

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM2023/0050

BETWEEN:

BY WAY OF CLAIM:

CIF

Applicant

and

**(1) DLG
(2) GIY**

Respondents

Appearances:

Ms. Nadine Whyte Laing for the Applicant

Mr. Simon Hall, with him Mr. Tyrone Bailey for the First Respondent

2023: July 13;
2024: February 29.

JUDGMENT

1. Introduction

[1] This is the judgment of the Court in relation to certain issues arising out of an application for a third-party disclosure (also known as a 'Norwich Pharmacal') order.

[2] On 1st May 2023 the Applicant filed an (amended) Notice of Application on an *ex parte* basis seeking a 'seal and gag' order and, in the same Notice of Application, the Norwich Pharmacal order.

- [3] Seal and gag orders need no introduction. They order a respondent not to communicate anything about an application to other persons, with certain exceptions (such as the respondent's legal advisers), and they require the Registrar of the Supreme Court to seal the Court file. Their purpose is to prevent the respondent directly or indirectly tipping off a suspected wrongdoer, so that the suspected wrongdoer is not afforded an opportunity to frustrate the purpose of the application.
- [4] The Respondents are two professional corporate service providing companies operating in the Territory ('BVI') that provide registered agency services for companies incorporated in the BVI.
- [5] The underlying factual matrix was entirely standard. The Applicant is a judgment creditor in respect of a final money judgment rendered by a court overseas. The Defendant(s) did not honour the judgment. The Applicant has evidence that the person who is behind the Defendant(s) has a documented history of dishonesty in business affairs and of non-fulfilment and/or evasion of legal obligations. The Applicant has good reason to believe that that person is the underlying beneficial and/or legal owner of shares in a number of companies incorporated in the BVI, of which the present Respondents are the registered agents. The Applicant brought its application to seek confirmation of its belief and such further related information as it was able properly to obtain from the Respondents in relation to the person's assets. The Applicant did so with a view, obviously, to considering its enforcement options.
- [6] In relation to the documents and records sought, these were identified with reference to the following broad categories of documents (with greater specificity than I summarize here):
- (1) Registers of members and directors;
 - (2) Documentation tending to show who the 'real' underlying beneficial owners and controllers are, including 'know your client' documentation and who it is that provides instructions to the Respondent registered agents and who pays their fees;
 - (3) Such documents as the registered agent might hold relating to assets and transactions carried out by the companies in question; and

- (4) Such documentation as is capable of being called in by the registered agent from elsewhere, including different jurisdictions, which a BVI registered agent is required by law to have access to.
- [7] The range and types of documents sought were entirely standard for disclosure orders made against registered agents in the BVI.
- [8] The applications came on for hearing on 4th May 2023 before me and the Court made the orders sought ('the Order').
- [9] Relevant features of the Order included the following:
- (1) Both the seal and gag and Norwich Pharmacal orders were made at the same *ex parte* hearing;
 - (2) A return date was fixed to take place within 28 days;
 - (3) The Respondents were required to disclose a specified category of documents to the Applicant within about 14 days;
 - (4) The Respondents were required to file and serve on the Applicant's legal practitioners an Affidavit giving and/or confirming various items of information, including in relation to compliance with the order, within about 21 days;
 - (5) By clause 10:
"The Respondents may apply to the Court on three clear days' notice first being given to the Applicant's legal practitioners, on any matters arising from this order;"
 - (6) By clause 11:
"The Respondents may apply to set aside or vary this Order within 14 days of being served pursuant to rule 11.16 of the Eastern Caribbean Supreme Court Civil Procedure Rules;"
 - (7) By clause 12:
"There shall be no order for costs, save that the Applicant pay each of the Respondents reasonable costs incurred in complying with the terms of this order such costs to be limited to US \$4,000.00, in the first instance."

- [10] By the return date, both Respondents had confirmed full compliance with the seal and gag order and the Norwich Pharmacal order.
- [11] The Norwich Pharmacal order pertaining to the First Respondent concerned one company, and that pertaining to the Second Respondent concerned six companies.
- [12] At the return date, the Applicant sought an extension of the seal and gag order to enable the Applicant and its legal advisers to review the information disclosed. The Respondents did not oppose that extension.
- [13] Shortly before the return date, the First Respondent provided the Applicant with a schedule of costs in which it sought the sum of US\$10,731.00 as compliance costs and US\$3,200.00 as its costs of the application. The Applicant took a point that this far exceeded the cap set out in the Order at clause 12. The Applicant thus indicated to the Court that it would be seeking the assessment of the Respondents' costs.
- [14] No issues were referred to the Court for determination in respect of the Second Respondent's compliance with the orders made at the *ex parte* hearing and the Second Respondent did not, and was not required to, participate further in the live matters remaining before the Court.
- [15] The First Respondent, through its learned Counsel, intimated misgivings about:
- (1) the rectitude of the making of seal and gag and Norwich Pharmacal orders upon the same occasion in a single *ex parte* hearing, on the basis that this denies a respondent an opportunity to make representations before a Norwich Pharmacal order is made; and
 - (2) the imposition of a recoverable costs cap at such *ex parte* hearing.
- [16] In light of the fact that both these aspects have been the subject of some controversy in this jurisdiction, the Court invited both sides to file written submissions, together with copies of authorities, to enable the Court to pronounce upon these issues in a written judgment. Both sides helpfully assisted the Court by doing so.

- [17] Reference below to the CPR is to the Eastern Caribbean Supreme Court Civil Procedure Rules. This matter arose under the 2000 version (as amended from time to time). In the discussion section I also refer to the more recent 2023 version. The material provisions are the same, although their numbering is sometimes slightly different in the 2023 revision.

2. The First Respondent's position

- [18] In taking issue with the approach taken by the Court in making its *ex parte* order, the First Respondent explained its position thus:

“1. [The First Respondent] addresses the following issues:

- a. When is it appropriate for an applicant to seek Norwich Pharmacal relief without notice to the respondent? Particularly, when is it appropriate for an applicant to seek a "wrap-up" order (an *ex parte* seal and gag and Norwich Pharmacal order) against a BVI registered agent?
- b. The entitlement of a respondent to a Norwich Pharmacal application to their costs of compliance and of the application; and
- c. Whether it is proper for an applicant seeking Norwich Pharmacal relief, on an *ex parte* basis, to also seek an order limiting the total costs that may be recovered by the respondent for complying with the order?

2. In summary, the First Respondent's position is that:

(a) As previously held by this Court, an applicant seeking Norwich Pharmacal relief without notice to the respondent needs to satisfy the mandatory requirements of CPR 17. In particular, the applicant must satisfy the Court that (i) there was a case of urgency, and no notice was possible or (ii) to give notice to the respondent (the BVI registered agent in the present case) would defeat the purpose of the application. To permit applications to proceed without those requirements having been satisfied is contrary to the CPR. It is also contrary to principles of natural justice since, where those requirements are not satisfied, the Court is making an order against a person without hearing from that person where there is no proper justification for doing so.

(b) Common law recognises that where an applicant seeks Norwich Pharmacal relief that requires an innocent party to assist the applicant in the assertion of its rights against a wrongdoer, the applicant is required to indemnify the innocent party against their costs of the application and of compliance.

(c) Generally, a cap or limitation on the costs capable of being recovered by the innocent party should only be imposed after the Court has heard the innocent party. Again, absent any proper justification (i.e. that no notice is possible due to urgency or to give notice would defeat the purposes of the application) such orders are contrary to principles of natural justice. They also place the respondent in an invidious position – such they prevent the respondent from taking independent legal advice (or at least put it unjustifiable financial risk if it seeks to do so).

A. Obtaining Norwich Pharmacal orders on an *ex parte* basis

3. The Eastern Caribbean Court of Appeal, in its decision in **A,B,C,D v E** (HCVAP 2011/001 (unreported, 19 September 2011) at paragraph 17) [...] confirmed that Norwich Pharmacal relief is a form of injunctive relief. On this basis, Farara J (Ag) (as he then was) held in **An Applicant v A Respondent** [...] that applications for Norwich Pharmacal relief were interim injunctive relief that fell squarely within the mandatory provisions of rule 17.4 of the CPR (BVIHCOM2019/0104 (unreported, 11 October 2019, at paragraph 17.)).

4. An applicant seeking Norwich Pharmacal relief, without notice to the respondent, therefore needs to satisfy CPR 17.4(4). That is, an applicant seeking an *ex parte* Norwich Pharmacal order against a BVI registered agent would need to show that the *ex parte* order was needed (i) with such urgency that no notice to the registered agent was possible or (ii) to give notice to the registered agent would defeat the purpose of the application.

5. Farara J at paragraph 26 in **An Applicant v A Respondent** [...] held:

“In my view CPR 17.4(4) is clear and mandatory. It sets out, in the alternative, the matters upon which the Court must be satisfied when an applicant for interim injunctive relief seeks to proceed without notice to the respondent. This procedure is applicable to all applications to which CPR 17.4(1) applies, including Norwich Pharmacal applications. Consequently, the procedure in 17.4(4) governing applications without notice applies whether the respondent is thereto a registered agent or some other party. Furthermore, it applies irrespective of the perceived impracticality, inconvenience or costs attendant to having two hearings, one without notice and the other upon notice. It also applies notwithstanding the quite sensible provisions of CPR 11.16(2) which applies to all orders obtained on a without notice application. Moreover, considerations of the overriding objective at CPR 1.1(2) for the court to deal with matters justly cannot override the mandatory provisions of CPR 17.4(4). Indeed, if it may be said that the requirements of CPR 17.4(4) are there to ensure applications for interim relief are dealt with justly, and a respondent is not unfairly treated by having the order made without notice to him, in circumstances where to do so is clearly not justified.”

6. In **AAA v TTT** [...] (per Jack J (Ag)) at paragraph 7, this Court explained the importance of giving notice to the registered agent before the order is granted. If the order were to be made in the absence of the registered agent, the registered agent is immediately on “the back foot; the Court has already given at least a preliminary view that an order should run

against the [registered agent]. This is particularly so when, as is often the position... the real point of disagreement between the [applicant and the registered agent] may be the scope of the documentation which should be produced. The [registered agent] is entitled to provide input into that issue before an order is made." (**AAA v TTT** BVIHCM2019/0066 (unreported, 21 May 2019) at paragraph 7.)

7. A registered agent will also have an interest as to the recovery of its legal and compliance costs. There may also be cases where the registered agent may, or needs to, raise an issue with the application, including as to the Court's jurisdiction to make the order sought (we have seen this point arising in practice). Additionally, registered agents should be allowed to provide their input on the timeline within which disclosure should be made. It is well known that reviewing and compiling documents falling within the scope of Norwich Pharmacal orders can be a time-consuming process for some BVI registered agents having regard to their respective database file storage systems. Some orders for Norwich Pharmacal relief are broad in scope and will require the registered agent not only to produce documents held at their BVI offices, but also documents held elsewhere which the registered agent has the power to recall. Registered agents will often need legal advice on the issues arising on the application, the scope of the order and to assist with determining whether a document should be disclosed. Legal advisers will need time to review the application papers and take instructions from the registered agents.

8. Making orders against persons without notice to them is also contrary to principles of natural justice and the circumstances in which they should be made are therefore limited: see, for example, **National Commercial Bank Jamaica Limited v Olint Corp. Limited**, ([2009] UKPC 16 at paragraphs 13 -15) [...] where the Privy Council held at paragraph 13:

"Although the matter is in the end one for the discretion of the judge, *audi alteram partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act."

9. The appropriate course is therefore for an applicant for a Norwich Pharmacal order against a BVI registered agent to apply *ex parte* for a seal and gag order (which then prevents the registered agent from informing its client of the application, as it may contractually be obliged to) and then to be heard on an inter partes basis on the Norwich Pharmacal application itself.

10. As noted in **An Applicant v A Respondent** [...], the Court had previously developed a practice of using the return date for the *ex parte* seal and gag order as the (abridged) inter partes hearing of the Norwich Pharmacal application. That may be convenient in most cases, but the Court was not persuaded to adopt it as 'standard practice'. (See paragraph 32 of the judgment. The two-step process was adopted by Jack J in **AAA v TTT**, BVIHCM2019/0066 (unreported, 21 May 2019) [...]; **EGE HLM v Nerine Trust Co Ltd and Trident Trust Co Ltd** BVIHCM2021/68 (unreported, 15 April 2021) [...]; and **Federal Republic of Nigeria**

et.al v Nerine Trust Co (BVI) and another BVIHCM2021/0068 (unreported, 27 July 2021) [...]).

11. In this case, it does not appear from the skeleton argument filed in support of the *ex parte* hearing at which the Norwich Pharmacal order was sought, or from the transcript of that hearing, that the Court was addressed on the question of why the application for Norwich Pharmacal relief satisfied CPR 17 (i.e. why it was so urgent that notice could not be given or why giving notice would stifle the application) and why a 'wrap-up' order was therefore being sought. There were therefore grounds on which the order could have been set aside. However, having reviewed the papers filed ahead of the *ex parte* hearing and considering the merits of the Applicant's case, the First Respondent did not apply to set aside the order in the interest of time and costs.

12. Of course, that will not always be the case. There are cases, even if it is a minority of cases, where a registered agent will have something substantive to say in response to a Norwich Pharmacal application. Adopting a 'wrap up' approach for all cases therefore risks granting applicants relief to which they are not entitled purely for some perceived convenience for applicants in most cases. [...].

B. Registered Agent's costs

13. There are two types of costs which may be incurred by a BVI registered agent against whom a Norwich Pharmacal order has been made. The first is the costs it is likely to incur for complying with the court order, i.e. the costs for performing the necessary searches, collating the documents and information requested by the applicant, and providing copies of all documents and information to the applicant. The second type of costs which may be incurred is legal costs, which includes the costs the registered agent may incur for instructing BVI legal practitioners to advise it including, for example, on matters such as whether the applicant's case is of merit, whether a document it has identified fall within the scope of the order and making representations on behalf of the registered agent at any court hearings.

Recovery of compliance costs

14. A person who is innocently mixed up in a wrongdoing has no duty, in the ordinary sense of the term, to assist the victim. The Court, however, has an equitable jurisdiction to intervene by making an order necessary to the administration of justice (i.e. by making an order for disclosure). (See paragraph 11 of **Cartier International AG and others v British Telecommunications plc and another** [2018] UKSC 28. See also **Singularis Holdings Ltd v PricewaterhouseCoopers** [2014] UKPC 36, at paragraph 22.)

Under this equitable jurisdiction, the innocent or intermediary party, does not incur any personal liability. (Ibid.)

Aldous LJ therefore emphasised in **Totalise plc v Motley Fool Ltd** that "Norwich Pharmacal applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party." (See **Totalise plc v Motley Fool Ltd** [2001] EWCA Civ 1897 at paragraph 29.)

In the learned judges' view (which has been confirmed by later decisions (See **Cartier, Jofa**.) "the costs incurred [by the applicant] should be recovered from the wrongdoer rather than an innocent party... in a normal case the applicant should be ordered to pay the costs of the party making the disclosure including the costs of making the disclosure." (See **Totalise plc v Motley Fool Ltd** [2001] EWCA Civ 1897 at paragraph 29.)

15. The position that the innocent party's costs must be paid by the applicant was first suggested in the **Norwich Pharmacal Co v Customs and Excise Commissioners** case itself [...], where Lord Reid said that "the full costs of the application and any expense incurred in providing the information would have to be borne by the applicant". ([1974] AC 133 at 176.) In the recent decision of **Cartier International AG and others v British Telecommunications plc and another**, ([2018] UKSC 28.) [...] the UK Supreme Court confirmed the common law principle that, absent exceptional circumstances, innocent or intermediary parties (particularly those whose services are used as mere conduits from wrongdoings) must be indemnified by the "rights-holder" against the costs of compliance with Norwich Pharmacal orders, freezing orders and other injunctions. (See paragraph 12.)

16. The Supreme Court stressed that in these types of cases, the starting point was the intermediary's legal innocence, including that it was a 'mere conduit' and had no means of knowing what use was being made of its network by third parties. Its only duty was to comply with the disclosure order made by the court. There was therefore no legal basis for requiring the innocent / intermediary party to shoulder the burden of remedying an injustice if he had no legal responsibility for the infringement and was not a volunteer but was acting under the compulsion of an order of the court. Although the intermediary might have benefited financially from the wrongdoer's use of its services, there was no degree of responsibility on the part of such an intermediary that corresponded to any legal standard, and, even if a moral or commercial responsibility were relevant, it was hard to discern one in cases like these. The Norwich Pharmacal order sought by the applicant (the rights-holder) was in his own commercial interest, were wholly directed to the protection of his legal rights, and the entire benefit of compliance with such orders inured to the applicant. It followed that in principle the applicant should indemnify the intermediary. That indemnity had to be limited to reasonable compliance costs: see the headnote in **Cartier International** and at [36] and [39] [...].

17. These principles are applicable to applications in the BVI for Norwich Pharmacal orders sought against BVI registered agents. There are important reasons for this policy. A BVI registered agent is an innocent third party mixed up in alleged wrongdoing which key players are usually foreign individuals. It owes duties of confidentiality to its client of record and, without an order of the Court, would be exposed to potential liability to its client if it voluntarily handed over its documents to the applicant. A court order is therefore necessary. Unlike the applicant, however, the BVI registered agent cannot later seek to recover its costs from the ultimate alleged wrongdoer. That is an important policy consideration in ensuring a registered agent is indemnified in respect of its costs (see the discussion in **Jofa Limited v Benherst Finance Limited** [2019] EWCA Civ 899 at [31]-[35] in particular). The costs

incurred are not therefore simply a cost of doing business, and the applicant should pay the full compliance costs (subject to them being reasonable costs).

Legal costs

18. The issue of the recovery of litigation costs was also briefly considered by the UK Supreme Court in **Cartier International AG v British Telecommunications plc** [...]. At paragraph 38 the court noted that the practice in these types of cases is to award costs of the action to the intermediary, although the court had a general discretion concerning the allocation of costs of litigation.

19. That approach also applies in the BVI, as CPR 64.3 gives the BVI Court the power to make orders about costs arising out of or related to all or any part of any proceedings. In deciding who should be liable to pay costs, CPR 64.6(5) mandates that the Court must have regard to all the circumstances of the case. When it comes to applications for Norwich Pharmacal orders against registered agents, the overriding consideration, as Aldous LJ noted in **Totalise plc v Motley Fool Ltd** [...] is that these kinds of applications are not ordinary adversarial proceedings where the general rule is that the unsuccessful party pays the costs of the successful party. There is no liability on the part of the registered agent, and any costs incurred by the applicant in the proceedings may be recovered from the wrongdoer. In these circumstances the balance weighs strongly in favour of a registered agent. As the Court of Appeal held in **Jofa** at [31]:

"While accepting that there can be no absolute rule in the matter, I find it hard to envisage circumstances in which it would be just to award costs against a respondent to a Norwich Pharmacal application who, before agreeing to disclose documents, has done no more than require the applicant to satisfy the court that such an order is appropriate." [...]

See also the discussion at [32]-[39].

20. As to quantum, these legal costs would be subject to assessment (as they were in **Jofa**). The ECSC CPR does not make provision for 'indemnity' costs and the costs would fall to be assessed pursuant to CPR 65.2(1), applying the factors in CPR 65.2(3). Those factors require the Court to take into account all the circumstances and it may be relevant to consider on an assessment the fact that registered agent is effectively entitled to an 'indemnity' and that it has not means of recovering those costs from the ultimate wrongdoer.

C. Whether it is appropriate to impose limitations on registered agent's costs?

21. As set out above the registered agent, as the innocent party, is entitled to be indemnified for its reasonable costs incurred by complying with the terms of the order and its costs of the application, any such costs to be assessed if not agreed. Given a registered agent is only entitled to its reasonable costs of compliance and any legal costs it incurs will be subject to assessment by the Court, the Court has an adequate means by which it can regulate the costs being incurred and claimed by registered agents who are respondents to Norwich Pharmacal applications.

22. The perceived risk of the incurring of disproportionate costs can be adequately controlled by the costs assessment process. Indeed, the Court should only make a costs capping order where it is satisfied that the detailed assessment process cannot adequately control the substantial risk that without a cost-capping order costs will be disproportionately incurred: see CPR 65.14(4)(c)(ii).

23. It is difficult to conceive of a scenario in which a costs capping order should be made on an *ex parte* basis since the giving of notice could not be said to defeat the purpose of the application nor could it be said that no notice could be given because the application is so urgent: see **National Bank of Jamaica** above [...]. CPR 65.15(1) in any event includes a mandatory provision that an application for a costs capping must be made on notice.

24. CPR 65.14 sets out the relevant issues for the Court to consider when making a costs capping order. No consideration was given to those issues in the present case. CPR 65.15 sets out the procedural requirements for an application for a costs capping order. None of those requirements were satisfied in the present case.

25. The likely costs of compliance will vary on a case-by-case basis. Sometimes the order sought will simply require a search of documents held in relation to one company, but orders are often sought against multiple companies. Sometimes orders require searches to be made against named individuals. Not every registered agent will have the same document management system and searches may be easier or more time-consuming depending on the scale, nature and criteria of the disclosure sought.

26. Similarly, a registered agent's legal costs will vary on a case-by-case basis. The application may be straightforward with limited documentation, or it could be complicated with voluminous documentation. There may be substantive issues with the application which the registered agent may need to challenge. The registered agent may need advice on compliance with the order.

27. Without hearing from the registered agent, and only hearing from the applicant whose interest is in keeping those costs to a minimum, it will be difficult for the Court to reach any preliminary assessment of what the likely costs of compliance and of the application are likely to be.

28. For those reasons, in our respectful submission, costs capping orders should not be made, nor should the Court give an indication of the likely costs it anticipates seeing incurred without hearing from the registered agent first.”

3. The Applicant's position

[19] The Applicant supported the approach taken by the Court in relation to its *ex parte* order. The Applicant's position was stated thus:

“3. ...the First Respondent addresses the following issues:

- a. When is it appropriate for an applicant to seek Norwich Pharmacal relief without notice to the respondent?
 - b. When is it appropriate for an applicant to seek a "wrap-up" order (an *ex parte* seal and gag and Norwich Pharmacal order) against a BVI registered agent?
 - c. The entitlement of a respondent to a Norwich Pharmacal application to their costs of compliance and of the application; and
 - d. Whether it is proper for an applicant seeking Norwich Pharmacal relief, on an *ex parte* basis, to also seek an order limiting the total costs that may be recovered by the respondent for complying with the order?
4. These issues are addressed below.

Obtaining the Norwich Pharmacal Order on an *ex parte* basis

5. It is well established that a Norwich Pharmacal order is an injunction. (Per (Pereira JA) in **A,B,C,D v E** HCVAP 2011/001 (unreported, 19 September 2011) [...] and per Farara J in **An Applicant v A Respondent** BVIHCOM2019/0104 (unreported, 11 October 2019)-[...]). CPR 17.4 deals with applications for interim injunctions. CPR 17.4 (4) allows the court to deal with an application for an interim injunction without notice if it is satisfied that: (a) in a case of urgency no notice is possible; or (b) that to give notice would defeat the purpose of the application.

6. In **An Applicant v A Respondent**, Farara J (as he then was) explained that the procedure set out in CPR 17.4(4) is applicable to Norwich Pharmacal applications and that that rule is clear and mandatory [...]. Therefore an applicant for Norwich Pharmacal relief who seeks to proceed *ex parte* must comply with CPR 17 4(4), and must satisfy the judge, in accordance with sub-paragraphs (a) or (b) of that Rule that the Court is justified in proceeding without notice to the Respondent. Once the court is so satisfied, the matter ought to proceed without notice, unless there are special or peculiar aspects which would justify a court taking a two-step approach, such as that adopted by Jack J in **AAA v TTT** [...].

7. Farara J explained further that an applicant for an interim injunction without notice to the Respondent may adduce evidence which demonstrate arguably that the matter is either one of urgency and notice is not possible, or that to give notice to the respondent would defeat the purpose of the application.

8. He then considered whether the application for Norwich Pharmacal order which was before him ought to proceed without notice to the Respondent. He accepted that it was conceivable that an application for Norwich Pharmacal relief against a registered agent in the BVI might be one of genuine urgency. He however ruled out as unlikely, circumstances where it was not practical to give notice of the application to the registered agent. Therefore, since both limbs of CPR 17.4(4) (a) must be satisfied, the applicant could not rely on that limb to proceed *ex parte* [...]

9. In relation to the second limb of CPR17.4(4) (b), Farara J explained at paragraph 30 that [...]:

“...I accept, as a matter of practicality within this jurisdiction, that to give notice of an application for Norwich Pharmacal relief to the registered agent would likely defeat the purpose of the application. The reason for this is that registered agents, in the absence of a 'gagging' or non-disclosure order, would be obliged to inform their client of record for the company, the target of the application, and to provide the documents to them... The position may be different where the registered agent has resigned as such, and it does not consider itself bound or obligated to tip-off its previous client.”

10. Although the Applicant in that case did not directly address in its affidavit evidence or in written submissions the reasons for proceeding *ex parte*, Farara J nonetheless held that:

“...having regard to the nature of the relief sought in this matter, I accept that to give notice to the Defendant, in the absence of a 'gagging' or non-disclosure order, would defeat the purpose of the application, as the Defendant would be obliged to disclose the application and documents to its client of record. This is a matter of obvious practicality in the way registered agents function, not requiring much, if any, evidential basis. It is for this reason and this reason only, that I was satisfied to proceed with the application *ex parte* for Norwich pharmacal relief [...].”

11. In the present case, the Applicant included in his evidence and submissions reasons for applying for the Norwich Pharmacal order and the seal and gag order on an *ex parte* basis [...].

12. In any event, even if there was no such evidence, it is clear from the judgment of Farara J that given the nature of the application, the evidence of dishonesty and the risk of dissipation in the instant case, to give notice to the Respondents in the absence of the seal and gag order would defeat the purpose of the application as they would be obliged to disclose the application and documents to their clients of record.

13. It is therefore submitted that for the reasons articulated by Farara J at paragraph 33 of his judgment and the evidence filed herein, the Court, properly dealt with the application on an *ex parte* basis.

Wrap up Orders

14. The First Respondent criticizes the approach taken by this Honourable Court in granting both the seal and gag order and the Norwich Pharmacal order at the *ex parte* hearing - a wrap up order. It contends that the Court ought properly to have dealt with the application for the seal and gag order without notice and the application for Norwich Pharmacal relief on notice to the respondent – the two-step approach - for the following reasons:

(a) The registered agent is entitled to provide an input into the issue before an order is made;

(b) The registered agent has an interest as to the recovery of its legal and compliance costs;

(c) The registered agent should be allowed to provide their input on the timeline within which disclosure should be made;

(d) The registered agent may, or needs to raise an issue with the application, including as to the Court's jurisdiction to make the order.

15. The issue of whether a wrap up order is appropriate on an application for seal and gag order and for Norwich Pharmacal relief was considered by Jack J in **AAA v TTT** [...], Adderley J in **A v R (A Registered Agent)** [...] and Farara J in **An Applicant v A Respondent** [...].

16. In **AAA v TTT**, Jack J granted the seal and gag order *ex parte*. However, he refused to grant the Norwich Pharmacal relief *ex parte*, holding that the general rule is that a Court will not act without hearing both sides to a case unless there are exceptional circumstances and there were no such circumstances [...].

17. On the other hand in **A v R (A Registered Agent)** Adderley J held that the grant of the wrap up orders appeared to have worked well in this jurisdiction for the last decade or so in applications involving registered agents as respondents as there is no injustice and it achieves the overriding objective by reducing the number of hearings and adding efficiency [...].

18. In **An Applicant v A Respondent**, Farara J considered both decisions. He rejected the rationale given by Adderley J for granting the wrap up orders because the procedure in 17.4(4) governing applications without notice applies whether the respondent thereto is a registered agent or some other party and irrespective of the perceived impracticality, inconvenience or costs attendant to having two hearings - one without notice, and the other upon notice [...].

19. He however held that:

"I am not convinced that the Court ought to adopt, as a standard practice, the two-step process of making a non-disclosure order first, followed by an abridged *inter partes* hearing. While I am certain there are circumstances in which such an approach would be warranted, or even prudent, once an applicant has met the requirements under CPR17.4 (4) for proceeding without notice, a court ought to so proceed to hear and determine the application, unless there are good and substantial reasons not to do so." [...].

20. On the application before him, having found that the applicant had satisfied CPR17.4(4)(b) Farara J proceeded to determine both the application for the seal and gag order and the application for the Norwich Pharmacal order *ex parte* as there were no special or peculiar circumstances which would justify adopting the two-step approach.

21. It is apparent that once the Applicant has met the requirements of CPR 17.4 (4), the Court can proceed with the application for both the seal and gag order and the Norwich Pharmacal Order and grant a wrap up order unless there are good and substantial reasons

not to do so. No such reasons having been shown to exist in this case, the Court properly granted both the seal and gag order and the Norwich Pharmacal relief at the *ex parte* hearing.

22. The Norwich Pharmacal order made provision for the Respondents to apply to the Court on three clear days' notice first being given to the Applicant's legal practitioners, on any matters arising from the order and to apply to set aside or vary the order within 14 days of being served. The Respondents were therefore given the opportunity to apply to the court if there were any issues or matters which arose on the Order and which could not be resolved between the parties. The Respondents were therefore not prejudiced in any way by the grant of the Norwich Pharmacal Order *ex parte*.

23. The First Respondent relied on **National Commercial Bank Jamaica Limited v Olint Corp** ([2009] UKPC 16) [...] to contend that making orders against persons without notice to them is contrary to principles of natural justice and the circumstances in which they should be made are therefore limited. This is an acceptable principle. However, the Privy Council in that case explained that the limited circumstances included where giving notice would defeat the purpose of the injunction - the very reason which the Applicant in the instant case relied on in seeking the Norwich Pharmacal relief without notice to the Respondents.

24. It is submitted that "the wrap up order" approach which was taken by Farara J in **An Applicant v A Respondent** ought to be the standard practice in this jurisdiction unless there are exceptional circumstances or good and substantial reasons for not doing so.

The respondent's entitlement to costs of compliance and of the application

25. It is accepted that a respondent to a Norwich Pharmacal order is entitled to the reasonable costs of compliance and is usually entitled to the costs of the application to be assessed if not agreed. (**JSC BTA Bank v Fidelity Corporate Services Limited** [HCVAP 2010/035] [...]).

26. The Respondent is however not entitled to its costs of compliance on an indemnity basis. The question of whether a party may recover costs on an indemnity basis was considered by the Court of Appeal in the **Attorney General of Saint Christopher and Nevis & Anor. v Queensway Trustees Limited** (Civil Appeal No.15 of 2005 - Judgment delivered on December 3, 2007) [...]. Gordon JA held that unlike the Civil Procedure Rules of England which allows the court to assess costs on an indemnity basis, there is no such rule in our CPR [...].

27. In **Renova Industries Limited and Others v Emmerson International Corporation and Others** [...], Wallbank J dismissed an application for costs to be awarded on an indemnity basis. He found that:

"Whilst, in my respectful judgment, the Renova Parties ought to have their costs of the application, it cannot be on the indemnity basis. It is well established, following the line of authorities from our Court of Appeal decision in **The Attorney General of Saint Christopher and Nevis & Anor. v Queensway Trustees Limited** that our CPR do not permit the award of costs on that basis. Rather, as stated there in the

Court of Appeal by Justice of Appeal Gordon, the CPR retained provisions pertaining to assessed costs 'to preserve the court's inherent jurisdiction to so regulate its own procedure as to protect a litigant from being put upon by an over-bearing or oppressive opponent, or for the court to sanction its finding that the conduct of the litigation was deserving of moral condemnation'. 'Assessed costs' are the standard in the Commercial Court, per CPR 69B.11 and 12" [...]

28. In any event, even in the UK where costs can be granted on an indemnity basis, the case law reveals that the indemnity is not at large. It is limited to reasonable compliance costs.

29. The Respondents therefore cannot recover their compliance or legal costs on an indemnity basis.

Costs capping orders

30. At the *ex parte* hearing of the application for the seal and gag order and the Norwich Pharmacal order, the court made a costs capping order. Paragraph 12 of the Order dated 4 May 2023 provides that there shall be no order for costs, save that the Applicant pay each of the Respondents reasonable costs incurred in complying with the terms of this order such costs to be limited to US \$4,000.00, in the first instance.

31. The First Respondent contends that the cost capping order was inappropriate for the following reasons:

- a. The Court has an adequate means by which it can regulate the costs being incurred and claimed by registered agents who are respondents to Norwich Pharmacal applications as a registered agent is only entitled to its reasonable costs of compliance and any legal costs it incurs will be subject to assessment by the Court;
- b. The perceived risk of the incurring of disproportionate costs can be adequately controlled by the costs assessment process;
- c. CPR 65.14 sets out the relevant issues for the Court to consider when making a costs capping order. No consideration was given to those issues in the present case;
- d. The order should not have been made without first hearing from the registered agent.

32. CPR 65.14 allows the court with or without an application to make a costs capping order against all or any of the parties if:

- a. it is in the interests of justice to do so;
- b. there is a substantial risk that, without such an order, costs will be disproportionately incurred; and

c. it is not satisfied that the risk in sub-paragraph (b) can be adequately controlled by – (i) case management directions or orders made under Part 26; and (ii) detailed assessment of costs.

33. As to the exercise of that discretion the following cases are instructive:

a. **Smart v East Cheshire NHS Trust** (2003) 80 BMLR 175 [...];

b. **King v Telegraph Group Ltd (Practice Note)** [2005] 1 WLR 2282, CA [...];
and

c. **Knight v Beyond Properties Pty Ltd and others, Practice Note** [2007] 1WLR 62 5[...].

34. In the **Smart v East Cheshire NHS Trust**, an application was made for a costs capping order in the context of an inquiry as to damages in a clinical negligence case. Gage J considered whether a test of exceptional circumstances should apply before the jurisdiction is invoked. He held it should not and said that: “Having considered all these factors my conclusion is that whilst each case must be dealt with on its own facts the test for the court when exercising its discretion on whether to make a costs cap order is closer to that proposed by Mr Moran QC than that proposed. In my judgment, the court should only consider making a costs cap order in such cases where the applicant shows by evidence that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred; and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial; and it is just to make such an order. It seems to me that it is unnecessary to ascribe to such a test the general heading of exceptional circumstances. I would expect that in the run of ordinary actions it will be rare for this test to be satisfied but it is impossible to predict all the circumstances in which it may be said to arise.” [...]

35. At paragraph 18 of his judgment Gage J explained the benefit of a costs cap order: “In my judgment costs cap orders can have a significantly beneficial effect in keeping costs within bounds and concentrating minds on keeping costs proportionate throughout the litigation. I am also of the opinion that if there is a provision in a costs cap order for the order to be reviewed in certain circumstances as well as a general liberty to apply the dangers arising from a cap being set too low can be avoided. I see nothing impracticable in allowing either side to apply where unforeseen circumstances have meant one or other side incurring unforeseen costs; or where the cap is so low that further necessary costs cannot be incurred without breaching it.” [...]

36. In **King v Telegraph Group Ltd**, defamation proceedings were initiated under a conditional fee agreement without “after the event” insurance coverage. Brook LJ appeared to accept that the Claimant’s lawyers were running their case in an extravagant manner

which would likely increase the costs (an uplift of as much as 100%) which the defendant may have to pay the claimant.

37. In considering whether to make a costs capping order Brook LJ stated that:

“There are three main weapons available to a party who is concerned about extravagant conduct by the other side, or the risk of such extravagance. The first is a prospective costs capping order of the type I have discussed in this judgment. The second is a retrospective assessment of costs conducted toughly in accordance with the CPR principles. The third is a wasted costs order against the other party’s lawyers, but this is not the time or place to discuss the occasions when that would be the appropriate weapon. In my judgment recourse to first of these weapons should be the court’s first response when a concern is raised by defendants of the type to which this part of this judgment I addressed. The service of an over-heavy estimate of costs with the response to the allocation questionnaire may well trigger off the need for such a step to be taken in future.” [...]

38. In **Knight v Beyond Properties Pty Ltd**, an intellectual property action, the defendants applied for a costs capping order against the claimant who instructed lawyers under a conditional fee agreement without “after the event” insurance cover for the costs he would have to pay the defendants if he were unsuccessful.

39. Mann J in that case considered the principles set out by Gage J in **Smart v East Cheshire NHS Trust** and Brookes J in **King v Telegraph Group Ltd** and observed that there appears to be a potential conflict between Gage J’s principles and those of Brooke LJ as the latter regarded the costs capping order as being a weapon to be deployed rather than the tough post-trial assessment, whereas Gage J considered that a costs capping order should only be used if the post-trial assessment was not a satisfactory solution [...].

40. After considering the principles in both cases, Mann J determined that the guidelines set out by Gage J in **Smart v East Cheshire NHS Trust** were more apt to the case before him. At paragraph 14, he explained that:

“I do not consider that I should find that Brooke LJ was impliedly overruling it or (perhaps a more accurate metaphor) indicating that the general game had moved on. Brooke LJ’s remarks were uttered in the particular context of a defamation action, and on the basis that such actions potentially gave rise to special features, and it is plain from the extracts that I have referred to above that his remarks about the order of deployment of weapons were uttered in that context. I do not consider that he was laying down wider principles applicable to all litigation in para 106. I consider Gage J’s indication that costs capping should be done if the normal post-trial costs assessment would or might not achieve justice (my paraphrase) to be important, and a guideline that is applicable to me in this case. It is something that must not be lost sight of. It is the normal role of the costs judge filter out the sort of extravagant costs which have in fact, in some cases, led to the making of a costs capping order. One should continue to expect them to be able to do that.” [...].

41. In applying Gage J guidelines to the facts of the case, Mann J held that: "Capping costs in advance does indeed involve a degree of speculation which, though it can be carried out when necessary (just as the courts have to assess proper sums for the purposes of security for costs applications) is not easy and has its dangers. The consequences of getting it wrong are in fact more serious than getting the sum wrong in a security application because costs outside the cap are irrecoverable. Costs outside the amount of the security remain recoverable. It is only a partial answer to say that insufficiencies can be dealt with under a liberty to apply. It is possible to remedy insufficiencies at that stage, but it is likely to increase costs if it has to happen ... and to require a party to explain and justify its future conduct in the litigation to the counter-party, which it would not normally wish or be required to do. If such matters can properly, fairly and reliably be left to detailed assessment post-trial then, on the whole, they should be. Retrospective judgments about such things are likely to be more reliable than prospective judgments." [...]

42. CPR 65.14 allows the court (with or without application) to make costs capping orders if it finds that there is a substantial risk that without a costs capping order, costs will be disproportionately incurred, that that risk cannot be adequately controlled by case management directions and/or detailed assessment of costs and it is in the interest of justice to do so.

43. The applicable principles in the exercise of that discretion as gleaned from the above cases are summarized below:

- a. Once the test is satisfied, there is no need to prove exceptional circumstances;
- b. It is the normal role of a judge carrying out detailed assessment after trial/hearing to filter out the sort of extravagant costs which have in fact, in some cases, led to the making of a costs capping order. One should continue to expect them to be able to do that;
- c. Capping costs in advance involves a degree of speculation which, is not easy and has its dangers. The consequences of getting it wrong are serious because costs outside the cap are irrecoverable.
- d. The dangers arising from a cap being set too low can be avoided, if there is a provision in the costs cap order for the order to be reviewed in certain circumstances as well as a general liberty to apply;
- e. An application to vary or increase the cap is likely to increase costs if it has to happen;
- f. If costs can properly, fairly and reliably be left to detailed assessment post-trial then they should be. Retrospective judgments about such things are likely to be more reliable than prospective judgments;

g. Each case must be dealt with on its own facts.”

4. DISCUSSION

4.1 Norwich Pharmacal orders – BVI context and trends

[20] It is instructive to relate the context of Norwich Pharmacal orders in the BVI. I will dwell here upon generalities – exceptional circumstances can and do occur which fall outside the norm.

[21] First, the number of Norwich Pharmacal applications brought in this Court is considerable. Norwich Pharmacal applications are an every-day feature of the legal and corporate service landscape in the BVI. In the past four years, by my count, I have dealt with some 25 Norwich Pharmacal applications, which is just over 6 a year on average. My brother or sister Judge on the same Bench will have a similar tally. If one were to compare this with the number of companies incorporated in the BVI which could be targets for Norwich Pharmacal relief (370,595, as at September 2023, as recorded in the most recent BVI FSC Statistical Bulletin, for the third quarter of 2023¹), this is a miniscule proportion,² but in terms of the work of the Court it represents, Norwich Pharmacal applications amount to regular work for the Court.

[22] Secondly, in the vast majority of cases Norwich Pharmacal applications are brought against corporate service providers that supply registered agency services for companies incorporated in the BVI. In most cases it is the current registered agent that is made a respondent. In a minority of cases a former registered agent might also be named as a respondent.

[23] Very rarely – i.e., almost never – are Norwich Pharmacal orders brought here against banks. This is significant, because Norwich Pharmacal applications against banks come with their own difficult issues: such as where accounts might be jointly held or controlled by an alleged wrongdoer and an

¹ Vol. 72, on page 2.

² Which is perhaps testimony to the overwhelmingly legitimate use of BVI Business Companies as opposed to as instruments of fraud.

innocent person, or where a bank provides a range of financial services to a client, or group, such that the interests of a wide and sometimes unconnected range of persons can be affected by a disclosure order. In such a case, it might be difficult to craft a disclosure order which is wide enough to be useful but not so wide as to invade the privacy of innocent persons. Similarly, in the case of a bank, it might be by no means clear that it is 'mixed up' in wrongdoing at all, as even wrongdoers may have legitimate businesses and domestic needs serviced by the bank. It is, I suggest, generally plain that in such cases the interests of justice would normally be served by the Court hearing the bank before making a particular Norwich Pharmacal order.

- [24] Depending upon the circumstances of each case, these considerations may also apply to corporate service providers such as registered agents. Where, though, there is reason to believe that a suspected wrongdoer is availing himself of offshore companies with no apparent purpose other than to put away assets to frustrate enforcement by creditors, it will usually be sufficiently probable that the registered agent is 'mixed up' in that such wrongdoing and apparent that the other requirements for the grant of Norwich Pharmacal relief are satisfied.
- [25] Thirdly, by contrast with Norwich Pharmacal applications against banks, in the vast majority of cases a Norwich Pharmacal application seeks an order requiring a registered agent to reveal the identity of the person or persons who beneficially and legally own and/or control a company. Thus, the basic information usually sought comprises membership and director registers, client of record and KYC information, and information as to who pays the registered agent's fees and expenses.
- [26] Although Norwich Pharmacal applications generally seek an order for disclosure of asset and transactional information, there is no requirement for a BVI registered agent to be provided with such information, so generally (unless the company's centre of main economic interest is in the BVI) the registered agent does not have any such information to disclose.
- [27] Fourthly, because of the limited nature of the information that a BVI registered agent can produce, a standard list of documents sought and ordered has developed. Typically (and the Court takes some care to ensure this), such lists are clearly expressed, in plain English, so that even the most junior

executives in BVI corporate service providers' offices should be capable of understanding what the registered agent is required to produce.

- [28] Fifthly, because of the number of Norwich Pharmacal applications dealt with by the Court, and the standard nature of the disclosure sought and ordered, it has been possible for the Court to obtain an informed sense of the costs a registered agent generally incurs in dealing with a Norwich Pharmacal order and application served on it, including to disclose the standard information sought. Typically, the figure is currently around US\$2,000 to US\$3,000 per company. Sometimes it is more; occasionally it is less.
- [29] Sixthly, because the registered agent is usually 'mixed-up' in the suspected wrongdoing to the extent only of providing registered agency services without becoming involved in managing the day-to-day affairs of the companies concerned, the registered agent will usually not be able to offer any view on whether the conditions for making a Norwich Pharmacal order are met. In that regard, in practice, the debate (such as it might be) on that part of the matter is between the applicant and the Court.
- [30] Seventhly, within the last couple of years, it is becoming increasingly common to see Norwich Pharmacal applications 'settle'. Such 'settlements' generally occur in one of two ways:
- (1) Where a seal and gag application has been filed prior to the service of a Fixed Date Claim Form or Originating Application, upon the Court making the seal and gag order and upon service of the proceedings on the respondent, the respondent comes to an agreement with the applicant on the terms of the Norwich Pharmacal order, subject to the Court being satisfied that the criteria for granting Norwich Pharmacal relief are satisfied. In most cases, no hearing takes place at all under such a scenario, because the seal and gag application is commonly determined upon the papers, and it is obvious that Norwich Pharmacal relief is appropriate.
 - (2) Where an *ex parte* Norwich Pharmacal and seal and gag order are served upon the respondent, the respondent frequently reaches agreement with the applicant on such issues as the respondent can realistically have an interest in, such as the scope of disclosure, the

timescale, and costs. In such a case only one Court hearing usually takes place (the *ex parte* hearing), with a return date hearing being obviated by agreement.

- [31] Such agreements are a responsible approach to litigation. It is reflective of the fact that a respondent to a Norwich Pharmacal application, who is innocently 'mixed up' in suspected wrongdoing, has no partisan stake in the outcome of the applicant's inquiries and the applicant's intended further litigation. As recognised in the English Court of Appeal case **Totalise plc v Motley Fool Ltd**,³ 'Norwich Pharmacal applications are not ordinary adversarial proceedings, ...'. Also, at a practical level, such agreement obviates the need for the parties to incur the costs of a further court hearing.
- [32] This latter consideration – the obviation of further costs – has a particular pertinence in the BVI Commercial Court. Unlike in other Divisions of the Eastern Caribbean Supreme Court where essentially token 'prescribed costs' apply, in most litigation before the BVI Commercial Court, costs orders are made that reflect the actual (but reasonable) legal costs incurred. Such litigation before the BVI Commercial Court is also generally high value (i.e. in multi-million or billion United States Dollar terms), such that the parties often – entirely reasonably - spare no expense and care in putting their cases in the most persuasive way possible. This generally means that parties hire the most competent legal practitioners locally and internationally available. That itself has generated a relatively large, generally high quality, and justifiably lucrative legal industry in the BVI. The hourly rates charged by BVI Commercial Court legal practitioners are often equivalent to, and sometimes surpass, the rates leading international law firms charge in the City of London or New York. Even a short hearing of 30 minutes, with preparation time included (it should be stressed), typically causes a party to incur between US\$10,000 and US\$15,000 in legal practitioners' time costs. The costs of the hearing itself are only the tip of the iceberg. Thus, one can see the good – and responsible – sense of parties who are technically opponents, but who are not opponents in an adversarial sense, agreeing terms of an order to resolve issues between them without requiring a further hearing or further litigation.
- [33] This trend towards standardisation and settlement of Norwich Pharmacal relief, in the interests of obviating unnecessary legal costs, is not unique. A similar trend has been developing in the BVI in

³ [2001] EWCA Civ 1897 at paragraph 29 (Aldous LJ).

other areas that do not constitute 'ordinary adversarial proceedings', in particular company restorations. It is increasingly common to see an applicant for company restoration agree terms with the respondent to such applications, who is the Registrar of Corporate Affairs, provided the Court is satisfied restoration of the company concerned is appropriate. This, again, reflects the fact that a great many company restorations are entirely standard in every aspect, do not require to be belaboured as if it were the first of its kind ever to come before the Court, and simply do not need a Court hearing – without compromising the Court's purview to ensure that orders are properly made.

- [34] I have gone into some detail to explain the context in the BVI within which Norwich Pharmacal orders are sought and made, to give an insight into local dynamics. These inform both the issues before the Court now – the use of seal and gag orders (i.e., whether they should be applied for separately or 'wrapped up' with Norwich Pharmacal orders) and interim cost caps.

4.2 Use of 'wrap-up orders'.

- [35] In this jurisdiction, as in others, an avid debate has arisen over the question whether or not an application which contains both an application for a seal and gag order and for Norwich Pharmacal relief should be determined at a single *ex parte* hearing or whether the seal and gag part of the application should be determined first, and then, if the seal and gag has been granted, whether the Court should require the Norwich Pharmacal part of the application to proceed on an *inter partes* basis.
- [36] The focus of the debate has naturally been on derogation from the principle of fundamental justice or equity or natural justice of '*audi alteram partem*' – 'hear the other side' – (or *audiatur et altera pars* - 'the other side too is to be heard') before the Court makes an order that affects him.
- [37] That principle itself, of course, is not an inflexible rule, but a general rule that admits of exceptions. The very existence of *ex parte* procedures attests to that. Speaking of the determination of interlocutory applications in general, CPR 11.8 (1) in both the 2000 and 2023 editions of the CPR provides that '[t]he general rule is that the applicant must give notice of the application to each respondent.' CPR 11.8(2) in both editions qualifies this general rule by providing that '[a]n applicant

may make an application without giving notice if this is permitted by a – (a) practice direction; or (b) rule.’

[38] Because the principle of ‘*audi alteram partem*’ is so important, the laws of procedure, including primordially the CPR, carefully circumscribe the circumstances in which that principle may be departed from by means of *ex parte* proceedings. In the CPR (2023 revision), CPR 17.3 (3) provides that ‘[t]he court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.’ CPR 17.3(4) goes on to provide that ‘[t]he evidence in support of an application made without giving notice must state the reasons why notice has not been given.’ Identical provisions were made in the 2000 edition of the CPR, at CPR17.3(2) and (3).

[39] The CPR stipulate safeguards where the Court makes an *ex parte* order. CPR 17.4(4) in both the 2000 and 2023 editions provides that:

“The court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these rules permits a longer period) if it is satisfied that –

- (a) in a case of urgency no notice is possible; or
- (b) that to give notice would defeat the purpose of the application.’

[40] A further safeguard is provided for by CPR 11.19 (in the 2023 revision; 11.16 in the 2000 edition), which stipulates that:

“1. A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.

2. A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.

3. An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.”

[41] The power of the Court to make seal and gag orders, and Norwich Pharmacal orders, derives from section 24 of The Eastern Caribbean Supreme Court (Virgin Islands) Act⁴ (as amended) (‘the Supreme Court Act’). By that section, the Court is empowered to grant injunctive orders and orders

⁴ Cap. 80.

of mandamus when it appears to the Court or Judge to be just or convenient. CPR 17.1(1)(b) in both the 2000 and 2023 editions of the CPR supplement this with a procedural rule that '[t]he court may grant interim remedies including – b. an interim injunction'.

[42] It is well settled in this jurisdiction that Norwich Pharmacal orders are a form of injunction.⁵

[43] A further question arises whether Norwich Pharmacal orders are a form of interim relief or a final remedy. This question is important, because if they are to be considered as a form of final remedy then they would fall outside the scope of CPR 17, which deals with 'Interim Remedies'. If they fall outside the scope of CPR 17, then an application for Norwich Pharmacal relief would in principle (at least arguably) have had to be brought by a Claim Form pursuant to CPR 8 for determination on an *inter partes* basis where the 2000 edition of the CPR applied. Pursuant to the 2023 edition of the CPR, at CPR 8.1(6)(c), there is now an express provision that:

“A person who seeks a remedy –
(a) before proceedings have been started;
(b) in relation to proceedings which are taking place, or will take place, in another jurisdiction;
(c) by an application for disclosure orders against a non-party (also known as Norwich Pharmacal Orders); or
(d) ...,
must seek that remedy by an application under Part 11.”

CPR 11 provides general rules concerning applications for court orders. Thus, Norwich Pharmacal orders may now not be sought by way of Claim Form but by way of a Notice of Application, in line with other types of applications for interlocutory and/or interim relief.

[44] The answer to the question whether Norwich Pharmacal orders are a form of interim relief is also supplied by section 24A of the Supreme Court Act, which was enacted on 31st December 2020 and Gazetted on 7th January 2021. Section 24(1) provides:

“24A. (1) The High Court or a judge thereof may grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction.”

⁵ A,B,C,D v E HCVAP 2011/001 (unreported, delivered 19 September 2011) at paragraph 17 (Pereira JA) and Broad Idea International Ltd v Convoy Collateral Ltd [2021] UKPC 24 at paragraph 48 (Lord Leggatt).

- [45] Section 24A. (4) provides:
- “(4) In this section “interim relief”, includes any relief which the High Court or a judge thereof has power to grant in proceedings relating to matters within its jurisdiction, as well as, an order against a non-cause of action defendant.”
- [46] Section 24A. (5) addresses certain aspects relating to Norwich Pharmacal orders, by which it is clear that such orders fall within the types of relief covered by this section.
- [47] The choice of the word ‘interim’ in Section 24A cannot be presumed to be fortuitous. It is the same as that used in CPR 17, which addresses ‘interim remedies’.
- [48] Moreover, it has been decided at the highest level that an injunction sought in this jurisdiction to support proceedings, or anticipated proceedings, for final relief in another jurisdiction should be treated as ‘interlocutory’, even though there is or will be no claim brought for final relief in this jurisdiction, and that such injunctive relief includes claims for Norwich Pharmacal relief: see the Privy Council case of **Broad Idea International Ltd v Convoy Collateral Ltd**.⁶ Section 24A of the Supreme Court Act replicates this part of the Privy Council’s Opinion in that case.
- [49] What I take from this is that a Norwich Pharmacal application is to be treated as an application for an interim remedy to which CPR 17 applies. An applicant should file an ordinary application under CPR 11 and 17, using Form 6.
- [50] As from 15th January 2024, the procedural requirements of CPR 17 have been supplemented by a Practice Direction, ‘Practice Direction 17, No. 4 of 2023, Procedure for Applying to the Court for an Interim Order’. This Practice Direction includes the procedure to be used for applying on a *ex parte* basis and when this is appropriate.
- [51] Seal and gag orders are simultaneously prohibitive and compulsive, thus falling broadly speaking within the terms ‘injunction’ and ‘orders of mandamus’ used in section 24 of the Supreme Court Act.⁷

⁶ [2021] UKPC 24 at paragraphs 77, 78 and 48 (Lord Leggatt, expressing the opinion of the majority).

⁷ This is not the place to analyse the extent to which seal and gag orders meet the characteristics of an ‘injunction’ or an ‘order of mandamus’ or are an anomalous category.

When used in conjunction with Norwich Pharmacal orders, they constitute a form of ancillary relief, in order to render the Norwich Pharmacal relief effective. Once Norwich Pharmacal relief has been exhausted, the utility of a seal and gag order also ceases, and the legal position should, as a matter of principle, revert to the Norwich Pharmacal respondent resuming his duty (such as it might previously have been) to communicate matters concerning his customer's business to his customer. Thus, a seal and gag order ought in principle to make provision for its expiry or termination and not left to run indefinitely. Equally, where an *ex parte* seal and gag order is made, it is to be treated as an 'interim injunction' for the purposes of CPR 17 prior to its return date.

- [52] As an ancillary order, a seal and gag order is peculiar, in that a seal and gag order is a free-standing form of relief which can be made before, or it can be made at the same time, as the Norwich Pharmacal order. In this regard, seal and gag orders differ from other, more standard ancillary orders, such as asset disclosure orders made ancillary to freezing orders, which are typically granted at the same time, or after, the freezing order itself. I have not (thus far, at least) encountered an asset disclosure order being sought and made before a freezing order.
- [53] Seal and gag orders prevent access to the Court file of the matter for ordinary members of the public and prevent the respondent from communicating with his client or customer about the disclosure application. Thus, it should be clear that seal and gag orders themselves are exceptional and draconian orders, because they interfere with the public's right to open justice, and they prevent a service provider from fulfilling his reporting obligations to his client. Seal and gag orders are in practice made on an *ex parte* basis. Whilst that may not necessarily always be the case, it is difficult to conceive of instances where such an order would be made, or considered, on an *inter partes* basis.
- [54] In this jurisdiction, there are relatively few written judgments on the controversy over the use of 'wrap-up orders'. The parties here appear to have referred to all of the published written judgments, and they are decisions of this Court. There are some three written by Justice Jack,⁸ all of which favour the so-called two-step approach, of dealing first and separately with the seal and gag part of the

⁸ AAA v TTT BVIHCM2019/0066 (unreported, delivered 21 May 2019), EGE HLM v Nerine Trust Co Ltd and Trident Trust Co Ltd BVIHCM2021/68 (unreported, delivered 15 April 2021), and Federal Republic of Nigeria et.al v Nerine Trust Co (BVI) and another BVIHCM2021/0068 (unreported, delivered 27 July 2021).

application on an *ex parte* basis, and then the Norwich Pharmacal part of the application on an *inter partes* basis. Then there is a decision by Justice Adderley,⁹ and a decision by Justice Farara.¹⁰ Both Justices Adderley and Farara supported a ‘wrap-up’ approach, determining, at a single hearing, both parts of the application on an *ex parte* basis.

- [55] The controversy has not been limited to those few cases. Norwich Pharmacal applications appear with some regularity in our Court Lists, as I have mentioned above, and the question has sometimes been raised on those occasions, without the Court considering it necessary to write a judgment.
- [56] It should be recalled that it is not only urgency which justifies proceeding *ex parte*. The Court may proceed to determine an application on an *ex parte* basis, but only if the Court is satisfied that ‘(a) in a case of urgency no notice is possible; **or (b) that to give notice would defeat the purpose of the application**’.¹¹ (Emphasis added.)
- [57] The approach of both Justice Adderley in **A v R (A Registered Agent)** and Justice Farara in **An Applicant v A Respondent** was to take the *ex parte* application before the Court (i.e. for both the seal and gag order and Norwich Pharmacal relief) and deal with it in its entirety at the first hearing where sufficient grounds for proceeding *ex parte* are present.
- [58] This begs the question whether this approach contravenes the provisions of the CPR. The answer must be ‘no’. When an application for Norwich Pharmacal relief is made, it would generally defeat the purpose of the application to give notice of it to the respondent, even if urgency is not present. It would be no exaggeration to say that, for that reason, in almost all cases an application for Norwich Pharmacal relief against a current BVI registered agent inherently and obviously (i.e. without requiring evidence to establish this) satisfies the CPR requirements for proceeding on an *ex parte* basis.

⁹ A v R (A Registered Agent) BVIHCM2019/0079 (unreported, delivered 30 July 2019).

¹⁰ An Applicant v A Respondent BVIHCOM2019/0104 (unreported, delivered 11 October 2019).

¹¹ CPR 17.4(4) in both 2000 and 2023 editions.

[59] The First Respondent relies upon **National Commercial Bank Jamaica Limited v Olint Corp. Limited**,¹² ('**Olint**') to support an argument that Norwich Pharmacal applications should not be brought on an *ex parte* basis where there is no urgency. **Olint** is a decision of the Privy Council and thus binding upon this Court. In the passage cited by the First Respondent, the First Respondent omitted the first sentence from the first paragraph it referred to, and it omitted to mention the context in which the Board of the Privy Council had made its (entirely uncontroversial and indeed well settled) observations. The entire first paragraph it referred to reads as follows:

"13. First, there appears to have been no reason why the application for an injunction should have been made *ex parte*, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, *audi alteram partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

[60] The Board concluded its statement of principle with the following, in paragraph 15, which the First Respondent also did not quote:

"15. These cases appear to show a disregard of rule 17.4(4) for which no justification is offered. If the rule is not generally enforced, plaintiffs will be encouraged to make a tactical use of the legal process which should not be allowed."

[61] The context of **Olint** was that the applicant had applied on an *ex parte* basis for an injunction to stop its bank closing Olint's account with that bank, in circumstances where the parties had already been corresponding about the bank's decision to close the account. The applicant had been given considerable notice that the bank intended to close the account on a certain date, but the applicant waited until three calendar days before that date to file its *ex parte* application for an injunction. Clearly, such urgency as there was had been of the applicant's own making. Clearly, also, the type

¹² [2009] UKPC 16 (Lord Hoffmann).

of injunction sought could have been brought on an *inter partes* basis, as there was no suggestion that the bank would steal a march on the applicant. **Olint** was not a case involving a Norwich Pharmacal application, which, when brought against a current BVI registered agent, almost always must be kept secret from the registered agent's customer. That is an important distinguishing factor, because proceeding on an *ex parte* basis with a Norwich Pharmacal application almost always **does** have regard to our equivalent of rule 17.4(4) (also 17.4(4) in both the 2000 and 2023 editions of the CPR) as the Privy Council admonished in paragraph 15 – it is precisely by that rule that a Norwich Pharmacal application is possible to be brought and to proceed on an *ex parte* basis.

[62] **Olint** is therefore of limited assistance to the First Respondent. At a broad level, the material headline points that it enunciates are that:

- (1) in the context of *ex parte* injunctions, 'urgency' means 'literally no time to give notice';¹³
- (2) where an application for an injunction can be brought on notice, it should be brought on notice, with even short notice being 'better' than no notice; and
- (3) the judge who hears such an application for an injunction which disregards CPR 17.4(4) should not 'entertain' it.

[63] What cannot be derived from **Olint** is that it is so wrong for a Norwich Pharmacal applicant to bring his application on an *ex parte* basis that the Court should refuse to hear it, or for that reason to refuse it, or to strike it out as an abuse of process.

[64] That does not mean that the Court can shut out from its mind the principle of *audi alteram partem* when dealing with a Norwich Pharmacal application brought on an *ex parte* basis.

[65] Upon dealing with a Norwich Pharmacal application on an *ex parte* basis, the Court should take care to further the overriding objective of dealing with cases justly¹⁴ by crafting an order which (a) accords the respondent a reasonable opportunity to be heard on all aspects of the application should he so wish and (b) which saves expense. That might be by deploying case management powers to put the conditions in place under which the application for the main relief sought can proceed on an *inter*

¹³ Cf Practice Direction 17, No. 4 of 2023, Procedure for Applying to the Court for an Interim Order at 1.2.

¹⁴ CPR 1.1(2) in both 2000 and 2023 editions.

partes basis or by way of a tailored *ex parte* order which orders disclosure upon the most fair terms. The Court has a broad discretion in this regard.

- [66] Whilst proceeding in an *ex parte* manner does not contravene the provisions of the CPR, it is a fair question to ask whether there is a better way of proceeding; 'better' in the sense of one which also satisfies the fundamental principle of *audi alteram partem* before the main part of the application, for Norwich Pharmacal relief, is determined.
- [67] The CPR envisage that proceeding on an *ex parte* basis is an exception to a general rule that applications are to be determined on an *inter partes* basis. It is important that the Court should take care that an exception does not become the rule; nor that the principle of *audi alteram partem* becomes routinely observed in the breach. This is so, particularly where there is a way in which applications such as Norwich Pharmacal applications can be heard *inter partes*, thus observing and applying the principle of *audi alteram partem*. By changing the way of doing things, over time the manner in which principles are perceived also changes. This dynamic holds true in the legal world as it does in other walks of life. In our present context, proceeding ordinarily on an *ex parte* basis when it is possible to proceed on an *inter partes* basis risks bringing about a paradigm shift: from a starting point in which a respondent's right to a fair hearing before his legal position is altered is treated as a fundamental principle which ought, where possible, be applied, to one in which the respondent's legal position is altered at the behest of the state with the respondent then having the burden of persuading the Court that a different, or no, order should be made. There is, in this, a short slippery slope from a legal system which respects the fundamental rights and freedoms of the individual to a dictatorship in which the state purports to know best.
- [68] Proceeding in a manner which applies the fundamental principle of *audi alteram partem* not only upholds this principle, but it is also 'better' than proceeding on an *ex parte* basis for a number of practical reasons. Our legal system, which forms part of the English Common Law adversarial legal system, recognises that a respondent is generally best placed to know how his interests are to be served, and to articulate this. Experience also shows that the most serious errors a Judge falls into usually occur at an *ex parte* hearing – precisely because the Judge has not had the benefit of the other side's evidence or argument.

- [69] Justice Jack was not alone in being of the view that a better way is for the Court to determine the seal and gag part of the application first, and then to hear the Norwich Pharmacal part of the application, perhaps on short notice to the respondent. This has been recognised in numerous English Common Law based jurisdictions. For instance, the two-step approach has, so I understand, been adopted in Hong Kong as the appropriate manner of proceeding as in **Asiya Asset Management (Cayman) Ltd v Dipper Trading Co Ltd**,¹⁵ a first instance case concerning Norwich Pharmacal relief being sought against a bank.
- [70] Upholding the *audi alteram partem* principle is however not the only burning issue. Another concerns costs. Clearly, it is in the interests of an applicant to avoid a multiplication of hearings in respect of which he would (a) have to incur legal costs and fees for his own legal representation; and (b) in principle have to indemnify the respondent for the respondent's costs of dealing with the application and complying with any order made. At the same time, the respondent often has an interest in being able to obtain adequate legal representation, which of course costs money.
- [71] With the two-step approach, one hearing can in most cases be obviated by the applicant requesting the Court to determine the seal and gag application upon the papers. It would only be in rare cases that the Court would see that there is some aspect affecting that application warranting an oral hearing. Similarly, it would generally only be in clear cases of one or more of the three¹⁶ conditions¹⁷ for the grant of a Norwich Pharmacal order being unsatisfied that a seal and gag order would be refused on the papers.
- [72] Once the seal and gag order is made, the Norwich Pharmacal application can in theory be determined at a single *inter partes* hearing if sufficient evidence is before the Court. That, however, leaves the applicant vulnerable to an unpredictable costs liability. In the context of BVI Commercial Court litigation, such costs can be substantial.

¹⁵ [2019] HKCFI 1090 (delivered 24 April 2019).

¹⁶ In fact, four conditions, since the third condition has two parts.

¹⁷ Cf. *Mitsui & Co v Nexen Petroleum* (2005) 3 All ER 511.

- [73] If (as is indeed the case), Norwich Pharmacal applications are anomalous in that they are not 'ordinary adversarial litigation',¹⁸ they are also anomalous in that they confront the applicant with such an unknown eventual costs liability. It is well settled that 'the full costs of the application and any expense incurred in providing the information would have to be borne by the applicant', *per* Lord Reid in **Norwich Pharmacal Co v Customs and Excise Commissioners**¹⁹ and that this obligation upon the applicant is qualified by reasonableness.²⁰
- [74] As in any litigation, the applicant and respondent can each reach an understanding with their own respective lawyers on how much their own lawyers are entitled to charge. Those understandings are a matter of contract. But there is no contract between a respondent and the applicant, and no duty of accountability or transparency owed by a respondent to an applicant prior to the making of a Norwich Pharmacal order. The only inherent constraint upon the respondent from running up a large bill for legal costs is that the applicant is liable to reimburse only the respondent's reasonable costs. 'Reasonableness', though, is an extremely flexible concept and one Judge's view can differ greatly on this from another without either of them being 'wrong'.
- [75] Where a Norwich Pharmacal application proceeds on an *ex parte* basis, an order can be put in place which prevents unpleasant surprises in this regard and saving the costs and time of further litigation about costs. I will deal in more detail with this in the segment of the Judgment on interim cost capping orders. Where a Norwich Pharmacal application is brought on an *inter partes* basis, no such restriction is generally in place. Indeed, I do not recall having come across an application for a seal and gag order which seeks to impose an initial costs cap and I do not know if it can be done. Where prevention is not possible, the focus must then be on cure.
- [76] It is of course a common idiom to say that prevention is better than cure. In that respect, proceeding with a Norwich Pharmacal application on an *ex parte* basis is 'better' than proceeding on an *inter partes* basis. That said, as Justice Farara observed in **An Applicant v A Respondent**.²¹

¹⁸ *Totalise plc v Motley Fool Ltd* [2001] EWCA Civ 1897 at paragraph 29 (Aldous LJ).

¹⁹ ([1974] AC 133 at 176.

²⁰ Cf e.g. *Cartier International AG and others v British Telecommunications plc and another* [2018] UKSC 28 at paragraphs [36] and [39] (Lord Sumption).

²¹ At paragraph 26.

“...the procedure in 17.4(4) governing applications without notice applies whether the respondent thereto is a registered agent or some other party. Furthermore, it applies irrespective of the perceived impracticality, inconvenience or costs attendant to having two hearings, one without notice, and the other upon notice. It also applies notwithstanding the quite sensible provisions of CPR 11.16(2), which applies to all orders obtained on a without notice application. Moreover, considerations of the overriding objective at CPR 1.1(2) for a court to deal with matters justly cannot override the mandatory provisions of CPR 17.4(4). Indeed, it may be said that the requirements of CPR 17.4(4) are there to ensure that applications for interim relief are dealt with justly, and a respondent is not unfairly treated by having the order made without notice to him, in circumstances where to do so is clearly not justified.”

- [77] Justice Farara is here observing that the CPR impose certain measures, such as a reasonably short return date period and liberty for the respondent to apply to vary or discharge an *ex parte* order, to make sure that the respondent has an opportunity to be heard. In other words, an after-the-event effort has to be deployed to satisfy, so far as it can still be done, the principle of *audi alteram partem*.
- [78] Where a Norwich Pharmacal application proceeds on an *inter partes* basis, a different form of after-the-event effort may be needed to achieve fairness, namely assessment of the respondent's reasonably recoverable costs.
- [79] To take Justice Farara's observations a step further, the sense of the CPR is to prefer the principle of *audi alteram partem* to be applied to its fullest extent in the first place, even if it means the level of costs an applicant will have to meet needs to be tempered after the event (rather than to derogate from that principle in order to preserve an applicant from an eventual exposure to excessive costs).
- [80] When it comes to a costs assessment, whilst each case should of course be addressed on its facts, robust costs assessment orders can be applied to relieve an applicant from having to meet unreasonably high legal costs incurred by a respondent, including robust orders dealing with the (often considerable) costs of costs assessments.
- [81] By 'robust', I mean orders which take full cognizance of the fact that (as I have outlined above) in the specific BVI context, the Norwich Pharmacal jurisdiction is a mature, established and prominent part of the legal and corporate service landscape and is well known. The degree of research, advice and legal work that it was reasonable in the early years of the remedy to incur should no longer be

necessary. Whilst necessity is not the criterion for reasonableness, it is less likely for costs to be reasonably incurred where they are unnecessary.

[82] Norwich Pharmacal proceedings are also not ordinary adversarial proceedings.²² With registered agent respondents taking a neutral stance in relation to the substantive merits of an application, and with the applicant in principle being liable to reimburse the respondent's reasonable expenses, there is usually no reason why a respondent should not reach out to the applicant in an effort to reach an agreement that keeps costs within agreed bounds. Experience shows that a Norwich Pharmacal applicant in this Court is often perfectly content to have a dispassionate, adult conversation with a respondent to cooperate with him, so that matters on which the respondent genuinely and reasonably would like legal advice can be identified and a costs budget agreed. For a respondent or his legal representative to forge ahead in isolation with preparation of his case as if this were ordinary commercial adversarial proceedings is in principle unreasonable.

[83] Moreover, it is also in principle unreasonable for an applicant to have to pay costs swollen by reason of the registered agent's files being disorganised. An applicant for a Norwich Pharmacal order against a BVI professional registered agent is entitled to assume that his records are kept to a competent professional standard, with the information being readily retrievable.

[84] Equally, as part of a 'robust' costs assessment process, the respondent should expect to have to justify with particularity time and expense incurred, and, where appropriate, by disclosing written work product (reacted to preserve privilege and confidentiality where strictly necessary).

[85] In sum, costs assessment orders can, and in principle should, be crafted to relieve an applicant from over-charging at the hands of a respondent and/or his legal representatives.

[86] Returning to the manner in which a Norwich Pharmacal order can be dealt with, the approach taken by Justice Jack was to case-manage the application to hear the seal and gag part of the application first, and then to have the Norwich Pharmacal part of the application proceed on an *inter partes* basis. There can be no doubt that a judge has power to case manage an application before the Court

²² Totalise plc v Motley Fool Ltd [2001] EWCA Civ 1897 at paragraph 29 (Aldous LJ).

in this way, pursuant to the very broad case management powers conferred by CPR 26 in both the 2000 and 2023 editions. In principle, it is not unreasonable for a judge to proceed in this manner in order to give effect to the principle of *audi alteram partem*, even though this could entail three hearings to be held (a first hearing to determine the *ex parte* seal and gag order application, a second hearing to hear the Norwich Pharmacal part of the application on a short notice or *ex parte* on notice basis and a third hearing for a substantive return date). An applicant who presents a Norwich Pharmacal application on an *ex parte* basis cannot be heard to complain if the judge uses his case management powers to render the overall procedure in his or her view fairer to the respondent in a particular case. This is a risk an *ex parte* applicant would have to take.

- [87] Viewed in the round, as I have endeavoured to do above, a two-stage approach is generally to be preferred by applicants and the Court over a single *ex parte* approach, as the former generally achieves a closer approximation to procedural and substantive justice and fairness than the latter, upholding the fundamental principle of natural justice *audi alteram partem*. That said, both the one-stage, entirely *ex parte*, and the two-stage approaches are available in this jurisdiction (absent any further Rule or Practice Direction further regulating the procedure). When presented with either form, the Court will endeavour to achieve, in practical terms, the most just result and to minimize prejudice to both sides. It should not be forgotten that CPR 1.3 (in both the 2000 and 2023 editions) provides that '[i]t is the duty of the parties to help the court to further the overriding objective.' Thus, the Court would be most assisted if, in cases where there is no urgency, an applicant were to file an application for an *ex parte* seal and gag order first, to be determined in principle upon the papers, followed by an on-notice application for Norwich Pharmacal relief.

4.3 Interim cost caps

- [88] The advent of interim costs caps is relatively recent. They began to be included in *ex parte* Norwich Pharmacal orders around two years ago. This followed a particularly stark example of high costs being claimed from an applicant. Where professional registered agent respondents were generally claiming a standard sum of around US\$2,000 to US\$3,000, the costs of the respondent in question were around ten times greater, at around US\$20,000 – to the understandable discomobulation of the applicant. The applicant referred the costs to assessment by this Court. That itself was a lengthy

process, taking place some months after the substantive part of the Norwich Pharmacal application had been spent, and involved each side in further substantial legal costs.

- [89] To avoid similar multiplication of costs and litigation in future cases, the concept of an interim costs cap was introduced. A provision was inserted into *ex parte* Norwich Pharmacal orders limiting, *in the first instance*, the amount of costs the corporate service provider respondent would be allowed to incur in dealing with the Norwich Pharmacal order and application that the respondent would be able to seek indemnification from the applicant for. Such a provision is now regularly used.
- [90] Typically, the figure for such a cap is set so as to be higher than the usual range of US\$2,000 to US\$3,000, (in the present case US\$4,000) so that it would, ordinarily, afford the respondent sufficient room within which to do the work of considering the Norwich Pharmacal application and complying with the *ex parte* order without having to apply for a variation of the order.
- [91] Such costs caps have engendered misconceptions, which it is opportune to clarify.
- [92] A first misconception is that such an interim costs cap derogates from, or cuts down, the well-established principle that an applicant for Norwich Pharmacal relief should indemnify the respondent for his reasonable costs of dealing with the Norwich Pharmacal application. It does not. It merely acts as a control mechanism to prevent the level of costs which the applicant might have to pay from becoming excessive. It serves as a reminder to respondents and their legal representatives that they do not have a blank cheque from the applicant and that a Norwich Pharmacal application should not be treated as an opportunity to profiteer from other people's money. It remedies the blind-spot of no transparency and no accountability in relation to a respondent's costs that would otherwise exist. That blind-spot represents a major source of uncertainty and unpredictability for an applicant, particularly in the BVI Commercial Court where professional costs run at high hourly rates. Such unpredictability acts as a strong disincentive to risk embarking upon litigation in the BVI Commercial Court and thus as a stumbling block to accessing justice. In a professional world where, increasingly, performance is measured through data and statistics, enabling commercial decisions to be made on a rational basis, the inability to predict with reasonable accuracy how much a respondent to a Norwich Pharmacal application will claim by way of indemnity if the issue of costs is left open-ended

is a weak point in the system of justice. Where an interim costs cap has been applied, if a respondent considers that the intentionally generous interim cap is insufficient, he can (and quite a few respondents do) seek to negotiate a higher interim cap with the applicant. Norwich Pharmacal applications are, after all, not ordinary adversarial litigation. If no agreement can be reached, the respondent has liberty to apply to the Court to vary or remove the cap if he can show good grounds. If the applicant is not prepared – or able – to meet a higher costs bill, he can choose to discontinue or withdraw his Norwich Pharmacal application.

[93] What is often overlooked (including by the respondent in the present case) is that the cap is expressed to apply only **in the first instance** prior to the return date, or until such time as it might be varied either by agreement or further order. It is an **interim** cap, intended to be reviewed at the return date.

[94] As an interim costs cap, it is not the type of costs cap to which CPR 65 applies. CPR 65.21(1) (in the 2023 revision, 65.14(1) in the 2000 edition) specifies the type of costs capping order to which that part applies as follows:

“A costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover **pursuant to an order for costs subsequently made**” (Emphasis added.)

[95] The interim costs cap here does not seek to limit the respondent’s costs pursuant to an order the Court might subsequently make.

[96] The procedures prescribed, including the need to apply on notice, for CPR 65 costs capping orders thus do not apply.

[97] The interim costs cap is simply a case management tool to further the overriding objective of enabling the Court to deal with cases justly, including ensuring, so far as is practicable, that the parties are on an equal footing and saving expense.²³

²³ CPR 1.1(1) and (2).

[98] The same can be said for an *ex parte* order in terms that there be no order as to costs of the application. This too is an order which can be reviewed upon the return date. At the *ex parte* stage it reflects the Court's preliminary view that on the standard facts of the case as presented by the applicant and in the Court's preliminary assessment of the matter in the round it would be reasonable for the respondent not to incur legal costs of dealing with the application. Such a preliminary view does not in any way prejudice nor influence the Court's opinion should the respondent wish to explain at the return date, on in an application to vary or discharge the *ex parte* order, that this preliminary view is mistaken.

5. Conclusion

[99] The analysis given above can be recapitulated by way of responses to the questions posed by the Respondent:

Question 1

When is it appropriate for an applicant to seek Norwich Pharmacal relief without notice to the respondent?

Answer 1

This is appropriate in cases of urgency, in the sense of literally no time to give notice of the Norwich Pharmacal application. Such cases will be rare and exceptional.

Otherwise, it is not justified, even though it is technically possible. Where there is no urgency, a two-step approach (of applying first for an *ex parte* seal and gag order to be determined upon the papers or at a hearing, and then to apply on notice for Norwich Pharmacal relief) is to be preferred because this upholds and applies the fundamental principle of natural justice of *audi alteram partem* and more fully furthers the Overriding Objective of the CPR.

Question 2

Particularly, when is it appropriate for an applicant to seek a 'wrap-up' order (an *ex parte* seal and gag and Norwich Pharmacal order) against a BVI registered agent?

Answer 2

This is appropriate in cases of urgency, in the sense of literally no time to give notice of the Norwich Pharmacal application. Such cases will be rare and exceptional. Where the urgency arises from the genuine need for urgent disclosure, and the requirements of CPR Part 17 are satisfied, the wrap up procedure is justified.

Otherwise, it is not justified, even though it is technically possible. If the applicant seeks a 'wrap-up' order in the absence of urgency, he can then expect that the Court might use its broad case management discretion to direct that the application proceeds on an on-notice basis or to make other orders that place the parties on a more even footing.

Question 3

What is the entitlement of a respondent to a Norwich Pharmacal application to his costs of compliance and of the application.

Answer 3

As stated by Lord Reid in **Norwich Pharmacal Co v Customs and Excise Commissioners**:²⁴ 'the full costs of the application and any expense incurred in providing the information would have to be borne by the applicant'. This is subject to the caveat of reasonableness and any other order of the Court.

²⁴ ([1974] AC 133 at 176.

Question 4

Whether it is proper for an applicant seeking Norwich Pharmacal relief, on an *ex parte* basis, also to seek an order limiting the total costs that may be recovered by the respondent for complying with the order?

Answer 4

Yes, provided the limitation on costs is:

- (1) imposed as an interim measure pending the return date;
- (2) expressed to be subject to the respondent's right to apply to vary or discharge the *ex parte* order; and
- (3) reasonably sufficient to enable a BVI professional corporate services provider to consider the application and comply with the order.

[100] Having addressed the issues raised by the parties, I will invite them to make further submissions on any matters that remain live between them.

[101] I take this opportunity to thank both sides' learned Counsel for their assistance. It behoves me to apologise for the delay in rendering judgment in this matter. The primary reason is that an earlier judgment after a lengthy trial proved to be unusually long, both as a document to write and in its content, whilst at the same time hearing and determining a full list of other matters and having another written judgment to complete in priority to the present matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar