Litigation & Arbitration Group

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Client Alert

Burford Capital v London Stock Exchange Group PLC: disclosure in support of market manipulation claims

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In a detailed judgment handed down on 15 May 2020, the Commercial Court examined a number of important and novel points concerning financial services regulation, market manipulation and the jurisdiction to order the London Stock Exchange ("**LSE**") to disclose information on market participants' identities to support potential claims by Burford Capital Limited ("**Burford**") against certain of those parties.[1] The court (Andrew Baker J) rejected Burford's claim that it had a good arguable case that its share price had been the subject of unlawful market manipulation. It also decided that, even if Burford had been able to establish a good arguable case, justice would not have required that the court exercise its discretion to order that the LSE disclose to Burford the identities of the market participants.

Background

Burford's shares are listed on the Alternative Investment Market ("**AIM**"), a market which is maintained and operated by the LSE. From 2pm on 6 August 2019 to the end of trading on 7 August 2019, there was a sustained run on Burford's shares that saw the share price fall very substantially. During 6 August 2019, the share price fell 18.8% and on 7 August 2019, it fell 46.5%. In the course of the two days, Burford's total market value declined by almost £1.7 billion.

The trigger for the fall in Burford's share price was the publication of a report by Muddy Waters, a U.S. investment and investment advisory business, and a short-selling attack (a 'bear raid') on Burford. Burford claimed that the collapse in its share price was not solely due to the short-selling attack but, in large part, "*was or may well have been caused or contributed to by spoofing and layering, a form of market manipulation and not by genuine trading activity on the market*."[2] Through this alleged spoofing and layering, Burford argued that a large number of sell orders had been submitted without any genuine intention to trade, which had given a false or misleading impression of the market in Burford's shares.

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[1] *Burford Capital Limited v London Stock Exchange Group plc* [2020] EWHC 1183 (Comm) (the "**Judgment**"). References to paragraphs hereafter are to paragraphs of the Judgment.

[2] Paragraph 17. The judge considered that the definition of 'spoofing' and 'layering' should be *"the creation and cancellation of a large volume of limit orders placed by sellers not intending, when placing those orders, to trade on the offered terms, which distorts the supply and demand for a security"* (paragraph 70 (with original emphasis)).

The Financial Conduct Authority ("**FCA**"), as regulator of the LSE, and the LSE itself, had each conducted an analysis of the trading during the relevant period and had concluded that Burford's evidence did not support any claim that there may have been spoofing or layering. Indeed, both the FCA and LSE had each concluded that, on the basis of the full range of evidence which was available to them (which was more extensive than the evidence available to Burford), there was no reason to think that unlawful market manipulation had taken place.

Although Burford had some public information about the trading in its shares during the relevant period, it brought a *Norwich Pharmacal* claim (explained below) against the LSE seeking the disclosure of the identities of all the market participants involved in trading its shares so that it could (amongst other reasons) bring claims against the alleged wrongdoers.[3]

Norwich Pharmacal relief

A *Norwich Pharmacal* order requires a respondent to disclose certain documents or information to the applicant. Orders are commonly used to identify the proper defendant to an action or to obtain information to plead a claim.

Norwich Pharmacal relief is not generally available against a respondent who is likely to be a party to the potential proceedings. The respondent must, however, be either involved or mixed up in a wrongdoing, whether innocently or not.

The principal conditions which must be satisfied to obtain *Norwich Pharmacal* relief are well established:

(a) a wrong must have been carried out, or well arguably carried out, by an ultimate wrongdoer;
(b) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
(c) the person against whom the order is sought must (i) be mixed up in so as to have facilitated the wrongdoing; and (ii) be able, or likely to be able, to provide the information necessary to enable the ultimate wrongdoer to be sued.[4]

Once these conditions are met, the court has a discretion to consider other relevant factors to determine whether justice requires the defendant to provide the assistance sought. Such factors include the strength of the case that there has been wrongdoing against the claimant, the public interest in allowing the claimant to vindicate its legal rights, whether the order will have a deterrent effect, and the degree of confidentiality of the information sought.[5]

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[3] Specifically, Burford sought disclosure by the LSE of the following information "*for every buy and sell order event posted for Burford's ordinary shares on 6 or 7 August 2019 (each a 'Share Order Event'…)…*": "*The names of the natural or legal persons, or third party entities (including but not limited to natural persons, brokers, banks and other financial institutions) which submitted the Share Order Event, including the names of the members or participants of the trading venue who submitted the Share Order Event to the trading venue, and the names of the client on whose behalf the member or participant of the trading venue submitted the Share Order Event to the trading venue*"; and certain additional data. See paragraph 22.

[4] Paragraphs 39-42. As Baker J noted (at paragraph 40), jurisdiction to grant the relief is not "*limited to cases of strict necessity. Rather, the question is 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 the facilitated wrongdoing.*"

[5] Paragraphs 44-45.

Burford argued that:[6]

(a) there were strong reasons (as explained in expert evidence submitted by Burford) to think that spoofing and layering had taken place on 6 and 7 August 2019;
(b) if there had been unlawful market manipulation, Burford should be assisted to know who was responsible for the unlawful behaviour so that it might be able to: (i) pursue civil or criminal claims against them; or (ii) seek to persuade the FCA and/or Crown Prosecution Service to bring a prosecution; or (iii) seek to persuade the FCA to re-consider its conclusion that there was no real basis for thinking that market abuse had occurred; and
(c) there was no powerful reason against granting the order – indeed, there were weighty reasons for doing so.

In defending the claim, the LSE argued:[7]

(a) despite the expert evidence submitted for Burford, there was no real reason to think that spoofing and layering had occurred at all, or so as materially to affect the fall in the share price (rather, the information published by Muddy Waters and usual market behaviour provided sufficient explanation);
(b) Burford (as opposed to investors or traders who sold at 'abusively' depressed prices) could not bring a claim in tort in respect of spoofing or layering and the other potential claims which Burford might bring or stimulate were not reasons to grant *Norwich Pharmacal* relief; and
(c) there were powerful reasons why, as a matter of discretion, the relief should not be granted. In particular, the information sought by Burford was highly confidential (market participants generally trade anonymously on AIM). If the information was provided to a market participant (rather than a regulator such as the FCA), this would risk undermining the normal functioning of the markets.

Market manipulation

Burford was required to establish a "*good arguable case*" that on 6 and 7 August 2019 its shares were the subject of spoofing or layering and that such spoofing or layering caused or contributed to the fall in the share price on either or both of these days.[8]

The foundation for each of Burford's allegations was Article 15 of the EU Market Abuse Regulation[9] ("**MAR**"), which states, "*A person shall not engage in or attempt to engage in market manipulation"*. Market manipulation is defined in Article 12 by reference to a number of different types of behaviour. The form of market manipulation which was relevant to Burford's claim is the sending of false market signals:

> "*entering into a transaction, placing an order to trade or any other behaviour which (i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of a financial instrument…*" (Article 12(1)(a)).

The judge noted that the essential ingredient is the giving of (or likelihood of giving) false or misleading signals as to supply, demand or price. Significantly, he rejected Burford's submission that this was an entirely objective enquiry and decided that the actual intention of the relevant market participant was a relevant consideration.[10]

[6] Paragraph 28.
[7] Paragraphs 29 and 202.
[8] Paragraph 33; and *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm).
[9] Regulation (EU) No. 596/2014.
[10] Paragraphs 50-51.

The judge conducted a detailed review of the evidence adduced by Burford in support of its claim. He rejected Burford's allegations and concluded that:

> "*…there is no strong case for supposing that spoofing and layering occurred. On a careful assessment of the evidence put forward by Burford, the case that spoofing or layering occurred, or may have occurred, is speculative*."[11]

Other relevant factors

The judge then considered the factors weighing in favour of, or against, the grant of relief, had Burford been able to establish a good arguable case of wrongdoing. He did so by reference to a list of factors,[12] including the following:

(a) *Merits* – if there were a good arguable case, it would only be so by a small margin. There was no clear case of wrongdoing; and there would be a strong likelihood that Burford would find it could not, in fact, put forward any actual allegation of wrongdoing at all.[13]

(b) *Vindication* – Burford contended that the alleged market manipulation gave rise to various different causes of action, such as: (i) a tort claim against the manipulators founded on Article 15 of MAR; (ii) a claim for creating a false or misleading impression as to the market in breach of s.90 of the Financial Services Act 2012; (iii) a common law deceit claim; and (iv) a claim for the tort of conspiracy to cause harm by unlawful means. The judge decided that there would be no good arguable case that Burford (as opposed to other market investors or Burford's shareholders) had any clear cause of action against any alleged wrongdoer and that there was no private law right of action under MAR.[14] The FCA has the exclusive statutory function under FSMA and MAR of investigating and deciding whether to prosecute market abuse; and no private prosecution may be brought thereunder. The judge also concluded that *Norwich Pharmacal* relief was not available to "stimulate" further regulatory action, such as an FCA investigation: that might theoretically be accomplished by bringing a judicial review claim, but Burford did not need *Norwich Pharmacal* relief to bring those proceedings.[15]

(c) *Deterrence* – there would be no real basis for finding that an order in this case would, in practice, deter unlawful market conduct in the future.[16]

(d) *Defendant's fault* – if spoofing and layering were ultimately found to have occurred, this might be the basis for an argument that the LSE had failed to detect such activity (although there was no suggestion of wrongdoing on the part of the LSE).[17]

(e) *Collateral damage* – this factor favoured the refusal of relief. It is a significant and important feature of the AIM market that trading is generally anonymous. Providing identity details to a party such as Burford would be "*a serious invasion into the confidential and commercially sensitive trading activities and strategies of…a large number of entirely innocent parties*."[18]

The judge concluded that, even if Burford had been able to establish a good arguable case of unlawful market manipulation, justice did not demand that the LSE provide the assistance which Burford sought.

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[11] Paragraph 145.
[12] See Lord Kerr in *Rugby Football Union v Consolidated Information Ltd* [2012] UKSC 55.
[13] Paragraph 156.
[14] Following *Hall v Cable and Wireless plc* [2009] EWHC 1793.
[15] Paragraphs 157-181.
[16] Paragraph 187.
[17] Paragraphs 191 and 194.
[18] Paragraph 195.

Comment

Overall, the decision is likely to be welcomed by market participants concerned that their confidential trading information and strategies may be disclosed as a result of a court order and, therefore, likely to support confidence in the functioning and operation of UK markets.

The Judgment also contains a cautionary note about the conclusions which can properly be drawn from the available data. In order to determine that Burford had failed to establish a good arguable case that market manipulation had taken place, the judge examined closely the evidence submitted by the parties' respective experts. The report by Burford's expert was the subject of some criticism by the judge: "*it contained data analysis that, so far as it goes, may well be right; however, it made claims for what that data analysis shows that are obviously unjustified; in particular, it repeatedly (a) described with care… what exactly the data analysis involved, but (b) asserted conclusions that cannot properly be drawn from that data analysis if attention is paid to that initial description.*"[19]

[19] Paragraph 121.

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