justice Andrew Baker declined (at [168]) to recognise a "euro-tort" founded directly upon Art. 15 of MAR (such as that recognised in *Antonio Muñoz y Cia SA et al. v Frumar Ltd et al.* Case C-253/00, [2003] Ch 328). Teare J had similarly declined to do so in *Hall v Cable and Wireless plc* [2009] EWHC 1793 (Comm) in relation to MAR's predecessor, the Market Abuse Directive. A direct remedy is not required to give full practical effect to Art. 15, as this is already achieved by the provisions of MAR itself and the exclusive role of national regulators (the FCA, in this instance) in relation to them. There was also no evidence to support a claim in conspiracy, and *Norwich Pharmacal* relief would not have been needed as the claim could have proceeded against Muddy Waters alone in the first instance with additional parties being added later. Claims under s. 90 of FSMA 2000 or for deceit at common law might be possible in principle, but only at the suit of Burford's investors, not Burford itself.

Similarly, disclosure is not required to vindicate Burford's rights through a prosecution or regulatory action (assuming that *Norwich Pharmacal* relief is available in such a context). "Exceptional justification" would be needed to invoke the *Norwich Pharmacal* jurisdiction in support of a possible public prosecution (at [173]). The proper remedy for Burford's complaint about the FCA's decision not to take enforcement action is through the judicial review process (at [180]), rather than seeking *Norwich Pharmacal* relief to found a private prosecution or to convince the FCA to alter its decision. It is also doubtful whether a private prosecution could even be brought, given the FCA's exclusive remit under MAR (at [175]).

The remainder of Lord Kerr's factors did not significantly assist Burford: (i) any suggestion that granting relief would deter further wrongdoing was purely speculative (and doing so might even have the opposite effect, in implying that the existing market abuse detection systems are weak); (ii) granting relief could cause serious collateral damage to innocent parties and to the reputation of the FCA as regulator; and (iii) whilst any confidentiality concerns regarding innocent parties could be mitigated, the burden would have been on Burford to make detailed proposals (and in any event this factor would be outweighed by the other factors weighing against Burford's claim).

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>