

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCM 2020/0016

BETWEEN:

[1] K
[2] S

Applicants

and

[1] Z
[2] Z

Respondents

Appearances:

Mr. Nicholas Burkill, with him Mr. Alexander Muksinov and Ms. Katherine Bradley for the Applicants

2020: February 12, 13;
March 10.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** This is an application for third party disclosure orders brought by two overseas commercial lending institutions against two registered agents doing business in the Territory of the Virgin Islands ('BVI'). The application was brought on an *ex parte* basis and heard on 12th and 13th February 2020. I granted the application and gave oral reasons. A number of points arose of wider interest which render it appropriate for an anonymized written judgment to be given. One of these touches and concerns the question of the extent to which, if at all, this Court has jurisdiction to make third party disclosure orders in aid of legal proceedings overseas. This is not the first time that this Court has had to address this question, but it is the first time (as far as I am aware) this Court has produced a written

judgment on the issue. Unfortunately, this Court has not so far had the benefit of contested argument, which is always welcome for refining debate and producing more mature consideration. I am extremely grateful to learned counsel for the Applicants for their detailed submissions, which have provided a substantial basis for the Court's consideration in this case. These submissions were provided in two stages: the first before the hearing on 12th February 2020 and the second before the hearing on the following day, 13th February 2020. With their permission I set out the general thrust of them below as they serve to crystallize admirably the arguments.

INTRODUCTION

- [2] This application is made without notice and in private for what is commonly referred to as **Norwich Pharmacal** orders, named after the English House of Lords case of **Norwich Pharmacal v Customers and Excise Commissioners**,¹ against the Respondents, the registered agents of, between them, a number of BVI companies.
- [3] This Court previously made freezing orders against each of the BVI companies, which continue until judgment or further order. Those freezing orders included ancillary disclosure orders to enable compliance with them to be policed. All of the BVI companies have disobeyed those orders by failing to provide any disclosure at all pursuant to these orders. The freezing orders were made on the **Chabra** basis² at the same time as a freezing order was granted against the cause of action defendant, an alleged primary wrongdoer ('APW'), on the basis that the APW had used the BVI Companies to hide his assets. The APW resides in the same country as the Applicants.
- [4] The background to the claim is that
- (1) the first Applicant ('K') has been granted a number of judgments against the APW in the overseas court of first instance arising out of the APW's liability to K under a contract. These judgments are presently subject to appeal. Under the foreign law, the judgments are thus not currently enforceable.

¹ [1973] 3 WLR 164

² TSB Private Bank International SA v Chabra [1992] 1 WLR 231.

(2) The second Applicant ('S') is also bringing a claim against the APW for alleged breach of contract. This claim has been referred to arbitration which will take place overseas.

[5] There is evidence that the APW has used a number of the BVI companies wrongfully to dissipate and hide assets in breach of an overseas court order. The Applicants believe that there is good reason to suppose that some or all of the BVI companies hold assets which will be available for enforcement of any judgment or award obtained against the APW.

A. JURISDICTIONAL BASES FOR RELIEF

[6] The Applicants rely on three alternative bases for the grant of the **Norwich Pharmacal** relief sought:

- (1) in support of the overseas proceedings brought by K;
- (2) in support of the overseas arbitration proceedings brought by S; and
- (3) in aid of this Court's freezing orders granted to both applicants.

Jurisdiction to grant Norwich Pharmacal relief

[7] The principles on which the Court will grant **Norwich Pharmacal** relief are conveniently set out in *Gee on Commercial Injunctions*:

"The principle is that if a person, through no fault of his own, gets "mixed up" in the tortious acts of others so as to facilitate their wrongdoing, he may not incur any personal liability, but he comes under an obligation to assist the person wronged by giving him "full information" and disclosing the identity of the wrongdoers, per Lord Reid in *Norwich Pharmacal v Customs & Excise Commissioners*. Information has been ordered to enable the person wronged to identify a mole within the organisation, to trace assets which have been taken without the alleged fraudsters being alerted, to locate assets upon which a judgment could be enforced, to enable third parties to be identified who had themselves done nothing wrong but who had received letters containing allegedly false statements, and to obtain information which is central to a contemplated claim, and which will show whether the applicant does have a good cause of action against a named person."³

³ *Gee: Commercial Injunctions* (6th Ed., Sweet & Maxwell, 2016) 23-049.

[8] In the English High Court case of **Mitsui & Co, Limited v Nexen Petroleum UK Limited**⁴ Lightman J reviewed the authorities and summarised the principles to be applied as follows (at paragraph 21):

"The three conditions to be satisfied for the court to exercise the power to order Norwich Pharmacal relief are: i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued".

[9] It is now clear that the 'wrong' arguably carried out 'may be a crime, tort, breach of contract, equitable wrong or contempt of court': **Orb ARL v Fiddler**⁵, cited by Flaux J in **Ramilos Trading Ltd v Buyanovsky**⁶ ('Ramilos').

[10] The Eastern Caribbean Court of Appeal decision in **JSC BTA Bank v Fidelity Corporate Services Limited & Ors**⁷ ('Fidelity') was an appeal on the issue of whether a registered agent is capable of being mixed up or facilitating the wrongdoing. In this regard, Mitchell, CBE, QC JA stated at paragraph [27]:

"I am satisfied that the respondents by virtue of their very role in providing registered agent services to the companies, a role which is voluntary, cannot on any view be considered as mere onlookers. The companies that they formed are said to have been mere vehicles created for the purpose of defrauding the Bank. The respondents, by incorporating and maintaining those vehicles thereby facilitated, albeit innocently, the commission of the fraud and as such were involved in the fraud perpetrated against the Bank. This renders the respondents under a duty to disclose information through Norwich Pharmacal type proceedings which may assist the Bank as the injured party in discovering the true wrongdoers. An order for discovery against them would permit the Bank to discover not only who had been the person or persons giving the incorporation and bank account instructions, but would provide the necessary protection to the respondents against any charge that might be brought against them that they had been in breach of their duty of confidentiality. Registered agents and registered office service providers who are used by others to create and maintain for them corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them seeking discovery of the names and addresses and other information and documents that will enable the perpetrators to be discovered and the misappropriated assets traced."

⁴ [2005] EWHC 625 (Ch).

⁵ [2016] EWHC 361 (Comm) at paragraph [84] (Popplewell J).

⁶ [2016] EWHC 3175 (Comm) at paragraph [12] (Flaux J).

⁷ HCVAP 2010/035 (delivered 21st February 2011, unreported).

[11] The decision in **Fidelity** has been reiterated by this Court in **UVW v XYZ**. In this regard, this Court stated there that:

“A registered agent (or other corporate service provider, depending upon the type of services provided) does more than trade with a company or its underlying owner. By its very role a registered agent facilitates the functioning of a company. It is involved in a company’s affairs, even if the registered agent does not know what the company is being used for.”⁸

[12] Furthermore:

“that if a corporate service provider involves itself in the life or affairs of a company that is, or becomes, used for wrongful purposes, he can expect to be required to give disclosure of information within its possession. This analysis is consistent with how the English courts treat with piercing the corporate veil.”⁹

Jurisdiction to make ‘Norwich Pharmacal’ orders in aid of foreign proceedings

[13] There has long been authority in England and Wales and in the Commonwealth that **Norwich Pharmacal** orders could be made in aid of foreign proceedings. The English Court of Appeal held in **Smith Kline & French Laboratories Ltd v Global Pharmaceuticals Ltd**:

"For the reasons which my Lord has given, in my judgment the Norwich Pharmacal case does establish that the court has jurisdiction to order disclosure of the name of 'X', even though such disclosure is required solely for the purpose of bringing proceedings in a foreign court provided that it is shown that the transaction by 'X' and the transaction in which the defendant is involved relate to the same subject matter."¹⁰

[14] However, the availability of **Norwich Pharmacal** orders in aid of foreign proceedings was recently rejected by the English courts in **R (Omar) v Secretary of State for Foreign Affairs**¹¹ (**‘Omar’**) and **Ramilos**. The courts in both cases considered the equitable jurisdiction in light of the domestic English legislation, namely the Crime (International Co-operation) Act 2003 (the "2003 Act") and the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "1975 Act"), both of which deal with circumstances and procedures whereby the domestic courts will assist in obtaining evidence required for use in foreign proceedings; it was held that the existence of

⁸ BVIHCM2016/0108 (delivered 27th October 2016, unreported) at paragraph [12] (Wallbank J (Ag.)).

⁹ BVIHCM2016/0108 (delivered 27th October 2016, unreported) at paragraph [31] (Wallbank J (Ag.)).

¹⁰ [1986] RPC 394 at 400 (Browne-Wilkinson LJ).

¹¹ [2013] EWCA Civ 118.

those statutory regimes precluded the granting of **Norwich Pharmacal** relief for the purposes of foreign proceedings.

[15] If **Omar** and **Ramilos** were to be followed by the BVI Courts, then the statutory regime embodied in the BVI's Evidence (Proceedings in Foreign Jurisdictions) Act 1988 (the "1988 Act") (which is essentially the same as the 1975 Act) would preclude the granting of **Norwich Pharmacal** relief in aid of foreign proceedings. For the reasons set out below the Applicant submitted that the BVI Courts should diverge with the English common law and **Norwich Pharmacal** relief should be available notwithstanding the existence of an alternative statutory regime. Such a divergence would be consistent with the approach taken by other major offshore jurisdictions, Guernsey and Cayman, and with the earlier English Court of Appeal decision in **Smith Kline & French**.

[16] In **Omar** it was held that the existence of the statutory regime in the Crime (International Co-operation) Act 2003 precluded the Court from making a **Norwich Pharmacal** order. The Court of Appeal applied the principles from **R (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions**¹² ('**Child Poverty Action Group**') as to whether a statutory scheme has impliedly overridden or displaced the common law. The relevant principles from **Child Poverty Action Group** were articulated by Sir John Dyson SCJ as follows:

"32. ... the test is whether in all the circumstances Parliament must have intended a common law remedy to co-exist with the statutory remedy...

33. If the two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will almost certainly have been excluded by necessary implication. To do otherwise would circumvent the intention of Parliament. A good example of this is *Marcic* where a sewerage undertaker was subject to an elaborate scheme of statutory regulation which included an independent regulator with powers of enforcement whose decisions were subject to judicial review. The statutory scheme provided a procedure for making complaints to the regulator. The House of Lords held that a cause of action in nuisance would be inconsistent with the statutory scheme. It would run counter to the intention of Parliament.

34. The question is not whether there are any differences between the common law remedy and the statutory scheme. There may well be differences. The question is whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme. The court should not be too ready to find that a common law remedy has

¹² [2010] UKSC 54.

been displaced by a statutory one, not least because it is always open to Parliament to make the position clear by stating explicitly whether the statute is intended to be exhaustive. The mere fact that there are some differences between the common law and the statutory positions is unlikely to be sufficient unless they are substantial. The fact that the House of Lords was divided in *Total Network SL* shows how difficult it may sometimes be to decide on which side of the line a case falls. The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended by co-exist with it."¹³

[17] In **Omar**, Maurice Kay LJ compared the **Norwich Pharmacal** remedy with the 2003 Act and concluded that there were substantial differences relating to the control by the Secretary of State of sensitive information on grounds including national security such that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme in this area.¹⁴

[18] **Omar** was concerned with the 2003 Act in the criminal context and not the 1975 Act. However, in **Ramilos**, Flaux J applied the reasoning in **Omar** with respect to the statutory regime in the 1975 Act and held that it too precluded the making of a **Norwich Pharmacal** order. In his judgment Flaux J made the following comments:

- (1) The Court of Appeal in **Omar** had considered its reasoning to be equally applicable to the statutory regime under the 1975 Act.¹⁵
- (2) It was not permissible to bypass the statutory regime by asserting that the case was at some earlier stage before the institution of proceedings abroad was contemplated.¹⁶
- (3) If the regime was engaged but the claimant was unable to obtain an order of the foreign court or a letter of request, the unavailability of relief from the foreign court was no answer to the argument that the statutory regime was engaged and precluded any common law remedies under the **Norwich Pharmacal** jurisdiction; the court had no residual jurisdiction to grant **Norwich Pharmacal** relief.¹⁷

¹³ R (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions [2010] UKSC 54 at paragraphs 32 to 34 (Sir John Dyson SCJ).

¹⁴ R (Omar) v Secretary of State for Foreign Affairs [2013] EWCA Civ 118 at paragraph 25 (Maurice Kay LJ).

¹⁵ Ramilos Trading Ltd v Buyanovsky [2016] EWHC 3175 (Comm) at paragraph [99] (Flaux J).

¹⁶ Ramilos Trading Ltd v Buyanovsky [2016] EWHC 3175 (Comm) at paragraph [121] (Flaux J).

¹⁷ Ramilos Trading Ltd v Buyanovsky [2016] EWHC 3175 (Comm) at paragraph [123] (Flaux J).

- (4) The question was whether there were substantial differences between the structure of the statutory regime and the common law remedy, such that parliament could not have intended the common law remedy to survive (**Child Poverty Action Group**); if there were, then the common law remedy could not be relied upon in any case where the statutory regime was engaged.¹⁸

[19] **Ramilos** was recently considered by the Grand Court of the Cayman Islands in **Arcelormittal USA LLC v Essar Global Fund Limited & ors**.¹⁹ Kawaley J conducted a thorough review of **Omar** and **Ramilos**, and held the principles from **Ramilos** to be as follows:

"It requires careful reading of the cited passages but they fairly enable one to extract the following principles. If the statute is engaged in the circumstances of a particular case and legal differences potentially exist between the statutory and common law (or equitable) remedy, the Norwich Pharmacal jurisdiction is ousted as a matter of law without any further factual inquiry. Implicitly, however, whether the statute is engaged at all depends on the factual and legal circumstances of each case. This analysis provides strong support for the review that, where the Evidence Order is properly engaged, Norwich Pharmacal relief is jurisdictionally unavailable."²⁰

[20] Kawaley J then proceeded to consider whether or not the **Norwich Pharmacal** jurisdiction had been displaced by the statutory regime under the Cayman statutory regime, a question which he considered to be a mixed question of law and fact:

"I accept that where an applicant for Norwich Pharmacal relief can obtain adequate relief via the statutory route for obtaining evidence for use in proceedings, this Court's equitable jurisdiction to grant corresponding relief falls away and is no longer available. However, determining whether or not the statutory regime is engaged requires a careful assessment depending on the particular facts and circumstances of each case. Factors such as the following may often be relevant:

- (a) whether the claimant is already possessed of sufficient information to commence proceedings in relation to the relevant wrongdoing;
- (b) whether it is clear that the substantive proceedings are likely to be commenced abroad;

¹⁸ *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) at paragraph [133] (Flaux J).

¹⁹ Cause No. FSD 2 of 2019, (IKJ) (delivered 13th February 2019, unreported). The corresponding statutory regime in the Cayman Islands is found in the Evidence (Proceedings in Foreign Jurisdictions) (Cayman Islands) Order 1978.

²⁰ *Arcelormittal USA LLC v Essar Global Fund Limited & ors*. Cause No. FSD 2 of 2019, (IKJ) (delivered 13th February 2019, unreported) at paragraph 60 (Kawaley J).

- (c) whether effective relief for the wrongdoing which forms the basis of the Norwich Pharmacal application would be rendered nugatory by exclusive recourse to the statutory regime."²¹

[21] **Arcelormittal** should be highly persuasive for this Court, since it is a fully reasoned decision of a court also considering the English case law in the context of an offshore jurisdiction.

[22] Kawaley J cited at paragraph [67] this Court's decision in **UVW v XYZ**²² and this Court's formulation at paragraph [6] of that judgment of the principle to be extracted from **Omar**:

"In *Omar*, the English Court of Appeal considered whether statutory provisions barred Norwich Pharmacal relief in support of criminal proceedings abroad. The issue was framed whether Norwich Pharmacal relief is available where a statutory evidential disclosure regime 'covers the ground'. The English Court of Appeal considered that ultimately the determinative factor is necessity. If legislation provides a means of obtaining disclosure then Norwich Pharmacal relief may not be necessary and is liable to be refused."²³

[23] This Court cited²⁴ **Macdoel Investments v Federal Republic of Brazil**²⁵: 'the determinative question in any particular case is whether justice requires discovery to be ordered'.

[24] Turning back to **Omar** and **Ramilos**, although these cases are persuasive, they are not binding on this Court. In particular:

- (1) **Omar** is applicable to the 2003 Act and Maurice Kay LJ's *dicta* with respect to the 1975 Act are strictly *obiter*.
- (2) **Ramilos** is only a first instance decision and its reasoning has not so far been considered by a higher court.

[25] Whilst the effect of the statutory provisions was not argued in **JSC BTA Bank v Fidelity Corporate Services Limited**, the Eastern Caribbean Court of Appeal found in that case that

²¹ *Arcelormittal USA LLC v Essar Global Fund Limited & ors.* Cause No. FSD 2 of 2019, (IKJ) (delivered 13th February 2019, unreported) at paragraph 64 (Kawaley J).

²² BVIHCM2016/0108 (delivered 27th October 2016, unreported).

²³ BVIHCM2016/0108 (delivered 27th October 2016, unreported) at paragraph [6] (Wallbank J (Ag.)).

²⁴ BVIHCM2016/0108 (delivered 27th October 2016, unreported) at paragraph [8] (Wallbank J (Ag.)).

²⁵ [2007] JLR 201.

Norwich Pharmacal relief should be granted against registered agents of BVI companies in support of UK proceedings.²⁶

[26] The *dicta* in **Child Poverty Group** is undeniably persuasive, but again not binding. Moreover, different considerations will naturally apply when considering Parliament's intention in a different jurisdiction.

[27] In **Arcelormittal** Kawaley J also considered Parliament's intention:

"It is true that Parliament must be deemed to have intended the Evidence Order to be applied in aid of civil justice in place of any common law or equitable remedies which might previously have applied. However, in my judgment Parliament may also be presumed not to have intended the Evidence Order to be used as a fixed barrier to civil justice, ousting this Court's equitable jurisdiction automatically whenever information or evidence is sought for use in foreign proceedings, without regard to whether or not the statutory regime is accessible in practical terms."²⁷ (emphasis added)

[28] Kawaley J's analysis of Parliament's intention reflected this Court's statement that **Norwich Pharmacal** relief is not a remedy of last resort:²⁸

"It may be granted where an applicant has no straight forward or available means of finding out the information and when the other conditions have been met ... Thus the Applicant need not be put to complex, costly and potentially nugatory procedures before being accorded Norwich Pharmacal relief."

[29] It is highly unlikely that the BVI House of Assembly's intention would be that such equitable relief should be restricted in the BVI in the same way as it has been (at first instance) onshore in England. In fact, the availability of **Norwich Pharmacal** relief in aid of foreign proceedings is highly desirable in an offshore financial centre such as the BVI and it is to the credit of the BVI that its courts will grant such interim relief in aid of foreign proceedings where necessary.

[30] **Norwich Pharmacal** relief in aid of foreign proceedings has been granted in other offshore jurisdictions. In **President of the State of Equatorial Guinea & ors v The Royal Bank of**

²⁶ BVI HCVAP 2010/035 (delivered 21st February 2011, unreported) at paragraph [5] (Mitchell CBE QC JA (Ag.)).

²⁷ **Arcelormittal USA LLC v Essar Global Fund Limited & ors**. Cause No. FSD 2 of 2019, (IKJ) (delivered 13th February 2019, unreported) at paragraph 68 (Kawaley J).

²⁸ **UVW v XYZ** BVIHCM2016/0108 (delivered 27th October 2016, unreported) at paragraph [8] (Wallbank J (Ag.)).

Scotland International & ors,²⁹ the Guernsey Royal Court and the Court of Appeal both confirmed that the Royal Court had the jurisdiction.

- [31] The Royal Court was not satisfied that the law of Guernsey should follow the law in England and Wales.³⁰ Instead, its main justification for holding that it had the requisite jurisdiction was 'the prevention of an abuse'.³¹ Indeed, The Lieutenant-Bailiff took a similar view to that later expressed by Kawaley J of the importance of the jurisdiction's reputation:

"... if I am correct in my belief that justice may require that Norwich Pharmacal relief can be made available, in appropriate cases, in Guernsey to assist corrective action outside the jurisdiction, a relevant factor may be the need to avoid creating the reputation that Guernsey is a safe haven for the non-disclosure of information which might otherwise assist in the establishment of liabilities elsewhere – evasion in effect."³²

- [32] The Court of Appeal, in agreement with the existence of the jurisdiction, articulated its rationale as follows:

"... Such jurisdiction is essential given the role of financial service provision on this Island... the ability to make orders relating to money, documents or information in Guernsey in support of proceedings in other jurisdictions is a necessary factor, given the successful development of Guernsey financial services. Frequently, litigation relating to assets in Guernsey is current in another jurisdiction... The Guernsey courts must ensure that Guernsey does not become a safe haven for those who may wish to evade financial liabilities..."³³

- [33] The Court of Appeal reversed the decision of the Lieutenant-Bailiff however on different grounds. That decision was then appealed to the Privy Council, which allowed the appeal and reinstated the Lieutenant-Bailiff's **Norwich Pharmacal** order on the basis that the Court of Appeal had wrongly exercised its appellate authority in exercising its discretion afresh. So whilst the focus of the Privy Council appeal was on the Court of Appeal's exercise of discretion,

²⁹ *President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors* 2005-06 GLR 65 (Guernsey Court of Appeal). See also the first instance decision (Guernsey Judgment 53/2004) and the Privy Council decision, 2005-06 GLR 373.

³⁰ *President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors* (Guernsey Royal Court) Guernsey Judgment 53/2004 at paragraph 44 (Lieutenant Bailiff Day).

³¹ *President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors* (Guernsey Royal Court) Guernsey Judgment 53/2004 at paragraph 53-56 (Lieutenant Bailiff Day).

³² *President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors* (Guernsey Royal Court) Guernsey Judgment 53/2004 at paragraph 56 (Lieutenant Bailiff Day).

³³ *President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors* 2005-06 GLR 65 (Guernsey Court of Appeal) at paragraph 59 (Southwell JA).

it was cognizant of the challenge to the jurisdiction to make a **Norwich Pharmacal** order in support of foreign proceedings³⁴ and then reinstated the order having considered a further jurisdiction issue³⁵ that it identified.

[34] In **President of the State of Equatorial Guinea**, none of the first instance and appellate courts considered the statutory argument raised in **Omar** and **Ramilos**. There is only a brief reference to the Evidence (Proceedings in Other Jurisdictions) Act 1975 in the Royal Court's judgment:

"I also reject [the] further submission that the proper route by which to acquire the evidence which the Plaintiffs seek is to be found in the provisions of the Evidence (Proceedings in Other Jurisdictions) Act, 1975... I agree... that it is up to a party how it seeks to obtain evidence. Whether it is successful or not is a different matter."³⁶

[35] Nonetheless the rationale for retaining the jurisdiction should be highly persuasive for this Court since the BVI is also an offshore centre providing financial services. Just as the Royal Court in **President of the State of Equatorial Guinea** did not consider that the law of England in this respect should be the law of Guernsey, so here the law articulated in **Ramilos** should not be the law of the BVI. Clearly the BVI legislature's intention with respect to the BVI will have been no concern for the English judges considering the interplay between the 1975 Act and the 2003 Act and the **Norwich Pharmacal** jurisdiction.

[36] The Applicants therefore submitted that this Court should diverge from the approach adopted by the English courts in **Omar** and **Ramilos**, such that **Norwich Pharmacal** relief can be granted as alternative relief in all cases where it is necessary notwithstanding the existence of the statutory regime in the 1988 Act. It is submitted that this would be the true intention of the BVI legislature.

³⁴ *President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors*, 2005-06 GLR 373 (Privy Council) at paragraph 9 (Bingham LJ).

³⁵ *President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors*, 2005-06 GLR 373 (Privy Council) at paragraph 24 (Bingham LJ).

³⁶ *President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors* (Guernsey Royal Court) Guernsey Judgment 53/2004 at paragraph 62 (Lieutenant Bailiff Day).

- [37] Alternatively, the approach taken by Kawaley J in **Arcelormittal**³⁷ should be adopted, whereby the key question is whether or not on the facts of a particular case the need for equitable relief is displaced by the availability of the statutory remedy.

Jurisdiction to make ‘Norwich Pharmacal’ orders in aid of foreign arbitration

- [38] In the alternative, even if the Court were minded to follow **Ramilos**, then a **Norwich Pharmacal** order can still be made in aid of a foreign arbitration. In **Benhurst Finance Ltd v Colliac**,³⁸ Judge Nicholas Cooke QC made a **Norwich Pharmacal** order, considering that there was no other more suitable route to relief. He made that order notwithstanding **Ramilos**. His reasons included the fact that a private arbitrator is not a court or tribunal within the meaning of the 1975 Act and therefore could not make a request. He found additional support for the grant of the relief under the **Norwich Pharmacal** jurisdiction in identifying that the English Arbitration Act did not permit orders against non-parties to an arbitration agreement: Section 43 of the BVI Arbitration Act appears similarly restricted by defining at section 43(9) the nature of relief available under section 43 by reference to section 33, which identifies only relief against parties.

Jurisdiction to make ‘Norwich Pharmacal’ orders in aid of freezing orders

- [39] There is a separate jurisdiction recognised by Jacobs J in **Arcelormittal USA LLC v Essar Steel Limited** to order third parties to provide information to support and make effective a worldwide freezing order (‘WFO’):

"In view of the decisions in *Omar* and *Ramilos*, I am not persuaded that it would be appropriate to make such orders where the sole purpose was to facilitate enforcement proceedings abroad. However, in the present case there exists a different reason for making the orders sought, namely to support and make effective the WFO which the court has granted. Here, the WFO has been granted by the court because of the risk that assets will be dissipated. In order to render that WFO effective, the court has granted (as it would typically grant) an order against Essar Steel for the disclosure of its assets. This enables the applicant to give notice to third parties of the existence of the order, and thereby seek to prevent any further dissipation. This necessarily occurs prior to the commencement of enforcement proceedings in foreign jurisdictions. It

³⁷*Arcelormittal USA LLC v Essar Global Fund Limited & ors*. Cause No. FSD 2 of 2019, (IKJ) (delivered 13th February 2019, unreported) at paragraph 69 (Kawaley J).

³⁸[2018] EWHC 2188 (QB) (at [8]-[12]) (Nicholas Cooke QC, J).

seems to me that precisely the same rationale underlies the Norwich Pharmacal order. AMUSA can therefore justifiably point to purposes for which they need the information which do not involve foreign legal proceedings, including protecting itself from further wrongdoing by further dissipations of assets. This is a legitimate basis on which the court can intervene: see the judgment of Zacaroli J. in *Blue Power Group sarl v ENI Norge AS* [2018] EWHC 3588 (Ch), paras 26-30. Neither *Omar* nor *Ramilos* were cases where a freezing order was in place, and information was sought in order to make that order effective."³⁹

- [40] The English Court of Appeal had previously decided in **Mercantile Group (Europe) AG v Aiyela**⁴⁰ that the English court has power under section 37(1) Supreme Court Act 1981 to order discovery ancillary to a post-judgment Mareva order from a person against whom there is no substantive cause of action, such power existing where a third party has become mixed up in the transaction and the order does not offend against the 'mere witness' rule as discussed in **Norwich Pharmacal**.⁴¹ As summarised by Jacobs J in **Arcelomittal**, the **Aiyela** decision was considered by the English Court of Appeal in **NML Capital Ltd v Chapman Freeborn Holdings Ltd et al** in which Tomlinson LJ

"considered that a Norwich Pharmacal order could be made ancillary to a freezing injunction; and that the court's jurisdiction to do so was derived from section 37(1) of the Senior Courts Act 1981 and the court's ancillary power to make such an order effective".⁴²

- [41] As recognised by Jacobs J in **Arcelormittal**,⁴³ **Norwich Pharmacal** orders are not usually sought at the time when a WFO with a disclosure order is first obtained, the applicant often waiting to see what information is provided. Where no information at all is provided pursuant to the WFO it is submitted that the court should be prepared to grant **Norwich Pharmacal** relief to make effective its disclosure order that has been disobeyed. In the BVI, the jurisdiction for such an order is section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act ('the Supreme Court Act') and/or the court's general equitable jurisdiction.

³⁹ [2019] EWHC 724 (Comm) at [159] (Jacobs J).

⁴⁰ [1994] 1 All ER 110.

⁴¹ **Mercantile Group (Europe) AG v Aiyela** [1994] Q.B. 366 page 374B (Hoffman LJ).

⁴² **Arcelormittal USA LLC v Essar Steel Limited** [2019] EWHC 724 (Comm) at [157] (Jacobs J).

⁴³ **Arcelormittal USA LLC v Essar Steel Limited** [2019] EWHC 724 (Comm) at [163] (Jacobs J).

Whether 'Norwich Pharmacal' relief is necessary where there is an alternative of committal

- [42] It is uncontroversial that, before exercising its discretion to grant **Norwich Pharmacal** relief, the court must be satisfied that the disclosure sought is necessary in order to enable the applicant to bring legal proceedings or seek other legitimate redress for the wrong on which it relies.⁴⁴ However, 'the requirement of necessity is a requirement that must be dictated flexibly in the circumstances of each case'.⁴⁵ The editors of 'Civil Fraud: Law, Practice and Procedure' summarise the approach to the threshold condition as follows:⁴⁶

"What is precisely meant by the word 'necessity' here is not altogether clear: it probably simply means that the court must be satisfied that the interests of justice require that the order be made. Certainly, this requirement does not mean that the applicant must show that the remedy is one of last resort (i.e. that there are no other avenues available to him to obtain the information sought, although the fact that the information or documents sought might be available from other sources will be a relevant consideration, both at this stage and, potentially, at the discretionary stage ...)."

- [43] Gee in 'Commercial Injunctions' notes,⁴⁷ to similar effect, that '**Norwich Pharmacal** relief is discretionary and to be applied flexibly in order to do justice' and 'does not have to be a remedy of last resort'. It will be exercised 'taking into account what would be reasonable and proportionate in the circumstances'.

- [44] This approach is supported by recent decisions of the UK Supreme Court and the Privy Council. The UK Supreme Court in **The Rugby Football Union v Consolidated Information Services Ltd**⁴⁸ reviewed the approach to the grant of **Norwich Pharmacal** relief and identified *inter alia*:

⁴⁴ See *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch) at paragraph [21] (Lightman J).

⁴⁵ *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112 at paragraph 30 (Maruice Kay LJ), endorsing the statement of the Divisional Court at first instance.

⁴⁶ Grant and Mumford, *Civil Fraud: Law Practice and Procedure* (Sweet & Maxwell 2019) 29-066.

⁴⁷ Gee: *Commercial Injunctions* (6th Ed., Sweet & Maxwell, 2016) 23-049.

⁴⁸ [2012] UKSC at paragraph 17 (Kerr LJ).

- (1) Cases following **Norwich Pharmacal** have emphasised the need for flexibility and discretion in considering whether the remedy should be granted (citing **Ashworth Security Hospital v MGN Limited**⁴⁹).
- (2) 'The need to order disclosure will be found to exist only if it is a 'necessary and proportionate response in all the circumstances',⁵⁰
- (3) 'The test of necessity does not require the remedy to be one of last resort': **R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)**.⁵¹
- (4) 'The essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors.'⁵²

[45] Somewhat earlier, in **Equatorial Guinea v Bank of Scotland International**,⁵³ Lord Bingham and Lord Hoffman (delivering the opinion of the Board) also considered the necessity requirement. They concluded that there was little difference in formulations which relied on notions of justice and convenience, on the one hand, and necessity on the other:

"Whether it is said that it must be just and convenient in the interests of justice to grant relief, or that relief should only be granted if it is necessary in the interests of justice to grant it, makes little or no difference of substance."⁵⁴

[46] In **JSC BTA Bank v Fidelity Corporate Services Limited**,⁵⁵ the Court of Appeal held that

"the jurisdiction is an exceptional one which is only to be exercised by the Court when it is satisfied that it is necessary that it should be exercised. The disclosure has to be a necessary and proportionate response in all the circumstances."

[47] It is clear, therefore, that the court does not engage in a comparative evaluation of the range of remedies available to an applicant who seeks **Norwich Pharmacal** relief. The fundamental question remains whether it is in the interests of justice that the relief should be granted.

⁴⁹ [2002] UKHL 29 at paragraph 57 (Lord Woolf CJ).

⁵⁰ **Ashworth Security Hospital v MGN Limited** [2002] UKHL 29 at paragraphs 36, 57 (Lord Woolf CJ).

⁵¹ [2009] 1 WLR 2579, paragraph 94 (Thomas LJ).

⁵² **The Rugby Football Union v Consolidated Information Services Ltd** [2012] UKSC 55 at paragraph 17 (Kerr LJ).

⁵³ **President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors**, [2006] UKPC 7.

⁵⁴ **President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors**, [2006] UKPC 7. at paragraph 16 (Bingham LJ).

⁵⁵ **BVI HCVAP 2010/0035** (delivered 21st February 2011, unreported) at paragraph 20 (Mitchell CBE, QC, JA (Ag.)).

Naturally, alternative relief will be a relevant consideration. But in taking such alternatives into account, the court must also consider the nature and purpose of the jurisdiction pursuant to which such alternative relief is exercised. There appears to be no reported decision of the English or BVI courts which squarely considers whether the availability of committal proceedings against the ultimate wrongdoer is relevant to granting **Norwich Pharmacal** relief as against a respondent who has been innocently mixed up in such wrongdoing. That is perhaps unsurprising given the distinct purposes for which the court considers committal appropriate and the strict procedural requirements with which an applicant must comply (such as endorsement of the order with a penal notice and personal service on the respondent). The law of contempt provides a quasi-criminal jurisdiction serving the twin purposes of securing compliance with court orders and punishing breaches thereof. As the editors of Arlidge, Eady and Smith on 'Contempt' note:

"Civil contempt cannot be considered therefore merely as a means by which individual litigants can enforce orders in their favour. The court has an interest, on behalf of the community at large, in ensuring that orders are not disobeyed at the option of one party, or even of both."⁵⁶

[48] In **JSC BTA Bank v Solodchenko**, Jackson LJ described the function of a sentence for contempt in the following terms:

"First, it upholds the authority of the court by punishing the contemnor and deterring others. Such punishment has nothing to do with the dignity of the court and everything to do with the public interest that court orders should be obeyed. Secondly, in some instances, it provides an incentive for belated compliance, because the contemnor may seek a reduction or discharge of sentence if he subsequently purges his contempt by complying with the court order in question."⁵⁷

[49] The committal jurisdiction serves rather different objectives to **Norwich Pharmacal** relief and should not be invoked unless truly required. Especially in relation to alleged contemnors based outside the jurisdiction (against whom the sanctions of imprisonment, fines and/or sequestration may offer little concern), resort to committal proceedings cannot sensibly be viewed as an alternative to relief under the **Norwich Pharmacal** jurisdiction.

[50] Accordingly, the availability of committal proceedings does not as a matter of principle or practice prevent the court granting **Norwich Pharmacal** relief. Indeed, the acceptance by

⁵⁶ Arlidge, Eady and Smith: Contempt (5th ed. Sweet & Maxwell, 2017) 12-5.

⁵⁷ [2011] EWCA Civ 1241 at paragraph 45 (Jackson LJ).

Popplewell J in **Orb v Fiddler**⁵⁸ that the 'wrong' for the purposes of the **Norwich Pharmacal** relief may be a contempt of court of necessity accepts that **Norwich Pharmacal** relief is available where committal proceedings are also available.

Whether 'Norwich Pharmacal' relief is appropriate pre-judgment to identify assets

- [51] At its most basic level, the purpose of **Norwich Pharmacal** relief is to obtain information in relation to wrongdoing which will assist the applicant to secure redress against the ultimate wrongdoer. Accordingly, the characteristic circumstances in which **Norwich Pharmacal** relief is sought is in the pre-judgment phase, indeed often before any substantive proceedings have commenced. Where the wrong on which an applicant relies is the unjustified dissipation by the ultimate wrongdoer of his assets to frustrate enforcement of a future judgment or award, the purpose of securing **Norwich Pharmacal** relief is to assist in obtaining and maintaining effective freezing relief. To that end, as Gee notes:

"The objection to exercising the jurisdiction pre-judgment overlooks the point that the information is not required for the purpose of establishing the claimant's substantive rights by evidence at the trial, but is required for a different purpose. This is to obtain effective Mareva relief, so that the claimant will have an effective remedy in respect of the wrongdoing which the third party has facilitated. Without the disclosure the claimant would be left without redress for the wrong which the third party had facilitated."⁵⁹

- [52] **Arcelormittal USA LLC v Essar Steel Limited**⁶⁰ was a post **Ramilos** authority where the court granted **Norwich Pharmacal** relief in aid of a WFO in aid of enforcement of an arbitral award. Jacobs J's reasoning⁶¹ does not identify the fact that the WFO was sought post award (or judgment) as a relevant consideration. Indeed, the learned judge addressed an argument advanced by counsel for one of the Essar defendants:

"Mr Stanley may be right in saying that Norwich Pharmacal orders are not usually sought at the time when a WFO including a disclosure order is first obtained, and that a claimant will often wait to see what information is provided. But in the present case I consider that there is a necessity for relief, since otherwise it is not possible to have confidence that relevant assets will be identified and frozen."⁶²

⁵⁸ [2016] EWHC 361 at paragraph 84 (Popplewell J).

⁵⁹ Gee: Commercial Injunctions (6th Ed., Sweet & Maxwell, 2016) 23-050.

⁶⁰ [2019] EWHC 724 (Comm).

⁶¹ **Arcelormittal USA LLC v Essar Steel Limited** [2019] EWHC 724 (Comm) at paragraph 159 (Jacobs J).

⁶² **Arcelormittal USA LLC v Essar Steel Limited** [2019] EWHC 724 (Comm) at paragraph 163 (Jacobs J).

[53] **NML Capital Limited v Chapman Freeborn Holdings Ltd**⁶³ was also a post judgment case, but the issue there was different. The Court of Appeal found⁶⁴ that the respondent to the **Norwich Pharmacal** application was not mixed up in the judgment debtor's wrongdoing, and that this rendered it unnecessary for the court to consider the argument on that appeal that was the opposite to that posed by the question in this section. The question in **NML Capital** was whether **Norwich Pharmacal** relief was available post judgment in aid of execution.⁶⁵ There was no suggestion that it was not available pre-judgment.

[54] As Jacobs J observed in **Arcelormittal**⁶⁶ Tomlinson LJ in **NML Capital** clearly considered that a **Norwich Pharmacal** order could properly be made ancillary to a freezing order and found that **NML Capital** confirmed the court's jurisdiction to make a **Norwich Pharmacal** order in the case before him.

[55] In **Mercantile Group (Europe) AG v Aiyela & Others**⁶⁷ the English Court of Appeal linked the power to order discovery against a third party in aid of a freezing order to the **Norwich Pharmacal** jurisdiction. Whilst this case was a post judgment one, Hobhouse LJ relied⁶⁸ on a decision of Robert Goff J in **A & Another v C & Others**⁶⁹ in which Robert Goff J had 'made an order for disclosure in aid of a pre-judgment Mareva against a bank which had been joined solely for the purposes of discovery'.

[56] The conclusion of Sir Thomas Bingham MR⁷⁰ is instructive:

"Both principle and authority persuade me that the judges who made these orders did have jurisdiction to make them. I am very pleased to reach that conclusion, for if jurisdiction did not exist the armoury of powers available to the court to ensure the effective enforcement of its orders would in my view be seriously deficient. That is in

⁶³ [2013] EWCA Civ 589.

⁶⁴ **NML Capital Limited v Chapman Freeborn Holdings Ltd** [2013] EWCA Civ 589 at paragraph 30 (Tomlinson LJ).

⁶⁵ See **NML Capital Limited v Chapman Freeborn Holdings Ltd** [2013] EWCA Civ 589 at paragraphs 31 and 32 (Tomlinson LJ).

⁶⁶ **Arcelormittal USA LLC v Essar Steel Limited** [2019] EWHC 724 (Comm) at paragraph 157 (Jacobs J).

⁶⁷ [1994] QB 366.

⁶⁸ **Mercantile Group (Europe) AG v Aiyela and Others** [1994] QB 366 at p. 374H (Hobhouse LJ).

⁶⁹ [1981] QB 956.

⁷⁰ **Mercantile Group (Europe) AG v Aiyela and Others** [1994] QB 366 at p.377D-F (Sir Thomas Bingham MR).

itself a ground for inferring the likely existence of such powers, since it would be surprising if the court lacked power to control wilful evasion of its orders by a judgment debtor acting through even innocent third parties."

'Norwich Pharmacal' relief in support of a foreign arbitration

- [57] Judge Nicholas Cooke QC distinguished **Ramilos** in **Benhurst Finance Ltd v Colliac**.⁷¹ In **Benhurst** the application for **Norwich Pharmacal** relief was in support of Swiss arbitration proceedings.⁷² The Judge identified⁷³ that an application under the 1975 Act was not open to those concerned in the Swiss arbitration. The learned judge concluded:

"I consider that a 'court or tribunal' [in the 1975 Act] means a state court or tribunal and not a private arbitrator or arbitration."⁷⁴

- [58] The Judge also considered that there was another more suitable route to relief and concluded in addition to his conclusion on the 1975 Act that section 44 of the English Arbitration Act did not provide a route because (as with the BVI Act) there is no basis for granting relief against non-parties to the arbitration.

'Norwich Pharmacal' relief in aid of foreign proceedings

- [59] In principle it may well be that the overseas court could send a letter of request for evidence to the BVI court. However, this does not address the fatal flaw in this process in the present context and a key distinction between that process and **Norwich Pharmacal** relief. This is that the **Norwich Pharmacal** jurisdiction can be exercised to help preserve assets by requiring secrecy on the part of the registered agent respondents; and the letter of request procedure is entirely *inter partes* and therefore vulnerable to an unscrupulous substantive defendant taking steps to evade court process whilst the letter of request procedure is completed.
- [60] In **Smith Kline**⁷⁵ Browne-Wilkinson LJ refers to the reasons given by Cumming-Bruce LJ for concluding that the court has jurisdiction under **Norwich Pharmacal** to order disclosure of the

⁷¹ [2018] EWHC 2188 (QB).

⁷² **Benhurst Finance Ltd v Colliac** [2018] EWHC 2188 (QB) at paragraph 5 (Nicholas Cooke QC, J).

⁷³ **Benhurst Finance Ltd v Colliac** [2018] EWHC 2188 (QB) at paragraph 8 (Nicholas Cooke QC, J).

⁷⁴ **Benhurst Finance Ltd v Colliac** [2018] EWHC 2188 (QB) at paragraph 9 (Nicholas Cooke QC, J).

⁷⁵ **Smith Kline & French Laboratories Ltd v Global Pharmaceuticals Ltd** [1986] RPC 394 at 400

name of a person solely for the purpose of proceedings in a foreign court. The reasons⁷⁶ given by Cumming-Bruce LJ for the existence of the jurisdiction (as opposed to its exercise) are based on the House of Lords' approval in **Norwich Pharmacal** of the Massachusetts case of Post & Others v Toledo (1887) in which a bill of discovery was granted against persons in Massachusetts to compel them to disclose the identity of persons to enable the plaintiff to institute proceedings in Ohio.

- [61] The Divisional Court in **Omar** distinguished between the purpose of a **Norwich Pharmacal** order seeking evidence and one seeking information. This was expressly disapproved by the Court of Appeal:

"It is apparent from paragraph 63 of its judgment in the present case that the Divisional Court attached some importance to the fact that what the appellants are seeking here was expressly referred to as 'evidence' rather than 'information'. I do not consider that anything turns on that taxonomy. I consider that the distinction is elusive or illusory or, to adopt the word of Mr James Eadie QC, 'ephemeral'. Today's information often ripens into tomorrow's evidence."⁷⁷

Is there a statutory basis for the grant of 'Norwich Pharmacal' relief for foreign proceedings?

- [62] There are some indications in the English and Eastern Caribbean authorities that a **Norwich Pharmacal** order should be considered as a form of mandatory injunction. In **British Steel Corporation v Granada Television Ltd**,⁷⁸ Templeman LJ described a **Norwich Pharmacal** order granted at first instance against a broadcaster to disclose the name of a source as "a mandatory injunction". In **X v Morgan-Grampian (Publishers) Ltd**,⁷⁹ Lord Donaldson MR considered that such an order was an injunction for the purposes of determining whether leave to appeal was required under s18(1)(h)(iii) of the Supreme Court Act 1981. These indications led our Court of Appeal in **A, B, C, D v E**⁸⁰ to depart from its previous decisions in **TSJ Engineering Consulting Ltd v Al-Rushaid Petroleum Investment Co**⁸¹ and **Morgan &**

⁷⁶ Smith Kline & French Laboratories Ltd v Global Pharmaceuticals Ltd [1986] RPC 394 at 398 line 10ff (Browne-Wilkinson LJ).

⁷⁷ R (Omar) v Secretary of State for Foreign Affairs [2013] EWCA Civ 118 at paragraph 12 (Maurice Kay LJ).

⁷⁸ [1982] AC 1096 at p1131 (Templeman LJ).

⁷⁹ [1991] 1 AC 1 at 14 (Lord Donaldson MR).

⁸⁰ AXA HCVAP 2011/001 (delivered 19th September 2011, unreported).

⁸¹ BVI HCVAP 2010/013 (delivered 27th July 2010, unreported).

Morgan Trust Corporation Ltd v Fiona Trust & Holding Corporation⁸² to hold that a **Norwich Pharmacal** order was an injunction for the purposes of section 30(4)(ii) of the Supreme Court Act.

[63] However, none of these decisions has treated the **Norwich Pharmacal** jurisdiction as derived from or codified in statute. The jurisdiction is generally understood, as a matter of English law, to be equitable, free-standing and non-statutory.⁸³ As Lord Sumption noted in **Singularis Holdings Ltd v PricewaterhouseCoopers**,⁸⁴ the **Norwich Pharmacal** jurisdiction illustrated ‘the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle’. The non-statutory nature of the jurisdiction is also reflected in CPR 31.18, which provides that the CPR provisions as to pre-action disclosure and third-party disclosure ‘do not limit any other power which the court may have to order’ such disclosure.

[64] Moreover, the BVI Court’s statutory power to grant injunctions (as set out in section 24 of the Supreme Court Act) appears in terms to be limited to interlocutory orders. It may at first seem difficult to see how section 24 could serve as a statutory source of jurisdiction for **Norwich Pharmacal** relief. Such orders are generally considered (as a matter of English law) not to be interim in character given that, as between the applicant and respondent, such relief is final: see **AB Bank Ltd v Abu Dhabi Commercial Bank**.⁸⁵ This distinguishes such an order from a freezing injunction granted under the **Black Swan** jurisdiction, which has been assumed to be interim in character.⁸⁶ As I shall explain below, this jurisdiction has historically adopted a different interpretation of the term ‘interlocutory’ than under English law.

⁸² BVI HCVAP 2006/003 (delivered 3rd April 2006, unreported).

⁸³ See Grant and Mumford: Civil Fraud: Law, Practice and Procedure (Sweet & Maxwell 2019) 29-052.

⁸⁴ [2015] AC 1675 at paragraph 23 (Sumption LJ).

⁸⁵ [2016] EWHC 2082 (Comm) at paragraph 15 (Teare J).

⁸⁶ See Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd BVI HCVAP 2010/028 (delivered 26th September 2011, unreported) at [147] (Kawaley JA (Ag.))

The equitable basis for Norwich Pharmacal relief is similar to the equitable basis for the Bankers Trust relief

- [65] In **Norwich Pharmacal v Customers and Excise Commissioners**⁸⁷ Lord Reid confirmed that the basis of the remedy is an equitable one and it may be granted in support of contemplated (as opposed to existing) litigation where it would be '**just and necessary**' to do so:

"Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a party in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage. Such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought. Indeed in some cases it would seem that the main object in seeking discovery was to find the identity of possible other defendants. It is not clear to me whether in all these cases the plaintiff had to undertake in some way to proceed against the person from whom he sought discovery if he found on discovery being ordered that it would suit him better to drop his complaint against that person and concentrate on his cause of action against those whose identity was disclosed by the discovery. But I would think that he was entitled to do this if he chose."⁸⁸

- [66] **Bankers Trust**⁸⁹ relief is a form of disclosure order which requires a third party (usually a bank) to provide information ordinarily protected by a duty of confidentiality to enable an applicant who has been defrauded to trace funds. The relief is dependent on the applicant's proprietary interest in the funds. As stated by Lord Denning MR:

"The plaintiff who has been defrauded has a right in equity to follow the money. [...] The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank [...]. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents — for that is the only way of tracing the money or of knowing what has happened to it [...]. So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery."⁹⁰

- [67] Accordingly, whilst both forms of relief are dependent upon equity, the **Banker's Trust** order is dependent upon the existence of a proprietary claim. No such proprietary claim is required for the grant of **Norwich Pharmacal** relief as is clear from the categories of wrongs recognised as capable of satisfying that condition for the grant of relief. The link, however, between **Banker's**

⁸⁷ [1973] 3 WLR 164.

⁸⁸ *Norwich Pharmacal v Customers and Excise Commissioners* [1973] 3 WLR 164 at p. 173 (Reid LJ).

⁸⁹ [1980] 1 WLR 1274.

⁹⁰ *Bankers Trust v Shapira* [1980] 1 WLR 1274 at p1282B-D (Lord Denning MR).

Trust and Norwich Pharmacal is illustrated by the fact that the application in **Ramilos** was in fact for both types of relief.

- [68] In **Ramilos**, the court⁹¹ referred to the judgment of Coulson J in **Shlaimoun v Mining Technologies International Inc.**⁹² At paragraph [17] of **Shlaimoun**, the judge noted that ‘there can be no doubt that Bankers Trust / Norwich Pharmacal orders can be used in order to obtain documents which are subsequently deployed in claims made in foreign jurisdictions’.
- [69] Flaux J in **Ramilos** distinguished **Shlaimoun** on the basis that the claimant in that case did not know where any proceedings might be commenced (whether in England or abroad) and whether such proceedings would be viable.⁹³ In **Ramilos**, unlike in **Shlaimoun**, the claimant had already identified the jurisdictions in which any claim could be brought.
- [70] This distinction is inapposite in the present case. In this case the application is aimed at identifying assets and ownership of the BVI companies in the context of anticipated enforcement of claims in the courts of a specific overseas country and in the arbitration. Those assets may be anywhere in the world including further BVI companies. This is typical of the context of **Norwich Pharmacal** applications in the BVI and illustrates why the distinction identified by Flaux J is inapposite for the BVI.

The broad nature of Norwich Pharmacal relief requires a broad jurisdiction to meet the ends of justice

- [71] The availability of the **Norwich Pharmacal** jurisdiction has been the subject of constant refinement and evolution. The most significant aspect of this process has been the broadening of the circumstances in which such relief is considered appropriate. The authors of ‘Disclosure of Information: Norwich Pharmacal and Related Principles’ describe these developments as follows:

“The more recent shift in emphasis has involved greater emphasis upon flexibility, involving recognition that relief is not restricted to specific areas. Rather, it is available

⁹¹ *Ramilos Trading Ltd v Buyanovsky Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) at paragraph [72] (Flaux J).

⁹² [2012] 1 WLR 1276.

⁹³ *Ramilos Trading Ltd v Buyanovsky Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) at paragraph [79] (Flaux J).

wherever the thresholds of wrongdoing and involvement are satisfied and where the Court exercises its discretion after balancing the competing interests. ... Notwithstanding this flexibility, the relief remains fairly tightly constrained and, whilst there have been exceptional cases where broad relief was granted, Norwich Pharmacal is often described as narrow in scope. However, the reality is that its flexibility means that the scope of the jurisdiction can never be marginal or insignificant.”⁹⁴

The BVI Legislature did not intend to restrict the courts' ability to protect the BVI from abuse

[72] When the BVI Legislature enacted the Evidence (Proceedings in Foreign Jurisdictions) Act 1988 it is highly unlikely that it intended to restrict the Court's ability to protect the territory from abuse by persons seeking to evade their financial obligations. It is highly likely that it intended to take the same approach to protecting its reputation in the same way as other major offshore jurisdictions such as Cayman, Jersey and Guernsey. The BVI approach to the protection of the territory from this abuse is apparent from the following.

[73] First, the Beneficial Ownership Secure System Act 2017 provides for the provision by the appropriate BVI authority of the results of a search of the beneficial ownership secure search system to a designated law enforcement authority. As identified in the exchange of Notes set out in Schedule 1 to that Act:

"This commitment between the Government of the United Kingdom and the Government of the Virgin Islands ("the Participants") is an important demonstration of our partnership to enhance the effectiveness of the long-standing law enforcement cooperation between the Participants in respect of the on-going sharing of beneficial ownership information."

[74] Secondly, it is clear from the Limitation Act 1961 that the BVI does not seek to restrict unduly the bringing of actions against BVI entities. For example, section 19 provides a six year limitation period for breach of trust claims by beneficiaries other than those in respect of a fraudulent breach of trust by a trustee where no limitation period applies. This is strikingly different from the two year limitation period for example contained in the Nevis International Exempt Trust Ordinance 1994.

B. APPLICATION OF THE PRINCIPLES

⁹⁴ Bushell and Milner-Moore: Disclosure of Information: Norwich Pharmacal and Related Principles (2nd Ed., Bloomsbury Professional, 2019) pp. 43-44.

A wrong carried out or arguably carried out by an ultimate wrongdoer

- [75] First, the respondents to the freezing orders are all in contempt of this court (or at least arguably so) as a result of their failure to provide any disclosure at all pursuant to those orders.
- [76] Secondly, K has already obtained judgments against APW for substantial sums. The Request in the arbitration proceedings identify additional claims of S for a nine figure Euro sum.
- [77] Thirdly, there is good evidence that APW (including with the assistance of an alleged secondary wrongdoer ('ASW')) has sought to hide assets from creditors in another offshore jurisdiction and from specifically the Applicants in this Territory, using the BVI companies we are here concerned with.

The need for relief

- [78] Z and Z are the registered agents of the four BVI Companies and accordingly mixed up in the wrongdoing of those companies and APW.
- [79] The evidence that Z and Z are required to hold with respect to the companies is precisely the documents that are required by the Applicants in order to:
- (1) make the BVI Freezing Orders effective;
 - (2) identify further assets (including further companies) with respect to which further relief may be sought in support of the overseas proceedings and the arbitration claim and against which a judgment or an arbitral award may be ultimately enforced.
- [80] In so far as this application seeks relief in support of the overseas proceedings, the Applicants submit that there are strong policy reasons for relief to be available in cases like the present one. As stated by the Court in Guernsey in **President of the State of Equatorial Guinea** the ability to make orders relating to money, documents or information in Guernsey in support of proceedings in other jurisdictions is 'essential' and the 'courts must ensure that Guernsey does not become a safe haven for those who may wish to evade financial liabilities'. Further, as

stated by Kawaley J in **Arcelormittal**, 'Parliament may also be presumed not to have intended the Evidence Order to be used as a fixed barrier to civil justice'.⁹⁵

[81] The Applicants submit that the above considerations apply with equal (if not greater) force in this jurisdiction. **Norwich Pharmacal** relief is often required in this jurisdiction on the basis that the disclosure is not identified to the ultimate beneficial owner until after the disclosure has been used to secure assets. To alert the ultimate beneficial owner to a request for evidence made under the 1988 Act would render the exercise pointless. That statutory route is for a wholly different purpose.

[82] A further distinction is that in cases like the present one, the disclosures are sought not 'for the purposes' of the overseas proceedings *per se* but for the purposes of an eventual enforcement in this jurisdiction (and elsewhere) of any judgment which may be obtained by K in the overseas jurisdiction.

The person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

[83] Z and Z are the registered agents of the four BVI Companies and accordingly mixed up in the wrongdoing of those companies and APW.

[84] As noted above, the evidence that Z and Z are required to hold with respect to the companies is precisely the documents that are required by the Applicants. The types of documents sought are classes of documents (a) that the registered agents can be expected to have and (b) that will identify their assets.

Conclusion on application of principles

[85] Accordingly, the Applicants submit there are strong grounds for exercising the court's jurisdiction to grant **Norwich Pharmacal** relief against Z and Z in support of the overseas proceedings and the arbitration, and to make the Court's freezing orders effective.

⁹⁵ *Arcelormittal USA LLC v Essar Global Fund Limited & ors.* Cause No. FSD 2 of 2019, (IKJ) (delivered 13th February 2019, unreported) at paragraph 68 (Kawaley J).

Discussion

- [86] I am persuaded by the Applicants' submissions that the arguments they have put forward are sufficient to determine the application in their favour. This is not a case where information is being sought which is intended to be deployed in order to obtain judgment in overseas proceedings. In the present case the information is being sought for different purposes: in aid of eventual (and reasonably likely) enforcement both overseas and in this jurisdiction, to render a freezing order effective and for deployment in proceedings before an arbitration tribunal, not (or not simply) in aid of proceedings before a foreign court.
- [87] The letter of request route provided for by the Evidence (Proceedings in Foreign Jurisdictions) Act 1988 would, where applicable, generally rule out a Norwich Pharmacal order as such an order would then not be 'necessary'. The statutory mechanisms laid down by the Evidence (Proceedings in Foreign Jurisdictions) Act 1988 do not appear to cover the present situations.
- [88] The principles governing the grant of Norwich Pharmacal orders have been expressed in the broadest terms in **Mitsui & Co, Limited v Nexen Petroleum UK Limited**.⁹⁶ Lightman J summarized these as only three conditions,⁹⁷ none of which are territorially restricted. It would be surprising if the Court were unable to make orders for the purpose of enabling justice to be done, merely because justice would be done overseas. If that were so, this would strike at the heart of such established practices as the making of freezing orders in aid of overseas legal proceedings. This is all the more so where the persons who hold information that, all else being equal, reasonably needs to be disclosed are domiciled here and keep the information here – they are obviously subject to the personal and territorial jurisdiction of this Court. Where such persons are registered agents for companies incorporated in this jurisdiction, those companies too are subject to this Court's same jurisdiction. They are often themselves potential defendants for causes of action to vindicate wrongdoing which can in principle be pursued in this jurisdiction, under our substantive and procedural laws, alternatively, they may be targets for ultimate enforcement proceedings here as asset holding vehicles used by suspected wrongdoers. It would not sit well, it seems to me, to conclude that this Court must stand by when the interests of justice as a whole sensibly require registered agents located

⁹⁶ [2005] EWHC 625 (Ch).

⁹⁷ *Mitsui & Co, Limited v Nexen Petroleum UK Limited* [2005] EWHC 625 (Ch) at paragraph 21 (Lightman J).

here to disclose information, particularly where such disclosure may be only means whereby substantive justice can ultimately prevail somewhere.

- [89] Yet it is an inescapable reality that the disclosure of information in aid of eventual overseas proceedings has always been a difficult issue. In the **Norwich Pharmacal** case itself, the disclosure sought was initially framed also to include disclosure for the purposes of pursuing legal proceedings overseas. The applicant there ultimately dropped that part of his application and the House of Lords did not have to consider it.
- [90] The English High Court decision in **Ramilos** has served as a check to recall that '[t]he jurisdiction of the English courts to order persons within its jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory.'⁹⁸ Prior to **Ramilos**, it seems that there has been a wide-spread tacit assumption that there was no conceptual difficulty with granting Norwich Pharmacal relief in aid of proceedings in foreign courts.
- [91] The phrase 'in aid of proceedings in foreign courts' is a wide formulation. The word 'aid' imports a concept without readily identifiable limits. It could be narrowly or widely interpreted. It is not easy to see which it should be, based simply on this general statement of doctrinal principle. It would probably also not be correct to try to parse this statement overly rigorously as if it were a statutory formulation, since this *dictum* of Lord Diplock appears to have been made as a general observation and not as a conclusion to any thorough analysis, nor as laying down a universal rule. Moreover, when interpreting the word 'aid', we are not concerned with policy arguments to ensure, for example, that the Court's equitable jurisdiction remains as wide as necessary to enable justice to be done, but with identifying the source of the Court's power. To that extent I respectfully differ from the Applicant's submission here that the Court should be taken to retain an equitable jurisdiction unless and until it is supplanted by a statutory provision. That argument does not address the difficulty that the power in question is said always to have derived exclusively from statute. If that proposition is right, then unless statute supplies the power, there is no equitable power and common law cannot fill the gap.

⁹⁸ *Ramilos Trading Ltd v Buyanovsky Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) at paragraph 65 (Flaux J), quoting *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 632G – 633A (Diplock LJ).

- [92] Another word which is striking in the formulation of this principle is ‘exclusively’. I have not been taken to an authoritative and detailed statement explaining the juridical basis for this proposition. This is not to call it into question – indeed I have no basis for doing so – but it is a strong statement. Where a principle admits of no exceptions (and that is rare) one would assume that the basis for it can be clearly seen or shown. With no disrespect intended, that is not the case here. The fact that a considerable number of courts, over many years, have been prepared to grant relief on a basis which we are now being reminded is wrong – at least as a matter of English law - suggests that this principle is not a self-evident proposition. We can, however, for present purposes take it to be correct.
- [93] We need to consider whether on the facts of each case, the Court is being asked solely to order disclosure ‘in aid of’ proceedings in a foreign court. If the application does more than this, then it seems logical that the Court’s equitable jurisdiction still applies to empower the court to grant the disclosure sought in order to fulfill those other purposes.
- [94] However, whatever may be the position under English law and in the context specifically of the United Kingdom statutory landscape, the position has developed differently in the Anglo-Saxon offshore world, in jurisdictions which look to the Judicial Committee of the Privy Council as their highest court.
- [95] In the Cayman case of **Braga v Equity Trust Company**⁹⁹ Smellie CJ made a general but *obiter* finding¹⁰⁰ that the existence of the jurisdiction to grant **Norwich Pharmacal** relief in aid of foreign proceedings must be taken as a settled proposition in light of the Privy Council decision in **Equatorial Guinea (President) v Royal Bank of Scotland International**. This was also observed in the closely reasoned Cayman Grand Court judgment of Kawaley J in **Arcelormittal USA LLC v Essar Global Fund Limited & ors.**¹⁰¹ Smellie CJ’s observation is compelling. However, the Privy Council was not required to determine the point, it was not an issue before it, and the Privy Council heard no argument on the issue. This Privy Council decision is thus *obiter*. Further, it should be noted that the Guernsey Court of Appeal itself did

⁹⁹ [2011] 1CILR 402.

¹⁰⁰ **Braga v Equity Trust Company** [2011] 1CILR 402 at paragraph 83 (Smellie CJ).

¹⁰¹ **Arcelormittal USA LLC v Essar Global Fund Limited & ors.** Cause No. FSD 2 of 2019, (IKJ) (delivered 13th February 2019, unreported) at paragraph 47 (Kawaley J).

not address the issue in detail. The approval ultimately came down to an endorsement in general terms of the decision and reasoning of the Lieutenant Bailiff sitting in the court of first instance. At risk of grossly oversimplifying the learned Lieutenant Bailiff's erudite reasoning, the twin planks of his decision were the demands of comity and the undoubted flexibility of the Norwich Pharmacal remedy in all its respects. This, however, does not necessarily address the key issue whether the Court has jurisdiction, in the sense of power, to consider an application for Norwich Pharmacal relief in the first place: either the Court has jurisdiction or it does not. That is a very different question from whether it ought sensibly to have such a power, to protect and enhance the jurisdiction as a responsible offshore financial centre. This latter is a political policy issue and is not a source of the Court's power. That said, the Privy Council's decision in **Equatorial Guinea (President) v Royal Bank of Scotland International** should be treated as at least very persuasive, if for no other reasons than that it is a decision of our highest court, informed by the collective wisdom and learning of its eminent panel and, very importantly, the Privy Council manifestly made its opinion on the issue known so that others could be guided thereby. This Court is thus gratefully persuaded by the Privy Council's guidance and interpretation there.

[96] In our own Eastern Caribbean Supreme Court jurisdiction we can also derive assistance from other binding precedent. This enables us to look to statute as a source for the power, if indeed it is right that its source must be exclusively statutory.

[97] In **A, B, C, D v E** the Court of Appeal held that a **Norwich Pharmacal** order is a type or form of injunction, by virtue of its import and intent.¹⁰² At paragraph [12] of that decision the Court of Appeal stated that the Supreme Court Act 'empowers the court to grant injunctions 'in all cases in which it appears to the Court or judge to be just or convenient...' In this Territory this provision is found at section 24(1) of that Act. It provides specifically that the Court or judge may do so 'by an interlocutory order'. But the Court of Appeal made no mention of this, apparently referring to injunctions without distinction. It went on in the same paragraph to recall that the **Norwich Pharmacal** jurisdiction serves a 'useful purpose' of 'providing a remedy in circumstances where none would otherwise exist'. The Court of Appeal then called this an 'equitable and exclusive' jurisdiction and observed that 'the court is charged with exercising the same equitable jurisdiction as the English courts of similar standing' by virtue of the importation

¹⁰² Anguilla HCVAP 2011/001 (delivered 19th September 2011, unreported) at [10] (Pereira JA).

provisions contained in that Act. The Court of Appeal then explained that this equitable jurisdiction is one which

‘continues to be shaped and developed as it seeks to achieve, as times and circumstances change, its fundamental objective of ensuring that justice is done. It is not surprising that the expression of the court’s jurisdiction is often contained in case law rather than in rules and statutes.’¹⁰³

[98] The Court of Appeal then considered whether a **Norwich Pharmacal** order made on an interlocutory application is a final order. It found that the so-called application test, derived from the case of **Othniel Sylvester v Satrohan Singh**,¹⁰⁴ applies: ‘an order is final if on an application ..., whichever way it goes, [it] brings finality to the issue or proceedings’. Thus, an order would be final if the applicant ‘could go no further with their claim’ or ‘in the sense that what the applicants wanted they in fact got’.¹⁰⁵ The Court of Appeal stated that the question whether a **Norwich Pharmacal** order is final or interlocutory may depend upon various factors, including whether the order may contain further directions requiring further disposition by the Court.¹⁰⁶ The Court of Appeal clearly intended the question whether an application is final or interlocutory to be one of substance over form, and to be considered on a case by case basis.

[99] The Applicants are correct that in the English High Court case of **AB Bank Ltd v Abu Dhabi Commercial Bank**¹⁰⁷ Teare J. ruled that Norwich Pharmacal relief is final in nature and not interlocutory. But in doing so he explained that as a matter of English law he was unable to follow precedent from this jurisdiction, in the form of our Court of Appeal decisions in **TSJ Engineering Consulting Ltd v Al-Rushaid Petroleum Investment Co**¹⁰⁸ and **Morgan & Morgan Trust Corporation Ltd v Fiona Trust & Holding Corporation**¹⁰⁹ in which a broad interpretation is given to the concept of ‘interlocutory’. Teare J expressly quoted from the judgment of the learned Chief Justice Rawlins (as he then was) in **TSJ Engineering**, at paragraph [30]:

¹⁰³ Anguilla HCVAP 2011/001 (delivered 19th September 2011, unreported) at [12] (Pereira JA).

¹⁰⁴ St. Vincent and the Grenadines Civil Appeal No. 10 of 1992 – (delivered 18th September 1995, unreported).

¹⁰⁵ Anguilla HCVAP 2011/001 (delivered 19th September 2011, unreported) at [18] (Pereira JA).

¹⁰⁶ Anguilla HCVAP 2011/001 (delivered 19th September 2011, unreported) at [19] and [20] (Pereira JA).’

¹⁰⁷ [2016] EWHC 2082 (Comm) at paragraph 15 (Teare J).

¹⁰⁸ BVI HCVAP 2010/013 (delivered 27th July 2010, unreported).

¹⁰⁹ BVI HCVAP 2006/003 (delivered 3rd April 2006, unreported).

"Its purpose [the purpose of the application for a **Norwich Pharmacal** order] is to seek information to support a cause of action in other proceedings, and is ancillary to those other proceedings. It does not itself create a substantive cause of action."¹¹⁰

- [100] As a statement of the law applying within our Eastern Caribbean Supreme Court jurisdiction, this has been overtaken by the decision in **A, B, C, D v E**¹¹¹ but both serve to underline that in this jurisdiction **Norwich Pharmacal** orders are not inherently final orders.
- [101] Both these cases also illustrate that our Courts have historically adopted a broad interpretation for the term 'interlocutory'.
- [102] If a **Norwich Pharmacal** order is an injunction, and if it is to be treated as an interlocutory order, then section 24(1) of the Supreme Court Act empowers the Court to make such orders. The source of that power is therefore not exclusively equitable or the common law. Section 24(1) confers a very broad power upon the Court. Where (or if) an equitable or common law power does not exist, section 24(1) permits orders to the same effect to be made.
- [103] This brings us to consider that there is a further, and (I would stress) separate reason for being able to see in section 24(1) statutory power to make **Norwich Pharmacal** orders in aid of proceedings before overseas courts. There is precedent from this Territory that the reference to interlocutory orders in section 24(1) is to be construed widely and not limited to meaning interim orders pending final orders of this Court. This is perfectly consistent with the historically wide interpretation of the term 'interlocutory' I have mentioned above.
- [104] In **Black Swan Investment ISA v Harvest View**¹¹² Bannister J expressly treated section 24(1) as conferring jurisdiction (in the sense of power) upon this Court to make asset freezing orders by way of an 'injunction ancillary to a claim for substantive relief to be granted by a foreign court or an arbitral body'.¹¹³ He considered that section 24(1) 'undoubtedly' gave the Court this jurisdiction.¹¹⁴ He observed, as part of his reasons, that 'freezing orders are unlike 'ordinary'

¹¹⁰ *AB Bank Ltd v Abu Dhabi Commercial Bank* [2016] EWHC 2082 (Comm) at paragraph 12 (Teare J).

¹¹¹ *Anguilla HCVAP 2011/001* (delivered 19th September 2011, unreported).

¹¹² *BVIHCV2009/399* (delivered 23rd March 2010, unreported).

¹¹³ *Black Swan Investment ISA v Harvest View BVIHCV2009/399* (delivered 23rd March 2010, unreported) at paragraph [6] (Bannister J).

¹¹⁴ *Black Swan Investment ISA v Harvest View BVIHCV2009/399* (delivered 23rd March 2010, unreported) at paragraph [10] (Bannister J).

interlocutory injunctions, because they bear no relation to the subject matter of the proceedings'.¹¹⁵ He concluded that the Court has the power to make a freezing order which would stand alone without other legal proceedings in this jurisdiction, but which is ancillary to, and in that sense interlocutory to, substantive overseas proceedings. **Norwich Pharmacal** orders too are not 'ordinary' interlocutory injunctions, as in many (indeed most) cases the disclosure respondent is not and will never be a party to the substantive proceedings, but, often the substantive proceedings would not be possible without the **Norwich Pharmacal** relief that is or becomes ancillary to the substantive proceedings.

[105] This Court's reasoning in **Black Swan** was accepted by a two to one majority of the Court of Appeal in **Yukos CIS Investments Limited et al. v Yukos Hydrocarbons Investments Limited et al.**¹¹⁶ The judgment of the majority was given by Kawaley JA (Ag.), with whom Gordon, QC JA (Ag.) concurred. Kawaley JA (Ag.) accepted the sense of 'interlocutory' as used by this Court in **Black Swan**.¹¹⁷ I will rely upon this decision as it still represents the law, although, for completeness I am aware that the underlying basis for **Black Swan** is currently pending consideration by our Court of Appeal.

[106] The key to this Court's jurisdiction to make such free-standing freezing orders in **Black Swan** was recognized to be the presence within the jurisdiction of assets which would be amenable to eventual enforcement here. That is the case where an eventual judgment debtor owns a company incorporated within the jurisdiction. Such a company falls under the personal and territorial jurisdiction of this Court. Where, as in the case at Bar, the **Norwich Pharmacal** relief is sought against BVI registered agents that provide corporate services in respect of companies incorporated here, which are or could be assets of or vehicles for suspected wrongdoers, this Court has jurisdiction in every respect (territorial, personal and strict) over both the registered agents and the eventual target companies that constitute assets or vehicles of suspected wrongdoers.

¹¹⁵ *Black Swan Investment ISA v Harvest View BVIHCV2009/399* (delivered 23rd March 2010, unreported) at paragraph [11] (Bannister J).

¹¹⁶ *BVI HCVAP2010/028* (delivered 26th September 2011, unreported).

¹¹⁷ *Yukos CIS Investments Limited et al. v Yukos Hydrocarbons Investments Limited et al HCVAP2010/028* (delivered 26th September 2011, unreported) at paragraphs [138], [139], [145] and [147] (Kawaley JA (Ag.)).

[107] Consequently, to the extent that this Court is required, as a matter of sound legal doctrine, to look solely to statute for the source of its power to order disclosure of information or evidence in aid of proceedings in a foreign court, it need not look only to the Evidence (Proceedings in Foreign Jurisdictions) Act 1988. Section 24(1) of the Supreme Court Act provides the Court with express power to grant injunctive orders ‘in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made’, where the order will be interlocutory in nature within a broad interpretation of that term. That is wide enough to include **Norwich Pharmacal** type injunctions, at least where the Court has jurisdiction over the disclosure respondent. Justice or convenience will then be served where the well settled conditions for the grant of such orders is made out.

[108] I take this opportunity to thank learned counsel for their assistance during this matter. The Court’s appreciation extends to Ms. Poppy Rimington-Pounder and Mr. Andrew McLeod who, whilst not appearing at the hearings of this matter, substantially prepared the Applicants’ skeleton arguments.

Gerhard Wallbank
High Court Judge

By the Court

Registrar