

Insights

LONDON STOCK EXCHANGE SUCCESSFULLY DEFENDS CLAIM TO DISCLOSE IDENTITIES OF MARKET PARTICIPANTS

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SUMMARY

Mr Justice Andrew Baker has dismissed a Norwich Pharmacal claim brought by litigation funder Burford Capital Limited against London Stock Exchange, in which it sought the disclosure of the identities of market participants involved in trading Burford's shares following a remote trial. In a judgment handed down on 15 May 2020 (*Burford Capital Limited v London Stock Exchange* [2020] EWHC 1183 (Comm)) the Court rejected claims by Burford that it had a "good arguable case" that its share price had been the subject of unlawful market manipulation on two days in August 2019 and stated that even if it had been, justice would not have demanded that London Stock Exchange disclose to Burford the identities of all market participants trading on the days in question. The claim was the first of its kind to be brought against a trading venue in the UK and represents a decisive step by the Court to protect public confidence in trading in the UK.

Burford shares are publicly traded on AIM, a growth market owned and operated by London Stock Exchange.

By its claim Burford was seeking an order pursuant to the principles established in *Norwich Pharmacal co v Customs and Excise Commissioners* [1974] AC 133, for London Stock Exchange to disclose the identities of all market participants who traded in its shares on 6 and 7 August 2019. On the days in question, Burford's total market value declined by almost £1.7 billion.

The decline followed the publication of a report on Burford by well-known US investment and investment advisory firm, Muddy Waters Capital LLC.

In its defence, London Stock Exchange made clear that there was no evidence to support the allegations of spoofing and layering in Burford's shares and that Burford did not accordingly have a good arguable case of spoofing and layering. In addition, London Stock Exchange made clear that information regarding market participants' identities was highly confidential information, which is

provided only to the FCA as the UK competent authority and that the regulatory regime established at EU level should not be undermined through one market participant having access to confidential data regarding the market's trades. Such a precedent would risk undermining the normal functioning of UK markets, which are based on market participants' identities remaining confidential and risk confidential trading strategies of market participants being discoverable. London Stock Exchange defended the claim in order to maintain the normal functioning and operation of UK markets.

Aside from London Stock Exchange's analysis, the FCA had conducted an extensive review of the trading at issue and concluded that there was no evidence of spoofing and layering, as alleged by Burford.

Norwich Pharmacal claim

In order for the Court to grant *Norwich Pharmacal* relief:

- (i) there must be a "*a good arguable case*" that a wrong has been carried out by an ultimate wrongdoer. The case needs to be more than just capable of serious argument but not necessarily a case the court considers to be well-founded; and
- (ii) the defendant must have been "mixed up" in so as to have facilitated the alleged wrongdoing such that it is able to provide the information sought by the claim.

Once these threshold conditions are met, there remains a discretion for the Court, to consider, by assessing and balancing all relevant factors, whether justice requires the defendant to provide the assistance sought.

There was no suggestion by Burford (or otherwise) that London Stock Exchange was involved in any alleged wrongdoing itself, but was "mixed up" by virtue of operating the markets on which the alleged wrongdoing was said to have occurred.

The alleged wrong-doing

Burford alleged that spoofing and layering had taken place in its shares on 6 and 7 August 2019, which caused or contributed to its share price decline. Through spoofing and layering, Burford alleged that a large number of sell orders in Burford shares were submitted without any genuine intention to trade, which gave (or were likely to give) a false or misleading impression of the market in Burford's shares.

The alleged manipulators were said to have breached the Market Abuse Regulation and to have committed the tort of conspiracy by unlawful means.

London Stock Exchange made clear that there was no evidence of spoofing and layering and that it had conducted extensive investigations into the trading at issue, both in real time and in response

to Burford's concerns. The FCA had separately communicated with Burford that it had conducted an extensive review of all the trading in issue and concluded that there was no evidence of spoofing and layering.

Dismissal of Burford's claims

The Court dismissed Burford's claims that it had "*a good arguable case*" that market manipulation had occurred.

In rejecting the claims, Mr Justice Andrew Baker noted that the anonymised public trading data supplied had given Burford reason to consider itself a possible *Norwich Pharmacal* claimant but, quoting the London Stock Exchange's evidence, noted that anonymity:

"is also precisely why public analysis and allegations of market manipulation can be flawed. That is primarily and simply because public participants do not know the trading positional data associated with the orders they observe. This leads frequently to erroneous accusations of manipulation, when in fact the orders are genuine – as is the case here. Errors such as failures to account for algorithm behaviour; lack of understanding of execution algorithm strategies; or a general lack of knowledge related to order or trade types are commonly made by market participants alleging spoofing and layering."

Mr Justice Andrew Baker also concluded that whilst there was no clear case of wrongdoing, if there were, weighing all the factors relevant to this matter, justice would not require disclosure by London Stock Exchange. In reaching its conclusion, the Court found, amongst other things, that the following factors weighed against disclosure:

- (i) there was no arguable case that despite their various allegations, Burford had any clear cause of action against any alleged wrongdoer and that it did not have a private right of action under the Market Abuse Regulation;
- (ii) there was no real basis for finding that intervention by the Court would serve to deter any unlawful market conduct; and
- (iii) that there would be significant collateral damage to innocent market participants and a risk of damage to public confidence in the FCA as regulator.

Conclusion

By its judgment, the Court has taken a decisive step to protect public confidence in trading in the UK. Had the Court ordered disclosure in circumstances where both London Stock Exchange and the FCA had concluded there was no evidence of market abuse, UK market participants would have been likely to have become concerned about their confidential trading strategies being disclosed through orders made by the Court.

The Court has also recognised the potential for an order of the kind sought by Burford to cause collateral damage to individual market participants as well as to undermine confidence in the regulator. Although this may not alone be sufficient to resist such a claim, the Court will clearly only make an order where there is a strong arguable case and where there is good reason.

London Stock Exchange and FCA have both indicated the seriousness with which allegations of market manipulation are taken. London Stock Exchange outlined the detailed systems and controls it has in place to monitor and investigate market abuse generally, and the steps taken to investigate the manipulation alleged in this case.

Andrew Tuson and Alexandra Kirby in the Litigation and Corporate Risk group led London Stock Exchange's defence of this claim. Should you require any further information about this matter, please contact them.

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