IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 2 OF 2019 (IKJ)

IN THE MATTER OF AN APPLICATION FOR A DISCLOSURE ORDER

BETWEEN

ARCELORMITTAL USA LLC

PLAINTIFF

AND

(1) ESSAR GLOBAL FUND LIMITED
(2) ESSAR CAPITAL LIMITED

DEFENDANTS

IN CHAMBERS

Appearances:	Mr Tom Weisselberg QC of counsel, Mr Paul Smith, Ms Katie Pearson and Ms Anya Park, Harneys, on behalf of the Plaintiff
	Mr Vernon Flynn QC and Mr Tom Lowe QC[1] of counsel, Mr Ulrich Payne and Mr Shaun Maloney, Ogier, on behalf of the Defendants
Before:	**The Hon. Justice Kawaley**
Heard:	**13 February 2019**
Draft Ruling Circulated:	**19 March 2019**
Ruling delivered:	**29 March 2019**

HEADNOTE

Norwich Pharmacal Order-application to set aside-whether jurisdiction exists to grant relief in aid of foreign arbitral award absent local enforcement-whether equitable jurisdiction ousted because of availability of statutory remedy -relevance of failure to seek local enforcement of foreign arbitral

[1] Mr Lowe QC was in attendance for only half of the hearing.

award-whether wilful evasion of foreign enforcement processes qualifies in law as 'wrongdoing'-whether scope of order proportionate-Foreign Arbitral Awards Enforcement Law (1997 Revision), section 5-Evidence (proceedings in Other Jurisdictions (Cayman Islands) Order 1978

RULING ON APPLICATION TO SET ASIDE OR VARY EX PARTE ORDER

Introductory

1. On January 15, 2019, I granted the Plaintiff ("AMUSA") an ex parte Norwich Pharmacal Order which was amended on January 16, 2019 ("NPO"), upon hearing the Plaintiff's Ex Parte Originating Summons dated January 10, 2019. The Defendants ("EGFL" and "ECL" respectively) applied orally on January 31, 2019 for directions to enable them to apply to set aside or vary the NPO. On January 31, 2019, I also granted further relief designed to ensure the preservation of the information sought under the NPO, relief which the Defendants very sensibly did not resist. By AMUSA's own account, it "*sought that relief to assist with the enforcement of an ICC Arbitral Award dated 19 December 2017('**the ICC Award**') that it obtained against a company incorporated under the laws of Mauritius, Essar Steel Ltd ('**Essar Steel**')*"[2].

2. The NPO was sought largely in reliance upon evidence filed by AMUSA against Essar Steel (enforcement of the ICC Award and Worldwide Freezing Order-"WFO")and against Essar Capital Services (UK) Limited ("Essar Capital"), Mr Prashant Ruia ("Prashant") and Mr Sushil Baid ("Mr Baid") (Search Order), Claim No. CL-2019-000029, as well as AMUSA against Prashant, Mr Joseph Seifert ("Mr Seifert"), Mr Nicholas Harrold, Mr Andrew Wright, Mr Nigel Bell, Mr Baid and Essar Capital (Norwich Pharmacal relief), Claim No. CL-2019-000030 (collectively, the "English Proceedings"). The NPO was granted in terms substantially similar to the corresponding order granted by Butcher J in the English Proceedings on January 14, 2019.

3. The Skeleton Argument of the Defendants sets out eight reasons why the NPO ought not to have been made, which (based on the points which were seriously pursued in oral argument) may be distilled into the following main three arguments:

    (a) the NPO could not be used in aid of enforcement of a foreign arbitration award which was not being enforced and/or recognised under Cayman Islands domestic law. This is because the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (the "Evidence Order") has displaced the equitable jurisdiction; the contrary decision of

[2] Skeleton Argument for the hearing on February 13, 2019, paragraph 2.

this Court in *Braga-v-Equity Trust Company* [2011] 1 CILR 402 (Smellie CJ) should be reconsidered;

(b) the alleged wrongdoing, deliberate evasion by the judgment debtor, is not an actionable wrong, particularly in circumstances where the ICC Award is only being enforced abroad. This complaint cannot in law support *Norwich Pharmacal* relief. *UVW-v- XYZ*, BVI HC (Com) 108 of 2016, Judgment dated October 27, 2016 (unreported, Wallbank J) was wrongly decided. Further the NPO was impermissibly being used to police (or support) a Worldwide Freezing Order ("WFO") granted by another court;

(c) the NPO went beyond the permissible limits of seeking essential information and sought broad discovery. It was not 'necessary' in the requisite literal sense.

4. Before considering the merits of these complaints, I will summarize what I consider to be the principal strands of the evidence relied upon by the Plaintiffs in obtaining the NPO and set out the short oral decision which I gave for granting the NPO at the conclusion of the hearing. After considering the merits of the NPO, I will set out salient parts of the NPO itself before addressing the complaints that if the NPO was otherwise validly made, its scope is impermissibly broad.

The Plaintiffs' evidence

Overview

5. The Plaintiff's case in a nutshell was that (a) the Defendants actively controlled the Essar Group and Essar Steel, (b) the Defendants had before the ICC Award had been obtained demonstrated a propensity for directing the affairs of the Essar Group (including Essar Steel) so as to dissipate assets and evade debts, and that (c) since the ICC Award was made on December 19, 2017, Essar Steel had made no attempts whatsoever to pay off even one cent of a debt now in excess of US$1.5 billion.

6. The Defendants did not seek to suggest that either of the first two allegations was incapable of proof or that the third allegation was incorrect. They of course took issue with the way their conduct had been characterised and denied that they were involved in a pattern of evading the Essar Group's debts (Fourth Sushil Baid Affidavit, paragraphs 22-30). The gravamen of their attack on the validity of the NPO was that it was not enough for the Plaintiff to convince the Court that they might be guilty of morally reprehensible conduct. The requisite legal test for establishing a need for relief to remedy actionable wrongdoing, the Defendants argued, had not been met.

7. Accordingly the crucial evidence for the purposes of the present application is really limited to what the Plaintiff relies upon as evidence of suspected wrongdoing. However, it is also important to take into account the 'parallel' proceedings in other jurisdictions which to some extent inform the wrongdoing analysis which the Defendants urge the Court to undertake. It is important because the Plaintiff relied heavily on evidence filed in the English Proceedings, and the claims asserted in those proceedings were not perfectly aligned with the claims asserted herein.

8. The Plaintiff's Ex Parte Originating Summons for a Disclosure Order was filed on January 10, 2019. It was supported by the First Affidavit of Kasra Nouroozi Shambayati sworn on January 10, 2019 ("Nouroozi 1"), the Second Affidavit of Kasra Nouroozi Shambayati sworn on January 11, 2019 ("Nouroozi 2") and the Third Affidavit of Kasra Nouroozi Shambayati sworn on January 14, 2019 ("Nouroozi 3"). Nouroozi 1 stated as follows:

> "*8. The Plaintiff relies on the content of the English Affidavit for the purpose of this application...I provide this affidavit by way of high level summary of the matters which are more fully explained therein.*"

9. Nouroozi 2 updated the evidential position by exhibiting the deponent's Second English Affidavit. Nouroozi 3 updated the evidential position by exhibiting the deponent's Third English Affidavit.

10. The Plaintiff's Skeleton Argument was filed on Friday January 11, 2019, well in advance of the hearing fixed for Tuesday January 15, 2019. The evidential case was summarised as follows:

> "2. *As described in Affidavits sworn by Kasra Nouroozi Shambayati in these proceedings ("Nouroozi Cayman Aff") and in related proceedings in the English Commercial Court ("Nouroozi English Aff"), EGFL and ECL have both been involved in wrongdoing by Essar Steel, namely concealing and/or stripping assets with the effect of frustrating or evading enforcement of the ICC Award. The purpose of seeking Norwich Pharmacal relief against EGFL and ECL is to assist AMUSA with its attempts to enforce the ICC Award and to locate and identify assets against which enforcement can be undertaken.*"

The underlying commercial relationship

11. On December 17, 2012, AMUSA entered into an agreement with two Essar Group companies, ESML and Essar Resources Inc. ("ER"), for the supply and purchase of iron ore pellets to be produced by ESML in Minnesota with an initial delivery date of July 1, 2014 (the "Pellet Sale Agreement"). This delivery date was extended on January 10, 2014 with Essar Steel replacing ER as a party (the "Amended and Restated Agreement"). Further extensions and modifications were made on June 18, 2015 (the

"June PSA"). The Amended and Restated Agreement as amended is hereinafter referred to as the "Agreement". The Agreement contained an arbitration clause.

12. AMUSA terminated the Agreement on May 27, 2016 having found an alternative source of supply. On July 8, 2016, ESML filed a petition under Chapter 11 of the US Bankruptcy Code. Those proceedings are still pending.

The ICC Award

13. On August 9, 2016,AMUSA commenced arbitration proceedings against Essar Steel in Minnesota. The ICC Award having been obtained on December 19, 2017 was then enforced in Minnesota in proceedings in which Essar Steel did not participate. On April 2, 2018, the US District Court entered judgment in favour of AMUSA by way of recognising and enforcing the ICC Award.

14. The Mauritian Supreme Court entertained a contested application to enforce the ICC Award on September 20, 2018. Essar Steel contended that it was unable to present its case and that consequentially enforcement would be contrary to public policy. A judgment was still awaited when the present application to discharge the NPO was heard.

The English Proceedings

15. From Mr Nouroozi's First English Affidavit, it is apparent that the primary relief sought is permission to enforce the ICC Award. The WFO was sought in aid of that enforcement. The real risk of dissipation was demonstrated by reference to:

    (a) historic asset dissipation at Essar Steel;

    (b) historic actual or alleged unlawful conduct within the Essar Group;

    (c) the use of the corporate structure to obscure which entity holds which assets within the Essar Group; and

    (d) Essar Steel's default in complying with the ICC Award.

16. From the Plaintiff's Skeleton in the English Proceedings filed in support of the ex parte application for a Search Order, it is apparent that this limb of relief was legally founded on a statutory provision broadly corresponding to the common law Anton Piller jurisdiction. The Search Order was sought in aid of execution of ICC Award.

17. The *Norwich Pharmacal* information and document preservation application was also implicitly made in support of enforcement of the ICC Award. In his First English Affidavit, Mr Nouroozi deposed:

> "*193. As set out above, AMUSA's position is that steps have wrongfully been taken to evacuate Essar Steel's assets to AMUSA's prejudice as a creditor. In order to enable AMUSA effectively to take action in respect of this, it needs additional information so as to understand these various steps, who was involved in them, and what has become of Essar Steel's assets…*"

Wrongdoing

18. The First English Affidavit identifies various asset transfers disclosed in the Essar India 2015 Financial Statements in support of AMUSA's belief that dissipation has occurred. The 2012 and 2013 transfers are not at first blush evidence of seeking to evade the ICC Award. Essar Steel was not yet party to the Agreement, although it had been consummated in its original form. However, it is fairly asserted that by September 2015, "*Essar Steel had become a party to the Agreement; and would have been aware of the substantial liabilities that it had assumed by its terms*". On September 19, 2015 Essar Steel's shareholding in Essar Steel UAE once valued at over US$ 41 million was purportedly transferred to another Essar entity for US$ 200 million, although it is unclear which entity received that consideration. What was clear, Mr Weisselberg QC pointed out in oral argument in the course of the ex parte hearing, was that this consideration did not appear in the asset column of Essar Steel's accounts.

19. Reliance was also placed on judicial findings made in Canada and India which suggested that EGFL had been used to control the Essar Group in a way which was prejudicial to creditors.

20. Against this background, the specific wrongdoing relied upon in relation to the *Norwich Pharmacal* relief was unsurprisingly described somewhat concisely in the First English Affidavit:

> "*193. As set out above, AMUSA's position is that steps have wrongfully been taken to evacuate Essar Steel's assets to AMUSA's prejudice as a creditor. In order to enable AMUSA effectively to take action in respect of this, it needs additional information so as to understand these various steps, who was involved in them, and what has become of Essar Steel's assets…* "

21. In Nouroozi 1, filed in these proceedings, it was crucially deposed that:

> "*17. As explained in detail in the English Affidavit …the Essar Group and the individuals behind it have taken various steps, the effect of which has been to dissipate and/or to obscure the location of assets so as to impede enforcement.*

In summary, it is AMUSA's belief that steps have been taken to strip Essar Steel of its assets with the object of and/or effect of preventing enforcement of the ICC Award and that the Cayman Defendants have played a central role in that exercise."

22. In the English Proceedings, the Plaintiff's Skeleton Argument summarised the case on wrongdoing as follows:

> "*170...there is a good arguable case that a wrong has been carried out. As explained in the Nouroozi Aff at §§71ff, on the evidence presently available to it AM believes that there is a good arguable case that steps have been wrongfully taken to unjustifiably...dissipate Essar Steel's assets in order to frustrate the ICC Award....*
>
> *171... the disclosure sought is necessary to enable AM effectively to enforce the ICC Award and take action in response to the dissipation of Essar Steel's assets. AM requires the information sought in the Information and Document Preservation Orders (together with that sought by the Search Order) in order to ascertain exactly what steps have been taken to dissipate Essar Steel's assets, who was involved in that dissipation and where those assets are now. AM may thereby prevent Essar Steel further evading enforcement.*"

23. In the Plaintiff's Skeleton for the January 15, 2018 ex parte hearing before this Court, the case on wrongdoing was put in the following way. Firstly, it is important to note that the purpose of the present proceedings was described as follows:

> "*21. The Summons that is now before this Court is thus made in parallel to the proceedings that are being commenced in the English Commercial Court. It is made alongside those proceedings but is independent of them; its purpose is to assist AMUSA with the process of enforcing the ICC Award and to identify assets that are either held by Essar Steel or that have been dissipated by it. AMUSA believes that unless the relief sought in this application is granted, there is a real risk that information and documents will be withheld and/or destroyed.*"

24. AMUSA's case was described most broadly as follows:

> "*16. In the light of such information as is presently available to it, AMUSA believes that steps have been taken and/or will be taken to dissipate and/or obscure the location of Essar Steel's assets and so impede enforcement of the ICC Award. The basis for this belief is set out in the Nouroozi English Aff. in particular at Sections E and F. In summary, however, they include the following:*

(1) *Historic dissipation of Essar Steel's assets. The 2015 Financial Statements reveal transactions during the currency of the Nashwauk Project by which Essar Steel transferred apparently very valuable shareholdings in Essar Steel India Limited ("**Essar India**") and Essar Steel UAE Limited ("**Essar UAE**") to another corporate structure under EGFL's control, in which Essar Steel had no interest. Pending disclosure and further information, AMUSA reasonably infers that Essar Steel received no or no valuable consideration for these transfers.*

(2) *Wrongdoing at the Essar Group. Relevant Essar Group companies (including EGFL) and individuals (including Prashant Ruia ("**Prashant**") and Joseph Seifert) have been implicated in findings or allegations of serious wrongdoing made in foreign proceedings, including in the context of insolvency proceedings in respect of Essar Steel's subsidiaries. These suggest the involvement of the Essar Group and those behind it in a wider pattern of wrongdoing characterised by: (i) dealing in bad faith; (ii) disregard for prevailing standards of corporate governance; and (iii) the transfer of assets within the Essar Group to the prejudice of creditors.*

(3) *The nature of the corporate arrangements at Essar Group. The Essar Group comprises a complex chain* [of] *companies and offshore trusts. AMUSA reasonably infers that such structures have been used by EGFL and the Ruia family to obscure the manner in which assets are held at the Group, to the prejudice of creditors.*

(4) *Essar Steel's conduct in the arbitral proceedings. Essar Steel failed to conduct the arbitral proceedings in good faith. It misled the Tribunal regarding the documents available to it; refused to comply with the Tribunal's orders, including for the production of documents regarding its financial position; and at a late stage elected no longer to participate. AMUSA reasonably infers that that election was made in recognition of the fact that Essar Steel's position on the issues in the arbitration lacked merit and/or as part of a strategy to manufacture grounds by which to resist enforcement of any award in AMUSA's favour.*

(5) *Essar Steel's default in complying with the ICC Award and its conduct in subsequent recognition and enforcement proceedings. Although Essar Steel participated in the arbitral proceedings, it has declined voluntarily to comply with the ICC Award. While it had the opportunity to challenge the ICC Award in the place where it was made, Essar*

Steel declined to do so, as noted above. AMUSA's position is that there was no basis for such a challenge; but it is telling that Essar Steel's stated reason for ignoring the recognition and enforcement proceedings before the US District Court is the assertion that it has no assets in Minnesota or the USA. AMUSA reasonably infers that Essar Steel will not engage with the ICC Award unless its assets are liable to enforcement action. AMUSA believes that Essar Steel thus has an incentive unjustifiably to dissipate its assets to impede such action; and in the light of the corporate arrangements at Essar Group, and the track record of those in control of it (i.e. EGFL and the Ruia family behind it), the opportunity and ability to do so."

25. The following concise submission was then made:

> *"38. AMUSA submits that there is a good arguable case that a wrong has been carried out. As explained in the Nouroozi English Aff at §§88 to 133,* ***[HB2 /4 / 25-44]*** *on the basis of the evidence that is presently available, AMUSA believes that steps have been wrongfully taken unjustifiably to dissipate Essar Steel's assets in order to frustrate the ICC Award. These actions do not simply represent an inability to pay a judgment debt in good faith; rather, they represent a deliberate effort to obstruct or frustrate enforcement. Indeed, it is notable that EGFL has recently announced that it has repaid US$ 1.75 billion to Essar Group secured creditors – it is reasonable to infer that the Essar Group can find the money when it has to do so, from sources that are not currently known to AMUSA."*

26. The crucial factual assertion relied upon is that "*AMUSA believes that steps have been taken and/or will be taken to dissipate and/or obscure the location of Essar Steel's assets and so impede enforcement of the ICC Award.*" This language most helpfully captures two dimensions of the wrongdoing alleged:

    (1) past steps to impede enforcement of the ICC Award;

    (2) future steps to impede the enforcement of the ICC Award.

27. The Defendants' application does not engage with this case on the factual plane. The submission that no wrongdoing was established was based on legal principles rather than evidential deficiency concerns. Some preliminary observations may helpfully be made at this juncture in relation to the essentially legal complaint that the NPO could only have properly been granted in support of local enforcement of the Award.

28. Is there a necessary conceptual link between the question of whether or not the ICC Award is or is not being enforced in the Cayman Islands as regards limb (2) of the wrongdoing case, but not as regards limb (1)? There might at first blush appear to be clearer jurisdictional link with this Court's domestic jurisdiction as regards (2). But as regards (1) as well, there would be a similar domestic law policy interest in affording relief to a party complaining of attempts to evade enforcement of a foreign award eligible for local recognition and enforcement before it is locally recognized. The real question appears to be whether *Norwich Pharmacal* relief is unavailable where the wrongdoing complained of relates to evading the enforcement of foreign awards or judgments, in circumstances where the relevant enforcement proceedings are exclusively taking place abroad. This question did not arise in relation to the parallel English Proceedings, because the ICC Award was likely to be recognized and enforced by the English Court.

29. It also important to note one further strand of the evidence which is potentially relevant to any jurisdictional analysis. AMUSA's case was that the Caymanian-incorporated Defendants, subject to the personal territorial jurisdiction of this Court, directed the activities of the Group. The Defendants were not alleged to have been innocently mixed up in wrongdoing perpetrated abroad by parties with no local jurisdictional ties.

The Mauritian Proceedings

30. The position in Mauritius explained in the Plaintiff's Skeleton Argument for the ex parte hearing which was not in controversy may be briefly described as follows:

(a) on February 19, 2018, AMUSA applied to the Mauritian court for a provisional order granting recognition and enforcement of the ICC Award;

(b) on February 22, 2018, the Mauritian Court granted a Provisional Order;

(c) on March 8, 2018, Essar Steel applied to set aside the Provisional Order and stay enforcement on public policy grounds that it had been denied a fair opportunity to present its case to the ICC Arbitration Tribunal;

(d) the application to challenge enforcement of the ICC Award was heard by the Mauritian Court on September 20, 2018 when judgment was reserved.

The January 15, 2019 Ruling

31. The oral reasons I gave for granting the NPO were subsequently transcribed as follows[3]:

> "1. *In this case the Plaintiff, pursuant to an ex parte originating summons dated 10 January 2019 seeks a Norwich Pharmacal order against the defendants. The present application is, in general terms, ancillary to a somewhat different application made against different defendants in London yesterday where Christopher Butcher, J granted various orders, including a worldwide freezing injunction against the defendants in those proceedings, also granted recognition of the arbitration award which is central to the present application, also granted a search order and finally granted Norwich Pharmacal relief against the defendants in that action.*
>
> *2. The applicant is a company incorporated in Delaware and is involved in the steel and mining businesses. The applicant seeks relief against two companies in the Essar Group of companies which group is described in a very clear chart, described in the plaintiff's skeleton as an organogram which indicates that the two defendants known by way of acronym as, "EGFL", and, "ECL", are both Caymanian companies that sit at the very top of the group structure. Beneath that structure one sees that the first defendant is 100 per cent shareholder of, amongst other companies, Essar Steel Ltd, a Mauritian company, which is the defendant against whom a substantial arbitration award was obtained in Minnesota.*
>
> *3. The award was obtained on 19 December 2017, and the Plaintiff was awarded just over US$1.38 billion in damages, costs and interest. It's noted, somewhat wryly in the Plaintiff's skeleton, that to date Essar Steel has not paid a cent -- paragraph 10. The claim for Norwich Pharmacal relief is advanced on the basis of two main strands, as I view the material. Firstly, there is evidence of what has been referred to as propensity evidence indicating various forms of the historic wrongdoing which were set out and summarised in paragraph 16 of the Skeleton Argument. That evidence, in my judgment, does nothing more than to set the scene for looking at the wrongdoing which is complained of in a substantive way in a more cynical light than might otherwise be justified had the Defendants been companies with an unblemished record.*
>
> *4.The proposition that the Defendants at the top of the corporate chain are likely to have information which is of relevance to the wrongdoing is supported by reference to the fact that there has been a judicial finding in the Ontario Court of Justice that the two Defendants have, in the past, exercised high levels of*

[3] I have made a few cosmetic changes and one or two typographical corrections.

operational control over companies beneath in the structure, and in a general way I found the suggestions of such control to be plausible because the evidence before me does seem to suggest that this is a family company with members of the family exercising strong control over the companies below.

5. It might assist if I just turn to the judgment, if I can find it, of Newbould, J.
MR WEISSELBERG: Bundle 2, tab 3, page 1438.
MR JUSTICE KAWALEY: Page 1438. Yes.

6. Newbould, J's judgment was given in Ernst & Young v Essar Global Fund Ltd et al and it concerned a company referred to as, 'Algoma', and in the course of his judgment Newbould, J had cause to consider, in particular, what -who was, actually controlling Algoma, and, also the question of was that control being exercised for the benefit of Algoma and its creditors or not, and reference was made in the course of argument to various paragraphs. Illustrative of the control issue is paragraph 49 of Newbould, J's judgment where he said:

> *'I do not intend to refer to all of the evidence on this issue. I will refer to only some of it, although it is overwhelming and substantiating that Essar Global and Essar Capital were calling the shots'.*

7. The other reference which is helpful in illustrating evidence of propensity for the misapplication of assets is paragraph 82 where Newbould, J concluded that:

> *'However, it is quite clear from the evidence that despite its obligations to Algoma under these agreements, Essar Global had no intention of living up to its promises. Essar Global acted in bad faith in this regard'.*

8. The central wrongdoing of which complaint is made is the evasive conduct of Essar Global Fund Ltd since the Final Award was entered against it. That, as I said earlier, cynical view of the evasive conduct is for the fight by the evidence of historic conduct which does include matters other than those to which I have just referred.

9. The legal basis for the present application was set out in the Skeleton Argument following on from paragraph 23, and the critical paragraph explaining the law relating to wrongdoing is paragraph 29 which said, in part:

> *'As to what constitutes wrongdoing for the purposes of the Norwich Pharmacal jurisdiction, the BVI and Cayman Courts have both taken the view that deliberate steps to obstruct or frustrate enforcement in contrast to a good faith inability to pay constitute wrongdoing for those purposes... '*

10. I was also assisted by being referred to the judgment of Butcher, J who viewed largely the same evidence as was placed before me and he made a number of findings which are helpful in fortifying the view that I would likely have reached on my own of the material placed before me. At paragraph 28 of his ruling, Butcher, J said this:

> *'I also accept that AM can show, on the basis of material which is present before me, that there is a real risk, judged objectively, that the judgment would not be met because of an unjustified dissipation of assets. For the purposes of the present application the wrongdoing that is complained about is feared steps to dissipate assets and generally thwart the ability of the plaintiff to enforce its arbitration award.*

11. At paragraph 40 Butcher, J said this:

> *'I should say that on the basis of the material which has been put before me, while the claim in the arbitration was not a claim in fraud there appear to be grounds to consider that the Essar Group has been operating to the detriment of its creditors and has engaged in conduct in bad faith'.*

12. Finally in addressing the specific question which is pivotal here for Norwich Pharmacal relief, paragraph 55, Butcher, J said this:

> *'The threshold conditions were summarised in Ramilos Trading Ltd v Buyanovsky [2016] England and Wales High Court 3175 as follows:*
>
> > *"Firstly, the applicant must demonstrate a good, arguable case of wrongdoing. Secondly, the disclosure of information sought must be necessary to enable the applicant to bring proceedings or seek other legitimate address for the wrongdoing, and, thirdly, the person against whom the order is sought must be involved in the wrongdoing in a way which distinguishes him from a mere witness".'*

13. Reliance was placed before me on my own recent decision in the case of Discover where I considered these legal tests.

14. I was then taken to a draft order which sought to build on the order granted in London in a somewhat more streamlined fashion, and having taken into account the form of relief that is sought, I am satisfied that the Plaintiff in this case has demonstrated, firstly, a good, arguable case of wrongdoing; secondly,

that the Plaintiff has demonstrated that the disclosure is necessary to enable the applicant to seek legitimate address for the wrongdoing, and, thirdly, that the person against whom the order is sought is involved in the wrongdoing in a way which distinguishes him from a mere witness.

15. As far as that aspect is concerned, it is very properly disclosed that the Plaintiff does not believe that the Defendants' involvement has been wholly innocent, but, nevertheless, it is rightly contended, in my view, that the way in which it appears the defendants have become involved in the holding of information which is relevant to the enforcement of the arbitral award falls into the ambit of the concept of being involved in a way which distinguishes the defendants from being mere witnesses, and so for those reasons I grant the order sought.

16. One matter I should mention which I didn't in the course of argument is the question of the absence of a need for fortification on the basis of the plaintiffs' financial status. It is a very substantial company. I think that the reference to the substantial value of the assets of the plaintiff needs to be taken into account, or needs to take into account the current asset and liability position which, according to the material placed before me, shows that the plaintiff has approximately US$22 million more current assets than current liabilities, but perhaps the best answer to why fortification isn't required is, as Butcher, J noted, that it's difficult to see how the relief sought on this application is likely to cause the defendants any great harm which the plaintiff would not be able to compensate the defendants for."

32. Clearly, I did not expressly consider the controversial jurisdictional points raised by the Defendants, which admittedly requires reconsideration of what has been viewed for years as the orthodox Cayman Islands legal position. I assumed that *Norwich Pharmacal* relief was available (a) more broadly, in aid of claims of wrongdoing which may be pursued abroad, and (b) more narrowly, in aid of overseas enforcement proceedings in relation to foreign judgments or arbitral awards without the need for formal enforcement proceedings being commenced here.

Findings: can Norwich Pharmacal relief be granted in aid of foreign proceedings?

The respective submissions

33. Mr Flynn QC invited the Court to find that there was no jurisdiction to grant the NPO in aid of foreign proceedings to enforce the ICC Award on two alternative bases:

    (a) the Award could not in law be relied upon without leave to enforce the same being obtained under the Foreign Arbitral Awards Enforcement Law (1997 Revision) ("FAAEL") or Grand Court Rules ("GCR") Order 73; and/or

    (b) *Norwich Pharmacal* relief could not in any event be granted in aid of foreign proceedings.

34. GCR Order 73 un-controversially governs the procedure for enforcing a foreign award such as the ICC Award. The disputed issue was whether section 5 of the FAAEL meant that without seeking leave to enforce the Award it could not evidentially or legally be relied upon at all. Section 5 provides:

> *"5. A Convention award shall, subject to this Law, be enforceable in the Grand Court in the same manner as an award under section 22 of the Arbitration Law (1996 Revision) and shall be treated as binding for all purposes on the persons between whom it was made and may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Islands and any reference in this Law to enforcing a Convention award shall be construed as including references to relying upon such award."*

35. Mr Weisselberg QC countered that this submission misunderstood the function of section 5 which was designed to confer a right to rely on an award as between "*the persons between whom it was made*". There was no reason in principle why the Court could not take notice of the fact that AMUSA had obtained the ICC Award in the context of the present application; no reliance was placed on the truth of the contents of the Award. At first blush, this response seemed to reflect a straightforward view of the correct legal position.

36. The second point advanced by the Defendants had more sinuosities in it. The central thesis was that because a specific statutory regime existed for obtaining evidence for use in foreign proceedings (the Evidence Order as read with GCR Order 73), the common law jurisdiction to obtain information for use in foreign proceedings through granting *Norwich Pharmacal* relief was not available. Reliance was mainly placed on *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] 1 All ER

161 (Divisional Court); [2014] QB 112 (Court of Appeal) and *Ramilos Trading Limited-v-Buyanovsky* [2016] EWHC 3175; [2016] 2 CLC 896.

37. AMUSA invited the Court to simply follow the Chief Justice's contrary earlier decision on this point in *Braga-v-Equity Trust Company* [2011] 1 CILR 402. In any event, the Evidence Order covered different legal terrain. It was further argued that the Cayman Islands Court of Appeal had even earlier decided that the Evidence Order did not preclude *Norwich Pharmacal* relief in *Gianne-v- Miller* [2007] CILR Note 10.

Findings: can the ICC Award be relied on without enforcement under the FAAEL?

38. I accept the submission advanced on behalf of AMUSA that reliance on the fact that the Award has been obtained is permissible as against the Defendants for the purposes of the present application. Section 5 of FAAEL is a provision designed to facilitate the enforcement of arbitral awards without the award creditor having to re-litigate the underlying dispute as against the award debtor. The Defendants' counsel identified no authority which directly supported the contrary proposition.

Findings: can Norwich Pharmacal relief be granted in aid of foreign proceedings in light of the Evidence Order? Preliminary analysis

39. The starting point of the analysis must be to determine what the scope of the Evidence Order is. The key sections provide as follows:

> "***Application to Grand Court for assistance in obtaining evidence for civil proceedings in other court***
>
> *1. Where an application is made to the Grand Court for an order for evidence to be obtained in the Cayman Islands, and the court is satisfied—*
>
> > *(a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ("the requesting court") exercising jurisdiction in a country or territory outside the Cayman Islands; and*
> >
> > *(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,*
>
> *the Grand Court shall have the powers conferred on it by the following provisions of this Act.*
>
> ***Power of Grand Court to give effect to application for assistance***
>
> *2.—(1) Subject to the provisions of this section, the Grand Court shall have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the Cayman Islands as may appear to the court to be appropriate for the purpose of giving effect to the*

request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision—

(a) for the examination of witnesses, either orally or in writing;

(b) for the production of documents;

(c) for the inspection, photographing, preservation, custody or detention of any property;

(d) for the taking of samples of any property and the carrying out of any experiments on or with any property;

(e) for the medical examination of any person;

(f) without prejudice to paragraph (e) above, for the taking and testing of samples of blood from any person.

(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

(4) An order under this section shall not require a person—

(a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or

(b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.

(5) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time as on attendance as a witness in civil proceedings before the court making the order." [Emphasis added]

40. The Evidence Order confers jurisdiction on the Grand Court to respond to requests from foreign courts for oral or documentary evidence to be used in the foreign proceedings which are pending or contemplated, with the most notable carve out being the prohibition of granting orders for discovery. The ambit of the Evidence Order appears to be assisting foreign courts by producing evidence for use in those

proceedings, whether at trial or (presumably) in any interlocutory proceeding as well. The legal terrain it covers does not, on a straightforward reading of the relevant provisions, appear to cover the same terrain as the *Norwich Pharmacal* jurisdiction as a matter of general principle.

41. This preliminary view assumes that the equitable jurisdiction is being invoked to obtain and/or preserve evidence of wrongdoing in circumstances where no proceedings in relation to that wrongdoing have yet been commenced. A potential overlap and conflict would clearly occur if the proceedings in which it is proposed to deploy the information sought have already been commenced. In the present case, it is important to remember that although it is obvious that various proceedings have already been commenced by AMUSA to enforce the ICC Award, it is far from clear that the information sought is intended to be deployed in those proceedings in a direct sense.

42. The Plaintiff's case is that the information sought to be preserved and produced is likely to assist it to pursue future remedies which are likely to include fresh freestanding proceedings, if not fresh interlocutory applications in existing proceedings. Assuming foreign law to be the same as local law, the legal function of proceedings for the recognition of arbitral awards is to permit judgment to be entered in terms of the award, opening the door to separate judgment enforcement procedures under the general civil law of the *lex fori*. Is the fact that no proceedings in relation to the wrongdoing are yet afoot a material consideration?

43. The proposition that the pendency of foreign proceedings is a relevant criterion for deciding whether or not a conflict with the Evidence Order jurisdiction has arisen finds some general support in *Gianne-v-Miller* [2006] CILR Note 26 (Henderson J), affirmed on appeal at [2007] CILR Note 10. Mr Flynn QC rightly submitted that the finding made in each Court to the effect that the Evidence Order did not oust the jurisdiction to grant equitable relief was strictly *obiter*. The operative findings described in the note of the Court of Appeal decision was as follows:

> "*(1) The appeal would be dismissed. The Grand Court had not erred in finding that further litigation involving the correctness of the of the original Norwich Pharmacal jurisdiction was res judicata…*"

44. Nonetheless, the strictly *obiter* finding of Henderson J to the effect that the Evidence Order was no bar to *Norwich Pharmacal* relief which the Cayman Islands Court of Appeal upheld in the same case supports AMUSA's contention that it is always necessary to analyse whether any real conflict between the two jurisdictions arises in the specific context of each particular case. According to the Note of the Court of Appeal's decision in *Gianne-v-Miller*:

> *"(2) The Court had been entitled to exercise its discretion to allow the wife to use the documents disclosed in proceedings that had not been started at the time of the application, since the jurisdiction to order equitable third-party discovery might be exercised for proceedings not yet begun, including those in which the defendant was unknown at the time of the application... Though there was an implied undertaking not to use documents disclosed for other purposes, the court might also exercise its discretion to extend their use to new proceedings in respect of the same claim... That legislation had been enacted in the Cayman Islands to allow evidence to be used in foreign proceedings did not preclude the use of equitable discovery for such purposes."*

45. The Note accurately summarises the full unreported judgment which was placed before the Court. The full judgment confirms that the context in which Taylor JA (at page 12) affirmed that "*the jurisdiction may be used in foreign proceedings*" was one in which the relevant proceedings had not yet been commenced when the order was made. The California Family Court proceedings which the applicant wished to reopen utilising the information about the respondent's assets sought from this Court were effectively closed. If the information was obtained and proved to be useful (as it turned out to be), it would have been deployed in support of an application yet to be made. This must be borne in mind when contrary authorities the Defendants relied upon are considered below, and my preliminary view was that this is a material consideration.

46. The *Norwich Pharmacal* order granted in *Braga-v-Equity Trust Company* [2011] 1 CILR 402 was seemingly unambiguously sought for use in pending Brazilian proceedings. But the respondents to the application did not themselves apply to set the ex parte order aside and the order was (as in *Gianne-v-Miller*) already spent. The jurisdiction to grant equitable relief in aid of pending foreign proceeding, despite the existence of the Evidence Order regime, did not directly arise for determination. As Smellie CJ held:

> *"40 When applicants seek to set aside an order already made by the court and executed by the party to whom it is directed, they need to establish an abuse of the process of the court through bad faith or material non-disclosure of information that was necessary to be taken into account by the court when assessing whether or not to make the order in the first place. See Wea Records Ltd. v. Vision Channel 4 Ltd. (30). As Purchas, L.J. said in that case in agreement with Donaldson, M.R. and Dunn, L.J. ([1983] 1 W.L.R. at 729):*
>
> > *'For my part I doubt that on an application to set aside an ex parte order which has become entirely spent, even if made to the court which made that order let alone by way of appeal, the party against whom the order had been made can succeed save only in those very exceptional circumstances to which Sir John*

Donaldson, M.R. and Dunn, L.J. have referred [i.e. where the order was obtained mala fide or by some material non-disclosure].'

41 This is the test that the applicants must meet if they are to succeed now to set aside the 'spent' Norwich Pharmacal orders and, as I understand their arguments, that which they have set about meeting. For the reasons that follow as a matter of the application of the law, and in light of the foregoing findings as to Dr. Braga's status, I do not find that this particular test is satisfied.

47. When the Chief Justice proceeded to discuss the scope of the *Norwich Pharmacal* jurisdiction and its availability in aid of foreign proceedings, he was not deciding anything but setting the scene for determining whether exceptional circumstances existed for permitting non-parties to set aside ex parte orders which had already been complied with. It is true that in summarising his conclusions, Smellie CJ (at paragraph 138) states that: "*The Norwich Pharmacal relief granted was within the ambit of the principles that define this court's jurisdiction in that regard.*" His operative findings in my judgment related to matters which were relevant to the question of whether "*the order was obtained mala fide or by some material non-disclosure*". He rejected the complaints that (a) material non-disclosure had occurred, and/or (b) the information had been used in breach of Dr Braga's implied undertaking to the Court. And he did make the following general findings on the foreign proceedings issue:

"*82 The alternative means available and which could have been used were, of course (and as subsequent events have demonstrated), letters rogatory. But while that recourse may well have been available (and enforceable by way of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 ("the Evidence Order")), it is not an exclusive or mandatory recourse. Rather, it must now be taken as settled that equitable third-party discovery in the form of Norwich Pharmacal relief can in appropriate circumstances be granted in aid of foreign proceedings (see Gianne v. Miller (14) in the Court of Appeal, approving the Grand Court decision of Henderson, J.) There it was further held that the Evidence Order contained no provision which might oust the equitable jurisdiction of the court and, in the absence of any such provision, a Norwich Pharmacal order can be the appropriate remedy in a particular case.*

83 The existence of the jurisdiction to grant Norwich Pharmacal relief in aid of foreign proceedings must also be taken to be a settled proposition in light of the decision of the Privy Council in Equatorial Guinea (President) v. Royal Bank of Scotland Intl. (13). In that case, such an order made against the Bank of Scotland was ultimately upheld even while doubts were expressed on other grounds about the nature of the action by the Privy Council."

48. Because the jurisdiction to grant the relief was not directly in issue in *Braga*, these strictly *obiter dicta* have less persuasive weight than would otherwise be the case. Mr Flynn QC was also correct to point out that in *Equatorial Guinea (President) v. Royal Bank of Scotland Intl.* [2006] UKPC 7, the foreign proceedings point was not pursued at the Privy Council level. However Lord Bingham described (with apparent approval) the Guernsey Court of Appeal decision on that issue in terms which elucidate the nature of the point which was argued at the intermediate appellate level:

> "*9. The interveners' primary submission of legal principle before the Lieutenant Bailiff was that the court had no jurisdiction to grant Norwich Pharmacal relief where no substantive proceedings were contemplated in Guernsey. He rejected this argument in a carefully considered judgment of 3 November 2004....*
>
> *11. The interveners gave notice of appeal against that decision, on two grounds only. The first, repeating their primary submission to the Lieutenant Bailiff, was that the court had no jurisdiction to grant Norwich Pharmacal relief in aid of foreign proceedings. It is unnecessary to say more of this argument since the Court of Appeal rejected it and it was not pursued before the Board.*"

49. So the Guernsey Court of Appeal in *Equatorial Guinea (President) v. Royal Bank of Scotland Intl.* did not decide or approve the proposition that *Norwich Pharmacal* relief could be granted in aid of pending proceedings notwithstanding the fact that letters rogatory were available. It did confirm the more general proposition that the equitable remedy was available in aid of foreign proceedings.

50. Only *obiter dicta* in *Braga* address the impact of the availability of a statutory remedy for obtaining evidence for use in foreign proceedings. There are two aspects to Smellie CJ's judicial observations on matters of legal principle (*Braga*, paragraphs 82-83) which in my judgment, properly understood, accurately reflected the common law position when they were made and (as I ultimately conclude below) still accurately reflect the current legal position:

(a) the Evidence Order did not oust the equitable jurisdiction altogether, so "*a Norwich Pharmacal order can be the appropriate remedy in a particular case*"; and

(b) "*the jurisdiction to grant Norwich Pharmacal relief in aid of foreign proceedings must also be taken to be a settled proposition in light of the decision of the Privy Council in Equatorial Guinea (President) v. Royal Bank of Scotland Intl.*"

51. The Defendants' counsel relied primarily on the subsequent English Court of Appeal decision in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112 as support for the proposition that where the Evidence Order potentially applies, the equitable jurisdiction to grant *Norwich Pharmacal* relief does not exist. This decision clearly supported this proposition in general terms. However, it is necessary to consider the crucial findings in greater detail. In my judgment it is immediately obvious that the factual matrix under consideration was different in these important respects: (a) the foreign proceedings were pending, and (b) there was no logistical reason why the statutory mechanism for obtaining evidence could not be deployed. The most pertinent question which arises from these distinctions is whether or not they impact on the principles to be extracted from the actual decision.

52. The applicants in *Omar* firstly commenced judicial review proceedings in Uganda to quash their criminal indictments. While those proceedings to obtain relief for the relevant wrongdoing were still pending, they applied for *Norwich Pharmacal* relief in England to obtain evidence about Ugandan Governmental misconduct for use in the pending foreign proceedings. There was in every practical sense a real collision between the available statutory relief of applying to the foreign court for letters of request to the English Court for assistance in relation to foreign criminal proceedings and the alternative equitable remedy. There was no question in that case of the need to seek urgent relief to preserve information which might otherwise be destroyed while the more elongated statutory procedure was deployed, an important consideration here. There was no reason why an apparently available statutory could not be deployed.

53. Maurice Kay LJ held as follows:

> "*24. Ultimately, we are concerned not with the 1975 Act (which is structurally different from the 2003 Act but which also contains national security and Crown servant exceptions: sections 3(3) and 9(4)), but with the 2003 Act. The approach to interpretation when considering the relationship between a statutory remedy and a common law remedy has recently received attention in the Supreme Court in R (Child Poverty Action Group) v Secretary of State for Work and Pensions [2011] 2 AC 15, which does not appear to have been cited in the Divisional Court in the present case. The Child Poverty Action Group case was concerned with whether the Secretary of State could avail himself of a restitutionary remedy at common law to recover overpaid benefits or whether a purpose-built statutory remedy was exclusive. Dyson JSC's judgment contains statements of principle in a number of passages. The following will suffice for present purposes:*
>
> > '*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 ...*
>
> *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 question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and could therefore not have been intended [to] co-exist with it.'*

Of course, in the present case there had been no instance of the Norwich Pharmacal remedy being used before the enactment of the 2003 Act to obtain information or evidence from a court in this jurisdiction for use in foreign criminal proceedings.

25. When one considers the Norwich Pharmacal remedy alongside the regime set out in the 2003 Act, certain points stand out as differences. I refer again to the three features of the 2003 Act described in paragraph 15, above: the discretion of the Secretary of State, the confinement of requests to foreign courts and prosecuting authorities, and the national security and Crown servant exceptions. None of these features is built into the Norwich Pharmacal jurisprudence as a mandatory requirement. The most that can be said is that they may be considered as factors to be taken into consideration on a particular application. In my judgment, these are substantial differences such that, to use the words of Dyson JSC in the Child Poverty Action Group case, Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme in this area. The statutory scheme accords ministerial discretion, national security and Crown service a paramountcy which the Norwich Pharmacal remedy does not. The statutory scheme enables the Secretary of State to retain a degree of control over sensitive information or evidence which the Norwich Pharmacal remedy would loosen or might deny. This leads me to the conclusion that Parliament did not and would not create a parallel procedure. It created an exclusive one in the area which it addressed. To relegate national security to the status of a material consideration to be weighed on a case-by-case basis at the stage of necessity or discretion in a Norwich Pharmacal application would be to subvert the carefully calibrated statutory scheme. I am in no doubt that, where the scheme of the 2003 Act is in play, Norwich Pharmacal does not run." [Emphasis added]

54. Implicit in the reasoning at paragraph 25 is the assumption, grounded on the facts of that case, that the statutory remedy was in fact available so that the *Norwich Pharmacal* jurisdiction would constitute a "*parallel procedure*". But the governing legal test for deciding whether statute excludes the availability of the equitable remedy is whether "*two remedies cover precisely the same ground and are inconsistent with each other*". In my judgment the relevant legal question is not simply whether or not the Evidence Order mechanism is theoretically available to obtain the information sought through the pre-existing equitable remedy. That is a threshold question which will usually involve consideration of the law of the relevant foreign jurisdiction as much as the local Evidence Order.

55. The complementary and more substantive question, assuming that some theoretical overlap of available remedies can be shown, is not simply whether the differences between the two regimes are "*so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme*" (*R (Child Poverty Action Group) v Secretary of State for Work and Pensions*, per Lord Dyson, cited by Maurice Kay LJ in *Omar* at paragraph 24). That is logically the second stage of this part of the analysis. The first question (which did not arise for consideration in *Omar*) is whether the "*two remedies cover precisely the same ground*".

56. Having regard to the breadth and flexibility of the *Norwich Pharmacal* jurisdiction, this question must in my judgment be a nuanced context-driven inquiry rather than a rigid and/or an abstract one. To my mind it makes no sense and it is not fairly possible to imply that Parliament must have intended to eliminate the Court's equitable jurisdiction in each and every case where the information sought was likely to be used in foreign proceedings. Why should the inquiry as to whether the statute has displaced the common law or equitable remedy be carried out without regard to whether or not the statutory remedy was in real world terms available?

57. *Omar* was purportedly applied in *Ramilos Trading Limited-v-Buyanovsky* [2016] EWHC 3175; [2016] 2 CLC 896 (Flaux J, as he then was), and the arguments and judgment in this case provide further general support for the view that factual and legal matrix of each case will usually shape the analysis as to whether the statutory remedy covers "*precisely the same ground*" as the equitable one. At first blush this decision seems to go beyond the limits of the actual decision in *Omar* by holding that the statutory foreign evidence regime is engaged even where no foreign proceedings are yet afoot. It clearly does undermine my preliminary view that the question of whether foreign proceedings are actually pending was a pivotal consideration. Flaux J held in this particular respect as follows:

> "*118. In relation to all the potential claims identified in [80] of the claimant's skeleton argument other than those which might be brought against*

Strongfield under the 2005 shareholders agreement, the only claims that could be brought in this jurisdiction, Mr Akkouh submitted that the statutory regime under the 1975 Act is nonetheless not engaged for a number of reasons. First, he submitted that the claimant in this case was in the same position as the claimant in Shlaimoun, that it was not sure what proceedings might be brought where, or whether any claim against Strongfield would be under the 2005 shareholders' agreement or the 2012 shareholders' agreement, until the disclosure sought by the draft order had been given.

119. *I do not accept that submission or the related submission that the claimant in this case is at the stage before the institution abroad of proceedings contemplated, within the meaning of section 1(b) of the 1975 Act. In my judgment, as is clear from [80] of the skeleton argument, in complete contrast to the claimant in Shlaimoun, the claimant in the present case has already identified and thus knows in which jurisdictions any claim could be brought and to that extent the institution of proceedings within the meaning of section 1(b) is contemplated. Furthermore, as I have already noted, the vast majority of the 39 questions are directed at the period of time after January 2012 and, therefore, cannot be intended to be used to found a claim under the 2005 shareholders' agreement, but only a claim under the 2012 shareholders' agreement or some other claim in overseas proceedings.*

120. *Even if the argument that the claimant is at some stage before the institution of proceedings abroad is contemplated were correct, it gives rise to the illogicality I identified during the course of argument that, on this hypothesis, the claimant has Norwich Pharmacal relief available, when it does not have enough to advance a claim at all, but where it does have sufficient evidence to mount a claim but needs the additional information sought to support the claim, Norwich Pharmacal relief is not available. It seems to me that the answer to this illogicality point is that if, as Mr Akkouh submitted, the claimant is at some stage before proceedings are contemplated, that is because the claimant cannot actually establish that there has been any wrongdoing, only that it suspects that there has been wrongdoing, in which case the claimant cannot show a sufficiently good arguable case to entitle it to Norwich Pharmacal relief.*

121. *I agree with Mr Chapman QC that it is not permissible to bypass the statutory regime simply by asserting that the case is at some earlier stage before the institution of proceedings abroad is contemplated. The reality in this case is that one of two situations must pertain. First, on the basis of the allegations which the claimant already makes, it has sufficient to launch a claim whether here or abroad, which must be a fortiori the position in relation to the dividends issue, where the claimant no longer pursues*

Norwich Pharmacal relief on the basis that sufficient information has been provided in the defendant's witness statement. This can only be on the basis that the claimant has sufficient information to plead its claim in relation to the dividends issue. Second, the alternative is that, whilst the claimant suspects wrongdoing and wishes to bring a claim against Strongfield in Cyprus arbitration or against the Polyplastic Group, Dameka Finance Limited, ETPHL or Violett Polymer in a foreign jurisdiction, the claimant cannot show a sufficiently good arguable case of wrongdoing to satisfy the first threshold condition to Norwich Pharmacal relief (even if the jurisdiction were available to obtain evidence or disclosure for use in foreign proceedings).

122. *Mr Akkouh also submitted that, since section 1(a) of the 1975 Act requires a request from the foreign court or tribunal, to that extent Coulson J must be right in Shlaimoun that proceedings must be 'up and running', or at least sufficiently so to enable the claimant to seek from that court or tribunal an order setting out such a request to the English court. It is correct that there must be a request from a foreign court, but in an essentially common law jurisdiction such as Cyprus, that might be achieved by some form of pre-action or pre-arbitration procedure, akin to section 44 of the Arbitration Act 1996, applicable even if court or arbitration proceedings are not yet instituted, but only contemplated. The claimant has not sought to adduce any evidence that relief of this kind would not be available from the courts in Cyprus or from other courts overseas."*

58. This analysis reflected the culmination of a detailed analysis of the interaction between the letter of request remedy and the *Norwich Pharmacal* jurisdiction and is, carefully scrutinised, clearly shaped by the following contextual framework. The applicant had identified various claims which were under contemplation, at least one of which could adequately be pleaded, the "*vast majority*" of the 39 categories of information sought (see paragraph 119) related to claims which could not be pursued in England. In this context, Flaux J found that the statutory regime for obtaining evidence for use in foreign proceedings was engaged even though those proceedings had not been commenced.

59. Flaux J also found that the statutory regime was substantially inconsistent with the equitable regime and so the former excluded the latter, rejecting the suggestion that there was any material difference between the 1975 UK civil regime and the 2003 criminal regime under consideration in *Omar*:

> "*131. Whilst it is true that the element of ministerial discretion is absent in the case of the 1975 Act, I do not regard that as a determinative factor suggesting that substantial differences do not exist, since in one sense, the ministerial discretion is an aspect of the overall point which I consider is*

the most significant difference between the statutory regimes under both Acts and the Norwich Pharmacal jurisdiction, the requirement for a request from a foreign court, not a request from the claimant or applicant himself or itself. As the Divisional Court said at [68] of Omar: 'As the history of the statutory regime makes clear, the request of the foreign court has been a requirement of the schemes when proceedings are before the court and the evidence is sought for that purpose.'

132. That requirement for a request from the foreign court ties in with another important limit built in to the statutory regime under the 1975 Act, section 2(4) of the Act, which ensures that, where what is sought is the production of documents, any order the court makes under the Act is limited to the documents specified in the order. It is not possible to obtain disclosure in general terms. As the Divisional Court said at [38] of Omar: 'It is important also to note that under s. 2(4) there is very substantial restriction on the power of the court to order disclosure.' In other words, the English court trusts the foreign court to make a proper, focused request and the question of what is sought is not left to the claimant or applicant. These are indeed important sovereignty limits on the extent of assistance the court will provide in relation to the obtaining of evidence for use in foreign proceedings. It is certainly not permissible to seek to bypass the constraints of the statute by making the sort of wide-ranging request made in the present case.

133. So far as the common exceptions in the two statutory regimes of national security and Crown servants are concerned, accepting that Maurice Kay LJ may have identified a difference between the statutory regimes and the common law remedy as regards national security which is more apparent than real, I would not regard that as a determinative factor suggesting that substantial differences do not exist. The exception in respect of Crown servants is common to both statutes and was regarded by both the Divisional Court and the Court of Appeal in Omar as a substantial difference between the statutory regime and the common law remedy. I do not regard it as a permissible exercise in statutory interpretation to suggest that the difference is only operative in excluding the Norwich Pharmacal jurisdiction, when the exception might actually come into play. The question is one of principle not tied to the facts of any particular case: are there 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 the introduction of the statutory scheme. If there are, then the common law remedy cannot be relied upon in any case where the statutory regime is engaged.

134. For all those reasons, I am satisfied that the statutory regime under the 1975 Act is engaged in this case, that there are such substantial differences and that, accordingly, this court has no jurisdiction to entertain the claimant's Norwich Pharmacal application to obtain evidence in support of foreign proceedings as referred to in [80 (a) and (c)] of Mr Akkouh's skeleton argument." [Emphasis added]

60. 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 view that, where the Evidence Order is properly engaged, *Norwich Pharmacal* relief is jurisdictionally unavailable.

61. However, in terms of understanding how one forensically grapples with the question of whether or not the statutory regime is engaged, it is important to view the findings quoted above in the wider context of the other main findings in the *Ramilos* case:

> *"135.In view of the conclusions I have reached as to the correct legal analysis, it will be apparent that I have concluded that the claimant's application must fail even before one looks at the detail of the allegations made by the claimant, essentially for three reasons. First, for the reasons set out in the last section of the judgment, the court has no jurisdiction in so far as the application seeks evidence for use in foreign proceedings. In so far as it is suggested that the evidence sought is for use in LCIA arbitration in England, the claimant does not have a good arguable case under the 2005 shareholders agreement or, at best, only has a good arguable case in respect of any breach of that agreement committed between December 2010 and the end of January 2012.*
>
> *136. Second, this application is a wide-ranging application for disclosure and evidence to support the claims which the claimant says it wishes to bring. The width of the application is apparent not just from the 39 questions set out in the schedule to the draft order but from [11] of Mr Armstrong's witness statement. As Mr Chapman QC submitted, this seeks what is in effect a blank cheque...*
>
> *137. Again, as set out above, this wide-ranging request goes way beyond anything which is permissible under the Norwich Pharmacal jurisdiction. None of the cases relied upon by Mr Akkouh is in the same league in terms of the breath-taking width of the application. Although he sought to submit that, in some cases, such as Mohamed, the courts had made wide orders, for the reasons I have set out above, I consider that a close analysis of those cases does not*

justify the interpretation which Mr Akkouh seeks to put upon them. I consider that Lord Mance JSC was correct in Singularis in determining that the Norwich Pharmacal jurisdiction remains a narrow one.

138. Third, to the extent that the claimant already has enough information to plead a case (as it does in relation to some of its proposed claims, for reasons set out hereafter) then this application is unnecessary and the claimant should get on with its case in whichever jurisdiction it can found its claim and await the normal process of disclosure or its equivalent in that jurisdiction. The Norwich Pharmacal jurisdiction has never been intended to be used to obtain advance disclosure beyond the narrow scope identified by Lord Mance JSC." [emphasis added]

62. In my judgment this unambiguous finding that there was no practical necessity for the *Norwich Pharmacal* jurisdiction to be invoked may be viewed to some extent as the other side of 'the statutory regime must be deployed to obtain evidence for use in foreign proceedings' coin. Where it is possible for the information sought to be obtained (and effectively used) through a request from a foreign court coupled with an application under the Evidence Order, it will ordinarily be impossible to contend that the intervention of equity is required. An important strand of the golden thread which runs through the *Norwich Pharmacal* jurisdiction was recognised by this Court in *Braga-v-Equity Trust Company (Cayman) Limited* [2011](1) CILR 402, where Smellie CJ (at paragraph 50) cited with approval the following observations of Lord Woolf in *Ashworth Hospital-v- MGN Ltd.* [2002] 1 W.L.R. 2033:

> "*57. The Norwich Pharmacal jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised...*"

Summary of findings on legal principles governing the determination of whether the FAAEL has ousted the Norwich Pharmacal jurisdiction

63. In my judgment the question of whether or not the *Norwich Pharmacal* jurisdiction has been displaced by the statutory regime under the Evidence Order is a mixed question of law and fact the answer to which is significantly shaped by the legal and factual matrix of each case. I accept Mr Flynn QC's submissions on the governing legal principles to this limited extent. I am guided by the highly persuasive reasoning of Maurice Kay LJ in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112 (Court of Appeal) and Flaux J (as he then was) in *Ramilos Trading Limited-v-Buyanovsky* [2016] 2 CLC 896.

64. I accept that where an applicant for *Norwich Pharmacal* relief can obtain adequate relief via the statutory route for obtaining evidence for use in foreign 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 is it clear that the substantive proceedings are likely to be commenced abroad;

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

65. I reject the submission of Mr Weisselberg QC that I am required to follow *Gianne-v-Miller* [2007] CILR Note 10 and *Braga-v-Equity Trust Company (Cayman) Limited* [2011](1) CILR 402 so as to have a basis for rejecting the framing of the governing legal principles upon which the Defendants relied. Nonetheless I accept that these two venerable local cases do provide some general support for what I consider to be an enduring proposition: that the mere fact that information is sought for use in aid of foreign proceedings is not an automatic ground for refusing relief. Neither case directly considered the interplay between the Evidence Order and the *Norwich Pharmacal* jurisdiction 'head on'. And both cases were decided years before both *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* and *Ramilos Trading Limited-v-Buyanovsky* directly considered the relevant interplay.

66. In these circumstances no question of reconsidering *Gianne* or *Braga* properly arises and I decline the invitation of Mr Flynn QC to undertake such reconsideration. The statements made in those cases about the statutory jurisdiction not displacing the equitable jurisdiction are in any event:

(a) still correct as a matter of general principle (there is no automatic bar on equitable relief in aid of foreign proceedings); and

(b) were in any event statements formulated in the context of the factual and legal matrices of each case.

67. The clearest and most precise support for my conclusion on the content of the modern governing legal principles appears in the judgment of Wallbank J in *UVW-v- XYZ* BVI HC (Com) 108 of 2016 (which was placed before me on another point):

> "[6] *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. That situation does not arise here. The Respondent has not identified any statutory regime which supplies the means for obtaining the information sought.*" [Emphasis added]

68. I fully endorse and adopt Wallbank J's concisely lucid formulation of the legal principle to be extracted from the *Omar* decision. When considering the scope of the Evidence Order, it is important to remember that it was extended to these Islands to give effect to international legal obligations arising under the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters, extended to the Cayman Islands on November 16, 1980. The main purpose of that and similar Conventions is to facilitate civil justice by creating a transnational framework for national courts to assist each other in civil proceedings. 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.

69. The preliminary views I set out above, suggesting that the legal terrain covered by the competing statutory and equitable jurisdictions was as matter of legal principle entirely different, reflected an overly simplistic analysis. The different function served by the competing jurisdictions is not in and of itself a material consideration. 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. The same applies to my initial suggestion that the pendency of foreign proceedings in which the information might be deployed was a potentially crucial consideration. On a proper analysis, whether or not proceedings have been commenced abroad is not dispositive of the question of whether in a particular factual and legal matrix the statutory regime is engaged because it is available. Having regard to all the circumstances of the present case, Mr Weisselberg QC was correct to submit that the statutory and equitable jurisdiction did not straddle the same terrain.

70. Whether the statutory jurisdiction displaces the equitable jurisdiction cannot be properly determined in a simple formulaic fashion. There is no inflexible legal principle that debars litigants from seeking to obtain information invoking this Court's

equitable jurisdiction solely because the information will likely be deployed in overseas proceedings; nor indeed because the wrongdoing involves a breach of a foreign law, a point which will be considered more fully below.

Findings: has the Norwich Pharmacal jurisdiction been displaced by the Evidence Order in the factual and legal matrix of the present case?

71. The key contextual elements of the application for the NPO in the present case may be summarised as follows:

(a) the suspected wrongdoing entails the taking of deliberate steps to avoid the effective enforcement of the ICC Award, broadly characterised as dissipating assets belonging to Essar Steel, a Mauritian company;

(b) the suspected wrongdoers are natural persons located entirely abroad but include the Defendants, which are both domiciled here;

(c) the Plaintiff has not identified what proceedings might be commenced in what jurisdiction, and there is no or no credible suggestion that the Plaintiff already has sufficient information to commence proceedings to set aside specific asset transfers;

(d) it is possible that proceedings to obtain relief from the wrongdoing might be commenced against the Defendants within this jurisdiction where they are domiciled even though the most obvious forum for primary remedial action would appear to be proceedings (possibly insolvency proceedings) against Essar Steel abroad;

(e) a central rationale for the present application is the risk that if information is not compulsorily preserved, it may be destroyed. In these circumstances there is no basis for suggesting that the NPO is not actually necessary because the Plaintiff has available to it a more appropriate alternative remedy of commencing proceedings in an identifiable jurisdiction abroad and obtaining adequate redress through the statutory regime governing obtaining evidence for use in proceedings abroad.

72. Having regard to the particular circumstances of the present case, I accept Mr Weisselberg QC's central submission that the Evidence Order has not displaced the equitable jurisdiction to grant relief in the form of the NPO. The most critical considerations in the present case are that although it is true that the information sought appears likely to be deployed in proceedings abroad, I am satisfied that:

(a) AMUSA does not yet have sufficient information to commence substantive remedial proceedings abroad; and

(b) having regard to the risk of information being destroyed, deploying the statutory regime for obtaining the information is a world away from being an available effective alternative remedy which AMUSA should be left to pursue.

73. For these reasons I find that the jurisdiction to grant equitable relief has not been displaced by the availability of the statutory regime under the Evidence Order for obtaining evidence for use in foreign proceedings.

Findings: has the Plaintiff established an actionable wrong which qualifies for Norwich Pharmacal relief?

The respective submissions

74. The Defendants submitted that the Plaintiff's reliance on *UVW -v- XYZ* BVI HC (Com) 108 of 2016, Judgment dated October 27, 2016 (unreported, Wallbank J) was misconceived. This decision provided the central legal plank of AMUSA's case that evading enforcement of the ICC Award constituted actionable wrongdoing for *Norwich Pharmacal* purposes. I have previously followed *UVW* on an ex parte basis. This was a case where *Norwich Pharmacal* relief was granted in support of the enforcement of foreign judgments. Wallbank J, citing *NML Capital Ltd-v-Chapman Freeborn Holdings Ltd & Ors* [2013] 1 CLC 968, held (at paragraph [14]): "*A deliberate effort to obstruct or frustrate enforcement is required. That undoubtedly constitutes wrongdoing.*"

75. Mr. Flynn QC submitted that deliberate non-payment of a debt was not an actionable wrong. *NML* did not decide that it was. Nor did it decide that *Norwich Pharmacal* relief was available post-judgment at all. *Norwich Pharmacal* relief was refused at first instance on the grounds that the respondent was not mixed-up in the wrongdoing relied upon, which was wilful evasion of a judgment debt. The initial refusal decision was upheld on appeal, so the observations of Tomlinson LJ on what constituted wrongdoing were purely *obiter* and expressed in qualified terms as well.

76. Reliance was also placed on *Law Debenture Trust Corporation –v -Ural Caspian Oil Corporation Ltd* [1995] Ch 152 at 166B-D where Bingham MR stated:

> "*...But the defendant violates no legal right of the plaintiff if he makes himself judgment-proof by dissipating his assets before he is enjoined from doing so ...*"[4]

[4] Savile LJ concurred at 172 D-F.

77. Mr Weisselberg QC responded by inviting the Court to follow *UVW -v- XYZ* and to find that it was correctly decided. However he was unable effectively to dispute that support for the approach adopted by Wallbank J was very thin indeed. In *NML, Norwich Pharmacal* relief had been sought in England in support of an English judgment. As I intimated in the course of argument, it would seem to be easier to establish the wrongfulness of interfering with domestic enforcement steps because this Court had an obvious legal interest in upholding the integrity of its own Orders. Precisely what the wrongdoing was in relation to a purely foreign enforcement exercise in multiple other jurisdictions on the face of it seemed to be more difficult to assess. In reply AMUSA's counsel indicated that if for any reason the Court felt that it was necessary for the Plaintiff to enforce the ICC Award in this jurisdiction (the point was only directly raised in relation to the FAAEL), an opportunity should be afforded for such an enforcement application to be made.

78. I was in short presented with a not unfamiliar choice between using common law powers liberally in aid of a foreign arbitral award or adopting a more technically rigorous and cautious approach.

Findings: do deliberate steps to avoid enforcement of a foreign arbitral award qualify as wrongdoing for the purposes of seeking Norwich Pharmacal relief? Applicable principle

79. Only one authority was placed before the Court in which the question of whether deliberate steps to avoid enforcement of a foreign arbitral award qualified as wrongdoing for the purposes of seeking *Norwich Pharmacal* relief was directly considered. This was *UVW -v- XYZ* BVI HC (Com) 108 of 2016 (Wallbank J), a first instance decision which I have previously followed in the context of another ex parte application. Whether I should do so again in the present case requires a careful analysis of the persuasive value of this solitary decision. It is useful to start with the factual and legal matrix of that case, which is helpfully summarised early in the judgment:

> *"[1] This ruling concerns an application for a Norwich Pharmacal disclosure order against a corporate registered agency service provider in the TVI. The purpose of the disclosure sought is two-fold. First, it is in aid of enforcement of a number of overseas judgments from superior courts in a civil law jurisdiction. Secondly, it is in aid of on-going proceedings in another common law jurisdiction.*
>
> *[2] In respect of the pre-judgment disclosure sought, the judgment debtor's assets were frozen by way of an interim injunction by the overseas court, with ancillary disclosure orders made to police it, but the judgment debtor breached those orders. That court's compulsive powers were engaged but to insufficient effect. The judgment creditor has identified a corporate vehicle registered in the TVI which appears to belong ultimately to the judgment debtor, containing at*

least one substantial asset. The judgment creditor has identified a pattern of conduct on the part of the judgment debtor which, when taken in the round, carries the unmistakable hallmark of efforts to make himself judgment proof by way of deliberate concealment of assets. The Applicant comes to this court, saying it needs disclosure to police the freezing order, to discover assets the judgment debtor may have concealed through the TVI corporate vehicle or other vehicles registered with the same corporate service provider and to discover possible leads for asset tracing and/or execution efforts." [Emphasis added]

80. It appears that no proceedings had been commenced in the British Virgin Islands to enforce the foreign judgments although such proceedings might well have been instituted later depending on what information the equitable discovery order might yield. The respondent sought to test the application and apparently raised the following main issues:

(a) whether it was possible to grant relief in aid of foreign proceedings;

(b) whether it was possible to grant relief post-judgment;

(c) whether the offshore vehicle had to be created for wrongful purposes;

(d) whether the application amounted to 'fishing'.

81. The point raised in the present case as a freestanding point was raised in *UVW* as a subsidiary part of the post-judgment relief analysis. Wallbank J accordingly considered more extensively the question of whether *Norwich Pharmacal* relief could be granted post-judgment in aid of enforcement, which he concluded it clearly could be, than whether or not wilful evasion of a judgment constituted wrongdoing. The present point was also considered in a context in which the respondent invited the Court to scrutinize whether or not there was evidence that it had become 'mixed up' in the wrongdoing, an evidential issue which is not controversial in the present case. The issue was thus addressed in the following way:

"*[13] Additionally, as the English Court of Appeal stated, care must be taken to analyse precisely what constitutes the wrongdoing in question. In NML, the result would probably have been different if the Republic had, for instance, used Chapman Freeborn's services to hire an aircraft to spirit away the Republic's reserves of bullion to defeat enforcement. That would have been a positive act of wrongdoing, facilitated by the chartering broker. Similarly, in the present case, if the judgment debtor uses the registered agent's services to use a corporate vehicle for evading enforcement efforts, I have no doubt the*

registered agent becomes liable to give disclosure, if all other Norwich Pharmacal criteria are also satisfied.

[14] The concluding remarks of Tomlinson LJ in NML support this. He stated: '...Norwich Pharmacal type relief in aid of execution should, if it is available at all, be available only in respect of involvement in conduct which necessarily amounts to willful evasion of execution. Anything short of that has the potential to involve the English court in the paralysis or at the very least serious inhibition of international trade.' I am not sure that the word 'willful' adds anything other than emphasis to 'evasion'. Tomlinson LJ was saying that mere non-payment of a judgment debt would not be enough to trigger the Norwich Pharmacal jurisdiction (assuming it to exist in support of execution). A deliberate effort to obstruct or frustrate enforcement is required. That undoubtedly constitutes wrongdoing. Inability to pay a judgment debt, although unfortunate, can occur in good faith. Justice still demands however that the judgment debtor satisfy the judgment debt. Tomlinson LJ described non-payment of a judgment debt as a wrong – and correctly so – but the fact of non-payment alone is not sufficient to trigger the Norwich Pharmacal jurisdiction. There has to be something sufficiently unconscionable in the alleged wrongdoer's conduct to trigger what is ultimately a jurisdiction which seeks to do equity. Strategies to obstruct and delay enforcement, on the other hand, are wrong because they frustrate justice. They work against the very purpose of the courts and legal system. Tomlinson LJ's observations ought not to be taken to imply that the court should be slow to see in a judgment debtor's acts an attempt to obstruct or evade settlement of the judgment debt. To the contrary, the court should be astute and robust to see through a judgment debtor's acts for what they are. A reasonable suspicion of willful evasion suffices."

82. Wallbank J then proceeded to consider in far greater detail the point actually raised in that case: "*The Respondent queried whether this court has jurisdiction at all to grant Norwich Pharmacal relief post–judgment in aid of execution…*" (paragraph [15]). His decision was, in effect, that it was obvious that any inequitable conduct (such as wilfully seeking to evade foreign judgments) qualified for *Norwich Pharmacal* relief. This was a robust finding which assumes that it is not necessary to pigeon-hole complaints of wrongdoing into precise legal categories, consistent with the fundamental aim of the jurisdiction being to "do justice" in all the circumstances of the particular case.

83. His main finding on the post-judgment issue was that the jurisdiction to grant *Norwich Pharmacal* relief was closely aligned with the jurisdiction to grant other post-judgment injunctive relief, and it was clear that the latter jurisdiction existed. The judge accordingly accepted the following submission:

> *"[23]The Applicant submits that the leading case on post-judgment third party disclosure orders is the English Court of Appeal decision in Mercantile Group (Europe) AG v Victor Aiyela. The Court of Appeal held that the two conditions which must be satisfied for making a disclosure order against a third party are that (1) the third party had become 'mixed up' in the transaction concerning which discovery is required and (2) the order for discovery must not offend against the 'mere witness' rule. The Court continued:*
>
> > *'In the case of discovery against a third party in aid of a post-judgment Mareva, the mere witness rule can have no relevance. The trial, if any, will already have taken place. It follows that all that is necessary to found jurisdiction is that the third party should have become mixed up in the transaction concerning which discovery is required and, of course, that the court should consider it 'just and convenient' to make an order."*

84. Another finding is significant to the question of whether or not it is material that no judgment enforcement proceedings have been commenced here. Wallbank J also stated:

> *"[26] In the present case, as in **Aiyela**, the Applicant seeks a third party disclosure order to police freezing orders. We are not told in **Aiyela** whether the disclosure orders were made at the same time as the freezing orders. It would seem to me not to matter if the freezing orders were made separately from the disclosure orders. In **A.J. Bekhor & Company Limited v Bilton** the English Court of Appeal by Ackner LJ considered that there must be a power inherent in the Court's statutory power to make all such ancillary orders as appears to the court to be just and convenient to ensure the exercise of the Mareva jurisdiction is effective. The Court there traced the power back to section 25 of the Judicature Act of 1873. **A.J. Bekhor** was a decision made whilst section 37 of what became the Supreme Court Act 1981 was still in Bill form. It was also a decision at a relatively early stage of development of the Mareva jurisdiction. Thus the juridical bases for the newly articulated jurisdiction called for scrutiny. Ackner LJ considered that the power to grant ancillary disclosure orders did not derive from the court's inherent jurisdiction, nor from the court's procedure rules, but from statute. Griffiths LJ agreed, and postulated the position in wide terms. He stated: "If the court has power to make a Mareva injunction it must have power to make an effective Mareva injunction. If the injunction will not be effective it ought not be made. (...) [I]t may be necessary to order discovery to make the injunction effective and I would hold that the court has the power to make such ancillary orders as are necessary to secure that the injunctive relief given to the plaintiff is effective. I therefore agree that a judge does have power to order discovery in aid of a Mareva injunction if it is necessary for the effective operation of the injunction."*

It would seem logical that orders in aid of a freezing order can be made after, and thus separately from, the freezing order itself.

[27] The observations in ***A.J. Bekhor*** *were made prior to the advent of the world-wide freezing order instituted by Section 25(2) of the English Civil Jurisdiction and Judgments Act 1982, and this court's decision in* ***Black Swan Investment I.S.A v Harvest View Ltd*** *et al.25 In the latter this court found that it has the jurisdiction to make a freezing order where there are assets in the TVI and the substantive cause of action is overseas and not here. These are two examples where the English and TVI courts respectively can use their powers to assist the administration of justice in other jurisdictions. Such an approach is based upon, or at least is in line with, principles of comity. As stated by Millett LJ in* ***Credit Suisse Fides Trust SA v Cuoghi****:*

> *'In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such cooperation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.'*

[28] It thus does not matter, it seems to me, that the freezing orders were made by an overseas court. The court's power to grant Norwich Pharmacal orders in aid of overseas proceedings is well established. This court, by Bannister J in Black Swan Investment I.S.A. v Harvest View Limited at al. alluded to this in support of his analysis that a stand-alone order for a freezing injunction can be made in this jurisdiction where a foreign judgment would be amenable to enforcement against assets in this jurisdiction. There is no requirement which limits the Norwich Pharmacal jurisdiction to being used as an ancillary power of this court to ensure that its own orders are effective." [Emphasis added]

85. The availability of stand-alone post-judgment freezing injunction against a defendant not subject to the territorial jurisdiction of this Court, established by the *Black Swan* case in the British Virgin Islands, is (it is well known) not recognised here: *VTB Capital Plc v. Malofeev, Universal Telecom Management and Universal Telecom Investment Strategies Fund SPC* [2011 (2) CILR 420]. However the availability of freestanding pre-judgment injunctive relief in aid of foreign proceedings without the need to commence domestic enforcement proceedings seems to be well recognised under Cayman Islands law: *J. Felderhof, I. Felderhof, Spartacus Corporation and Bank of*

Butterfield International (Cayman) Limited v. Deloitte & Touche Incorporated [2011 (2) CILR 35]. In that case, which was not cited to me, Chadwick P held as follows:

> *"51 It was, I think, accepted that—without qualification—a submission that a court in the Cayman Islands has no power to grant Mareva relief against a person amenable to its jurisdiction in aid of proceedings pending in Ontario against that person could not be sustained....*
>
> *52... Further, as it seems to me, the real question is not whether the cause of action pleaded in the Ontario proceedings would be justiciable here: the real question is whether a judgment against Mr. Felderhof in the Ontario proceedings could be enforced against him in the Cayman Islands. Given that proceedings have been commenced against him here, at a time when he was amenable to the jurisdiction of the courts of the Cayman Islands, which raise substantially the same issues as those raised in the Ontario proceedings, there is, at the least, a good arguable case that a judgment against Mr. Felderhof in the Ontario proceedings would be enforceable here. That, of course, was the premise underlying the order made in 2003 for a stay of the proceedings in these courts.*
>
> *53 The second qualification—that "(b) the person whose assets are to be frozen is not a party defendant in the foreign jurisdiction"—is based on the assumption that, following investigation, it will be established that the assets to be frozen are, indeed, the assets of Mrs. Felderhof and not assets which are held by her for the benefit of Mr. Felderhof. In so far as the assets subject to the freezing injunction made against Mrs. Felderhof are assets which she holds for the benefit of Mr. Felderhof the question raised by the second qualification does not arise. But, as Henderson, J. had recognized in the Algosaibi case (1), the Chabra jurisdiction is not limited to assets which are held by the non-cause-of-action defendant for the benefit of the cause-of-action defendant: it extends to assets to which the non-cause-of-action defendant is entitled beneficially which may (perhaps through some judicial process) become available to satisfy a judgment against the cause-of-action defendant. The relevant question, therefore, is whether in relation to assets in the latter category, the Cayman courts have no power to grant Mareva relief against Mrs. Felderhof because she is not a party to the proceedings pending against Mr. Felderhof and others in Ontario.*
>
> *54 In my view, the answer to that question is plainly 'No.' The purpose of the Chabra jurisdiction is to ensure that enforcement of a future judgment of the court against a cause-of-action defendant is not frustrated by the dissipation of assets (in the hands of the non-cause-of-action defendant) which would or might otherwise be or become available to satisfy that judgment. The principle*

was explained by the High Court of Australia in Cardile v. Led Builders Pty. Ltd. (2) (162 ALR 294, at para. 57):

> *'What then is the principle to guide the courts in determining whether to grant Mareva relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word 'may,' be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which:*
>
> *(i) the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including 'claims and expectancies,' of the judgment debtor or potential judgment debtor; or*
>
> *(ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.'"*

86. The existence of this authority, which provides strong indirect and general support for Wallbank J's reasoning, may explain why the Defendants did not challenge the *UVW* findings that the jurisdiction to grant injunctions and *Norwich Pharmacal* are closely aligned. The critique focussed very narrowly on whether Wallbank J was entitled to place as much reliance on *NML* as he did. Assuming that the post-judgment jurisdiction must at a minimum be as broad as the pre-judgment position (it should to my mind be more readily available), it puts to bed the notion that it is impermissible for the NPO to be used in aid of the WFO granted in the English Proceedings. If a freezing order may be granted pre-judgment to prevent third parties within the jurisdiction who control a foreign defendant's assets from disposing of them, it would logically seem to follow that a similar injunction can be granted post-judgment in similar circumstances. If a freezing injunction may be granted post-judgment against parties resident here to prevent them from disposing of a foreign judgment debtor's assets, it would seem to logically follow that *Norwich Pharmacal* relief can potentially granted to obtain information about past or future asset dissipation activities which the resident third parties have directed or may in the future direct.

87. However this authority does not entirely undermine the central thesis of Mr Flynn QC, which was, in effect, that seeking to defeat Court orders might well constitute wrongdoing; but seeking to make oneself judgment proof in the absence of any positive

legal restraints would not. In the present case substantial reliance was placed on historic asset dissipation activities and there is no suggestion that any pre-judgment orders were contravened. As is clear from my ex parte Ruling, I regarded the historic conduct to be relied upon as evidence of a propensity for future dissipation steps being likely to happen. However, properly understood, AMUSA's case also is that it suspects that further dissipation may also have occurred after the ICC Arbitration was commenced and after the ICC Award was obtained. If so it will seek to set aside any improper transfers including those before the Award was obtained on December 19, 2017.

88. To some extent *Felderhof* supports the Defendants' case by demonstrating that it was open to the Plaintiff not simply to commence enforcement proceedings here, but also to apply for a freezing injunction here. However, this decision is very far from being dispositive of the wrongdoing question. I do not consider that fairness requires that the Defendants be afforded an opportunity to make supplementary submissions on an authority not cited which is ultimately of only peripheral significance.

89. The real point is that no authority was cited by Mr Flynn QC which unambiguously supported the Defendants' central hypothesis that (a) the qualifying wrongdoing had to be capable of precise legal formulation at the date the application was made and (b) the information could not be sought in aid of foreign enforcement efforts. The present application for the NPO was based on two key assertions:

(a) AMUSA believed that asset dissipation had been occurring and would continue to occur but lacked the information to (1) verify this and (2) identify what form of relief was appropriate; and

(b) there was in any event a risk of key documents being destroyed at the direction of the Defendants, and this possibility had to be forestalled.

90. Lord Bingham's observations in *Law Debenture Trust Corporation-v-Ural Caspian Oil Corporation Ltd* [1995] Ch 152 at 166B-D read in the abstract appear to support the Defendants' thesis that dissipating assets where no judicial restraint is being contravened is not wrongdoing in a legal sense. Mr Weisselberg QC rightly submitted that these remarks arose in an entirely different context. The question was whether the defendant, which had no contractual relationship with the plaintiff, had committed an actionable wrong (interference with contractual relations) by transferring certain shares at a time when the relevant defendant was not subject to a Mareva injunction. The focus of the analysis was the scope of tortious liability in that case. The Plaintiff's Skeleton, as it happens, identified in passing conspiracy as a possible claim. Be that as it may there is no basis for suggesting that the only form of wrongdoing which qualifies for equitable relief is tortious liability.

91. The *Law Debenture* case cannot be read as a debtor's charter legally validating for all purposes any asset dissipations which do not entail a breach of a freezing injunction. Further and in any event, the wrongdoing relied upon here would clearly involve deliberate steps to avoid compliance with the ICC Award as enforced by the English Court and the English WFO. This would in my judgment quite clearly constitute legal, not simply moral wrongdoing.

92. One can now turn to *NML Capital Ltd-v-Chapman Freeborn Holdings Ltd* [2013] 1 CLC 968 which was central to the *UVW* decision. An important preliminary statement which informs how one should approach the question of what qualifies as wrongdoing appears in the following passage in Tomlinson LJ's judgment in *NML*:

> *"24. Both Lord Judge in Omar and Lord Kerr in Rugby Football Union v Consolidated Information Services Limited [2012] UKSC 55 emphasised the need for flexibility in the development of the Norwich Pharmacal principle – see per Lord Judge at paragraph 2 and per Lord Kerr, with the concurrence of the rest of the Supreme Court, at paragraph 15. The essential purpose of the Norwich Pharmacal remedy is of course to do justice – if authority is needed for that proposition see per Lord Kerr at paragraph 17."*

93. Other passages suggest that the limits which the English Court of Appeal wished to place on the parameters of wrongdoing were more concerned with limiting the scope of the potential involvement of innocent third parties than in limiting the scope of what qualifies as wrongdoing altogether:

> *"26. It follows that it is important to analyse with some care in what precisely lies the alleged wrongdoing. There is nothing inherently wrong in chartering an aircraft, unless it be said that any trading by a judgment debtor which involves using his assets for that purpose rather than satisfying a judgment debt is in itself wrongdoing. However I reject that proposition. It would lead to a jurisdiction of absurd width. It is no answer to that objection that the exercise of the jurisdiction would be subject to discretionary considerations. It would be absurd and exorbitant if parties were exposed to the risk of having to defend applications for discovery on the basis of no more than having traded with a person who turns out to have been at the relevant time a judgment debtor. It would encourage speculative litigation.*
>
> *27. The present case is in my judgment completely different from one in which assets are removed from a jurisdiction for no purpose other than to insulate them from execution in satisfaction of a judgment debt. Such a transaction would* ***arguably*** *be in itself for relevant purposes wrongful. So too the transfer of assets between persons or companies*

for a similar purpose, as in the case of transfers of money to Mrs Aiyela by Mr Aiyela and companies which he controlled as ***arguably*** *had occurred in the Mercantile Trust case. The evidence in that case demonstrated that that was* ***arguably*** *done for the purpose of frustrating execution against Mr Aiyela's assets. Mrs Aiyela was, in the words of Steyn LJ, mixed up in her husband's attempt to make himself judgment proof – see at page 376G.*" [Emphasis added]

94. These observations provide strong support for the proposition that a deliberate strategy of evading execution "*would arguably be in itself for relevant purposes wrongful*". It is true that these remarks were strictly *obiter*. In later explaining why the facts of the case before the English Court of Appeal were far removed from wrongdoing, Tomlinson LJ admittedly expressed himself in non-committal terms. But in my judgment Wallbank J was right in *UVW* to place the reliance on *NML Capital Ltd-v-Chapman Freeborn Holdings Ltd* [2013] 1 CLC 968 which he did. The repeated use in the quoted passage of the word "*arguably*" reflects the fact that *Norwich Pharmacal* applicants need only show that it is *arguable* that the conduct of which they complain amounts to wrongdoing. It is only if a substantive claim for wrongdoing is actually made, be it a claim in equity or tort or indeed a statutory avoidance claim, that the applicant (like the plaintiff in *Law Debenture*) will be required to establish the viability of a specific cause of action. As Flaux J held in *Ramilos*:

> "*12. What needs to be satisfied in relation to the first condition was usefully encapsulated by Popplewell J in the recent decision of Orb A.R.L. v Fiddler [2016] EWHC 361 (Comm) at [83] and [84]:*
>
> > *'83. As the jurisdiction has developed there are three threshold conditions which must be satisfied.*
> >
> > *84. The first condition is that there must have been a wrong carried out, or arguably carried out, by an ultimate wrongdoer. The 'wrong' may be a crime, tort, breach of contract, equitable wrong or contempt of court. It is not necessary to establish conclusively that a wrong has been carried out; it will be sufficient if it is arguable that a wrong has been carried out. The strength of the argument will be a factor in the exercise of the discretion, but an arguable case is sufficient to meet the threshold condition. The wrongdoing must be identified by the applicant at least in general terms: see Ashworth Hospital Authority*

v MGN Limited [2002] 1 WLR 2033 per Lord Woolf CJ at paragraph [60]."

95. I reject the submission (Defendants' Skeleton, paragraph 44) that it is incumbent on the Plaintiff to identify statutory insolvency avoidance provisions which might be invoked by a liquidator of Essar Steel before this Court is entitled to find that an arguable case of wrongdoing is made out[5]. In all the circumstances of the present case, I am satisfied that (a) there was a risk of documents being destroyed, (b) there was a need for an Information Preservation Order and (c) it is arguable that the Defendants have directed asset dissipation actions in the past. AMUSA's belief that wilful attempts to evade enforcement of the ICC Award have been made and will likely continue to be made are sufficiently cogent to substantiate an arguable case of wrongdoing in the requisite legal sense. Depending on what wilful avoidance steps (if any) are proven to have occurred and in which jurisdictions and at what point in time, it is realistic to assume that the Plaintiff may be able to assert applicable avoidance claims.

96. The Defendants' counsel did not identify any authority which clearly supported the proposition that the wrongdoing complained of had to be linked to the jurisdiction of this Court. The point may not ever have previously arisen for formal determination. It arose indirectly in *UVW*. But perhaps the best indirect support for the wider general proposition that *Norwich Pharmacal* relief can be sought in respect of wrongdoing alleged to have occurred abroad in respect of which substantive relief is being sought in overseas proceedings may be found in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112 (Court of Appeal). In that case the only jurisdictional point which was taken did not relate to the absence of any territorial nexus between the wrongdoing, where the wrongdoing was sought to be remedied and the forum in which information as being sought. Instead it was assumed that, apart from the operation of an overlapping statutory regime for obtaining evidence for use in foreign proceedings, *Norwich Pharmacal* relief was in principle available. Giving the leading judgment in a unanimous Court of Appeal decision, Maurice Kay LJ opened his judgment as follows:

> "*4. Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133 gave life to a remedy, derived from nineteenth century authorities, enabling a litigant to obtain from a non-party information required for use in his primary litigation. Initially, the remedy was sought in cases where the primary litigation was entirely domestic and between private parties. However, its subsequent development has seen its extension to cases where the primary litigation is taking place in a foreign jurisdiction and/or where it is of a public law nature.*

[5] Counsel did not pursue in oral argument the submission in paragraph 43 of the Defendants' Skeleton which does not appear to be supported by *Dallah Real Estate and Tourism Holding Co-v-Ministry of Religious Affairs Government of Pakistan* [2011] 1 AC 763 in any event.

In the present case, the primary litigation is essentially criminal, albeit with constitutional issues, and is taking place in Uganda."[Emphasis added]

97. In the course of Mr Flynn QC's argument, I made reference to the Privy Council's decision in *Singularis Holdings Ltd-v-PricewaterhouseCoopers* [2015] AC 1675 as illustrating in an analogous legal context the need for care about delineating the scope of common law powers. There is again indirect support in this decision for the proposition that *Norwich Pharmacal* relief may be sought even where it is clear that the information sought is intended to de deployed only in overseas proceedings (assuming, of course, that the jurisdiction has not been ousted by the availability of the statutory regime for obtaining evidence for use in foreign proceedings). *Singularis* was a case where Caymanian official liquidators sought information from former auditors subject to the territorial jurisdiction of the Bermuda Court. The Privy Council held (by a majority) that the Bermudian Court possessed a common law power to compel the production of information, although it was unanimously held that the power was unavailable in the circumstances of that case. Lord Sumption (delivering the leading judgment for majority) drew the following parallel between the common law power to assist foreign insolvency courts and the *Norwich Pharmacal* jurisdiction:

> "*21. What is sought in this case, however, is not evidence for use in forensic proceedings but information required for the performance of the liquidators' ordinary duty of identifying and taking possession of assets of the company. In R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2014] QB 112, para 12 the Court of Appeal doubted whether the distinction between evidence and information was helpful, and their doubt was probably justified in that case, where information was being sought for use in foreign proceedings. But the distinction is of broader legal significance. The courts have never been as inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy calls for it.*
>
> *22. The classic modern illustration is the jurisdiction recognised by the House of Lords in Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133. The House, drawing mainly on the earlier decisions in Orr v Diaper (1876) 4 Ch D 92;25 WR 23 and Upmann v Elkan (1871) LR 12 Eq 140, LR 7 Ch App 130, recognised a common law power to order the production of information about the identity of a wrongdoer where the defendant had been involved, even innocently, in the wrong. Such an order, as they recognised, would not have been available to compel the giving of evidence, because of the long-standing objection of courts of equity to a bill of discovery against a "mere witness": see, in particular, pp 173-174 (Lord Reid). In Smith Kline and French Laboratories Ltd v Global Pharmaceutics Ltd [1986] RPC 394, the Court of Appeal in England applied the same principle to information about the identity of a wrongdoer outside the jurisdiction. These decisions were founded not on*

the procedural requirements for proving facts in English litigation, but on the recognition of a duty to provide the information in certain circumstances. The duty of a person who had become involved in another's wrongdoing was held [1974] AC 133, 175 (Lord Reid) to be to "assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers"; cf. p 195 (Lord Cross of Chelsea). It is, however, clear that this duty was of a somewhat notional kind. It was not a legal duty in the ordinary sense of the term. Failure to supply the information would not give rise to an action for damages. The concept of duty was simply a way of saying that the court would require disclosure. Indeed, Lord Morris of Borth-y-Gest (pp 181-182) thought that the duty would not arise until the court had held that the conditions were satisfied. Viscount Dilhorne (p 190) agreed and so, it seems, did Lord Cross (p 198). Lord Kilbrandon, citing with apparent approval the South African decision in Colonial Government v Tatham (1902) 23 Natal LR 153, observed (p 205) that the duty lay "rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff."

23. The present case is not a Norwich Pharmacal case. The significance of Norwich Pharmacal in the present context is that it illustrates 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. In the Board's opinion, an analogous power arises in the present case." [Emphasis added]

98. Further indirect support for the proposition that, apart from the availability of the statutory remedies under the Evidence Order, there is no general objection in principle to granting equitable relief in aid of foreign proceedings or in relation to foreign wrongdoing may be found in *Ramilos Trading Limited-v-Buyanovsky* [2016] 2 CLC 896. Reviewing the history of the *Norwich Pharmacal* jurisdiction, Flaux J held as follows:

"68. *Nevertheless, for some thirty five years after the Westinghouse case, it seems to have been accepted that Norwich Pharmacal relief would be available in aid of actual or anticipated foreign proceedings, in the same way as in relation to English proceedings, without the 1975 Act imposing any sort of impediment. Thus, in the Court of Appeal decision of Smith Kline & French Laboratories Ltd v Global Pharmaceutics [1986] RPC 394, the defendants were marketing the plaintiffs' drug manufactured by the plaintiffs' Spanish patentee which only had permission to market in Spain, not elsewhere. The appeal concerned that part of the judge's order which required the defendants to disclose, pursuant to the Norwich Pharmacal jurisdiction, the names and addresses of their suppliers and all documents relevant to the supply, to enable the plaintiffs to sue in a foreign court, in Spain or another E.U. country. The*

Court of Appeal held that the court had jurisdiction to make the order and dismissed the appeal. In his judgment, Cumming-Bruce LJ affirmed and applied the principle set out in the decision of the Supreme Court of Massachusetts in Post which Lord Cross had approved in Norwich Pharmacal itself."

Summary of governing legal principles

99. In my judgment it is ultimately clear that *Norwich Pharmacal* relief can be sought in respect of foreign wrongdoing including evading foreign enforcement procedures in circumstances where no local enforcement proceedings have been commenced. If the statutory machinery for obtaining evidence for use in foreign proceedings is not engaged to such an extent as to oust the equitable jurisdiction altogether, there is no additional requirement for the *Norwich Pharmacal* applicant to establish that the wrongdoing complained of has occurred or will in the future likely occur within rather than without the jurisdiction. It has never been doubted that in general terms the equitable jurisdiction can in principle be invoked in support of wrongdoing in relation to which relief is being or may be sought abroad.

100. This conclusion might perhaps be supported in part on a far simpler alternative basis which was admittedly not canvassed in argument. Grand Court Law (2015 Revision) section 11A provides as follows:

> "*11A. (1) The Court may by order appoint a receiver or grant other interim relief in relation to proceedings which-*
>
> *(a) have been or are to be commenced in a court outside of the Islands; and*
>
> *(b) are capable of giving rise to a judgment which may be enforced in the Islands under any Law or at common law.*"

101. A *Norwich Pharmacal* Order is very arguably a form of interim relief analogous to an interim injunction which Parliament has provided may be granted in aid of foreign proceedings, provided that the foreign proceedings "*are capable of giving rise to a judgment which may be enforced in the Islands*". A foreign arbitral award can be enforced as a judgment in the Cayman Islands. I leave the effect of section 11A of the Law on the *Norwich Pharmacal* jurisdiction open for determination in future cases.

Findings: does wilful evasion of a foreign award or judgment qualify as wrongdoing for Norwich Pharmacal purposes?

102. The Plaintiff in the present case can accordingly seek and obtain relief in respect of anticipated wilful steps to avoid the ICC Award which is being enforced in the English and Mauritian Proceedings. The jurisdictional anchor which provides the gateway for the Plaintiff to seek equitable relief under local law is the fact that the Defendants are domiciled here and subject to this Court's territorial jurisdiction. Mr Flynn QC was unable to identify any coherent legal principle according to which the wrongdoing complained of had to engage domestic law.

103. In the present case AMUSA focussed on historic dissipation but in reality primarily used this as a platform to launch their case that wilful steps to evade enforcement would likely be taken in the future if the information sought was not preserved and produced. In my judgment an application seeking equitable discovery in relation to wrongdoing which takes the form of evading enforcement of arbitral awards or judgments will invariably have greater resonance when sought in aid of a domesticated foreign award or judgment. There is a strong legal policy imperative for this Court to uphold the integrity of its own orders and/or processes. This is an imperative which is, in my judgment, clearer and easier to define than the comparatively ethereal common law duty to assist foreign courts in the cross-border civil litigation field.

104. Accordingly, seeking *Norwich Pharmacal* relief grounded upon a complaint of wrongdoing in the form of wilfully evading debts will usually be clearer and stronger where the foreign award and/or judgment in question has been (or is proposed to be) converted into a local judgment. Proceeding on this basis is also likely to eliminate any scope for argument about whether or not the equitable jurisdiction has been ousted by the availability of the statutory remedies conferred under Cayman Islands law by the Evidence Order. On the fact of the present case that might appear to be more 'optics' than substance because in a strict and orthodox sense there was no apparent need to enforce the ICC Award against Essar Steel in the Cayman Islands.

105. Had I found that a requirement of wrongdoing within the jurisdiction did exist, I would in any event have afforded the Plaintiff an opportunity to (a) seek leave to enforce the ICC Award in the Cayman Islands, and (b) apply for a domestic freezing order restraining the Defendants from taking any steps to dissipate Essar Steel's assets.

106. In summary, I find that the deliberate steps to avoid enforcement of the ICC Award which AMUSA believes the Defendants have facilitated constitute an arguable case of wrongdoing for the purposes of satisfying this requirement for obtaining *Norwich Pharmacal* relief. It matters not that (a) no domestic enforcement proceeding has been instituted against Essar Steel (which is not resident here) (b) no local freezing order has been sought, and that (c) the NPO is in substance sought in aid of the execution

processes of foreign courts. This finding is closely connected to my rejection above of the contention that the statutory regime under the Evidence Order, in the factual and legal matrix of the present case, was not engaged and accordingly did not oust this Court's equitable jurisdiction to grant the NPO.

Findings: was the NPO too broad in scope, seeking more than information which was strictly necessary?

The NPO and the Information and Documentation Requests

107. The NPO firstly provided as follows:

> "**Provision of information**
>
> *4. Each Defendant shall within 72 hours of service of this Order upon it file and serve on the Plaintiff's attorneys an affidavit providing to the best of its knowledge, information, and belief the following information:*
>
> > *(a) Where information and/or documentation relating to any of the matters set out in paragraphs 4(a) to (d) of Schedule B are/is located, whether that information and/or documentation are in its own custody or in the possession of someone else.*
> >
> > *(b) Where that information and/or documentation are/is in the possession of someone else, the name, current address and contact details of that person.*
> >
> > *(c) The information set out in paragraph 5 of Schedule B.*
>
> *5. Each Defendant shall within 21 days of service of this Order file and serve on the Plaintiff's attorneys an affidavit providing to the best of its knowledge, information, and belief, full information as to the matters set out in paragraphs 4(a) to (d) of Schedule B to this Order. Insofar as any Defendant is unable to provide full particulars of those matters, that Defendant shall:*
>
> > *a. Provide such particulars as it is able to provide to the best of its knowledge, information, and belief; and*
> >
> > *b. Identify and give the contact details of any other entity or individual who it believes may be able to provide information of such matters.*
>
> *6. If the provision of the information required by paragraphs 4 or 5 above is likely to incriminate a Defendant it may be entitled to refuse to provide it*

but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Defendant liable to be fined or to have its assets seized.

Disclosure of documentation

7. *Each Defendant shall within 14 days of service of this Order provide to the Plaintiff's attorneys copies of the documentation (whether in hard copy or electronic format) evidencing or relating to any of the matters set out in paragraphs 4(a) to (d) of Schedule B to this Order.*

8. *The First Defendant shall within 14 days of service of this Order provide to the Plaintiff's attorneys a copy of the document(s) showing the appointment and/or resignation of any person who has been its director from 1 June 2008 to the date of the service of the Order on it.*

9. *The Second Defendant shall within 14 days of service of this Order provide to the Plaintiff's attorneys a copy of the document(s) showing the appointment and/or resignation of any person who has been its director from 22 March 2013 to the date of the service of the Order on it."*

108. The specific categories of information sought were set out in Schedule B, which provided as follows:

"***Information and documentation required to be provided***

4. The matters in respect of which information and documentation are to be provided:

(a) Any direct or indirect disposal of Essar Steel Limited's assets to related parties from 1 January 2012 to the date hereof;

(b) Any disposal of Essar Steel Limited's assets at an undervalue from 1 January 2012 to the date hereof;

(c) What has become of such assets as described in 5(a) and (b) above;

(d) The identity, location and extent of Essar Steel Limited's assets as at the time the Order is served;

where the asset has or at the time of the disposal had a value of more than US$250,000; and

5. *The identity, current address and contact details for each and every person who has been a director of:*

a. *The First Defendant from 1 June 2008 to the time the Order is served on it; and*

b. *The Second Defendant from 22 March 2013 to the time the Order is served on it.*"

109. Schedule B set out non-exhaustive definitions for three key terms: (a) "*assets*"; (b) "*related parties*"; and (c) "*transactions at an undervalue*". Apart from amendments made to the definition of "assets" on January 16, 2019 primarily to insert references to "*Essar Steel*" instead references to "*the Defendant*", the NPO's definitions essentially followed the form of those contained in the corresponding Order made in the English Proceedings.

110. As regards the scope of the information requests contained in the NPO, the Defendants complained that they were far too broad and failed the proportionality test because they were oppressive. The categories of information were concisely enumerated and initially appeared to me on their face to be proportionate. It was only at the present *inter partes* hearing that detailed attention was focussed on the practical effect of the requests from a compliance perspective, and the necessity for the broad time period covered by the requests.

111. It is also necessary to appreciate that paragraph 3 of the NPO ("Preservation of Documents") prohibited the Defendants from destroying, deleting or altering and required them to preserve "*any document...relating to any of the matters identified in paragraphs 4(a) to (d) of Schedule B to this Order*". So the scope of the information the Defendants were required to produce mirrored the scope of the documents the Defendants were required to preserve.

The Defendants' evidence

112. The Defendants (in their Skeleton) relied primarily upon the Second Sushil Baid Affidavit sworn on February 4, 2019 and the Fourth Ritish Doorbiz Affidavit sworn on February 11, 2019 in support of their case that compliance with the NPO as presently formulated would be oppressive. From the Second Baid Affidavit (supported by the Second Doorbiz Affidavit), prepared for the first return date of January 31, 2019, it was apparent that the Defendants had adopted the well-advised approach of:

(a) agreeing in principle to comply with the preservation portion of the NPO and engaging Ernst and Young to image various servers and devices; and

(b) seeking more time for compliance due to the extensive nature of the requests.

113. On January 31, 2019, it was clear that the Defendants would be objecting to actually handing over most documents until the merits of the Order had been challenged. I directed that production of the main categories of documents would be postponed until after the present application had been determined. The Second Baid Affidavit in substance explained the logistical difficulties of identifying locations where documents were held. More significantly for present purposes, it identified problems of identifying documents through electronic searches and the overly broad timescales involved. The Third and Fourth Baid and Third and Fourth Doorbiz Affidavits also updated the Court on further document locations, prompting AMUSA to complain (essentially in support of their costs application) that a deliberately obstructive approach to compliance had been adopted.

114. The Fourth Baid Affidavit (supported by the Fourth Doorbiz Affidavit) made the following additional complaints:

(a) lack of clarity in the scope of the NPO e.g. as to what "information" meant, what was an indirect disposal or what was a transaction at an undervalue;

(b) asking for documents covering more than seven years was excessive;

(c) a considerable volume of documents had to be examined.

115. The difficulty in identifying electronic documents because different persons used different methodologies seemed to me a very credible complaint, taking into account different geographical locations and the involvement of personal computers. The Plaintiff's expectations of prompt and straightforward production appeared to me to be unrealistic. The asserted difficulty the Defendants had in understanding terms such as "*indirect transfer*" and "*transaction at an undervalue*" appeared somewhat exaggerated.

116. But, despite having initially approved the temporal scope of the NPO, the most serious complaint seemed to be the challenge to the necessity of reaching back for so many years. This spoke to both proportionality and the risk of oppression. AMUSA had not sought freezing orders at the commencement of the arbitration process and had not identified through expert evidence specific avoidance actions which might be available to it under Mauritian law. Instead, reliance was placed on the broad assertion that since asset dissipation appeared to have been going since the beginning of the parties' commercial relationship, historic information covering that entire period (and beyond) was reasonably required.

117. The Third Affidavit of Anya Park did not respond to the timescale complaints. It is difficult to extract from the evidence filed in support of the NPO a detailed analysis of why it is necessary to obtain documents from the Defendants going back to the beginning of 2012 (and as regards the 1st Defendant's directors, information going back to 2008). The Pellet Sale Agreement was entered into in December 17 2012, but Essar Steel did not become a party until January 17, 2014. AMUSA did not refer the dispute to arbitration until August 9, 2016. The Plaintiff's initial evidence clearly explains why it is believed that assets may have been dissipated from as early as June 2012 (the Essar Asia 2012 Transfer), continuing in August 2013 (the Essar Asia 2013 Transfer) and in September 2015 (the Essar UAE Transfer). It is only by the time of the third suspect transaction which is identified by reference to the Group's financial statements that it is expressly asserted that the Defendants would have been aware of Essar Steel's substantial obligations under the Agreement.

The respective submissions

118. In addition to generalised complaints about the timescales for compliance being unrealistic and the NPO resembling a full-scale discovery exercise, the Defendants advanced two significant complaints:

(a) the time period of January 1, 2012 to January 2019 would require the examination of thousands of transactions;

(b) the scope of the NPO as a result of imprecise drafting infringed the requirement of the party to verify the production of documents by affidavit to know what documents fell within or without the scope of the Order: *Berkeley Administration Inc and Others-v-McClelland* [1990] FSR 381. Complaint was made that the value threshold of US$ 250,000 for individual transactions was excessively low.

119. I indicated in the course of argument that I rejected one limb of the non-compliance complaint; the rolling nature of reports as to where documents were located. Mr Weisselberg QC described the Defendants' approach to identifying document locations as "shambolic". Non-compliance in the context of a widely dispersed Group would, in my judgment, have been reflected by a gross under-reporting of potential locations where relevant documents might be found; not over-reporting.

120. Mr Weisselberg QC responded with considerable force to his opponent's oral critique of the breadth of the key terms in the NPO, in essence submitting that the scope of the Order was sufficiently clear to anyone not motivated to conjure up grounds for not complying with it. However, no cogent response was advanced to the complaint that the seven year period covered by the Order was "extraordinary". That period seemed to me to be the sort of period that might be relevant to preserving documents in anticipation of a full discovery exercise in any subsequent litigation, but not "necessary

information" to enable the Plaintiff to determine whether wilful steps to evade enforcement of the ICC Award had been taken.

121. Neither the Affidavits, the respective Skeleton Arguments nor counsel in their oral submissions, so far as I recall, addressed the need for separate analysis of the proportionality of the time periods covered by the following discrete aspects of the NPO:

(a) paragraph 3 ("Preservation of documents");

(b) paragraph 4 ("Provision of information").

122. This was a framing of the issues which did not suit the tactical interest of either party and was one which I only adverted to having reserved judgment. It arises out of a contest and context in which the Defendants appeared to me to focus their efforts on advancing difficult legal points[6] which potentially delivered a knockout blow, while cleverly balancing a responsibly cooperative approach to document preservation with a more obstructive approach to document production. The Plaintiff focussed on upholding the NPO in its entirety, adroitly combining legal arguments on the merits with robust assertions that the Defendants' obstructive conduct should be penalised in costs.

123. The First Nouroozi Affidavit explained the basis of the present proceedings under the heading "*Information and Disclosure Order*" (paragraphs 38-48) and did not address the Information Preservation aspect of the Order at all. The First Nouroozi Affidavit in the English Proceedings appears to deal with the "*Information and Document Preservation Orders*" together on the basis that the Preservation Orders were sought in order to prevent the purpose of the Information Orders "*being frustrated*" (paragraph 191). There was no convincing rationale advanced for the temporal scope of the NPO (as regards directors, narrowly, and information more broadly) which linked the periods in question with the legally applicable requirements of necessity in the context of seeking to identify suspected wrongdoing (as opposed to proving a claim).

Findings: is the temporal scope of the NPO impermissibly broad?

124. I find that the temporal scope of the NPO can only be sensibly considered on the assumption that the same purposes are served by paragraphs 3 and 4 of the NPO, without prejudice to the Plaintiff's right to apply for a freestanding Preservation Order in aid of any substantive avoidance actions it may decide to initiate. Without deciding the point, the jurisdiction to grant such relief would seem to be closely aligned to the *Mareva* injunction jurisdiction, in its pre-judgment and post-judgment forms.

[6] The complexity of the legal points which emerged in oral argument were somewhat masked by their concise formulation in truly skeletal written submissions.

125. Accordingly, I am bound to conclude that justice requires the temporal scope of the NPO to be narrowed so as to commence on March 1, 2015, approximately six months before the most significant suspect transfer made at a time when the Defendants must very arguably have been aware that Essar Steel had substantial liabilities under the Agreement. The nature of the present application is that the Plaintiff does not yet know precisely what application might be brought in what jurisdiction if its suspicions of wrongdoing are vindicated. It has the right to enforce the Award in Minnesota and England and Wales, and may soon have a similar right in Mauritius. I am satisfied that it is not legally required for AMUSA, at this juncture, to adduce positive evidence of what cause of action with what limitation period it may pursue to set aside such transactions which the information it seeks under the NPO may justify.

126. Requiring the Defendants to produce information over a period of just under 3 years preceding the date when the ICC Award (December 19, 2017) was made in favour of the Plaintiff is in my judgment sufficiently proportionate to meet the needs of necessity in the *Norwich Pharmacal* context. The longer period initially ordered might rationally support an Information Preservation Order in aid of a substantive avoidance claim, assuming it is legally possible to grant such relief. But where the Plaintiff is seeking information to enable it to decide whether or not to bring a claim, there must be a fundamental distinction between information which is necessary to achieve that limited purpose and information which would more broadly be relevant and discoverable in the context of future substantive asset recovery proceedings.

Findings: are the terms and scope of the NPO otherwise too broad?

127. Paragraphs 4-5 of the Order deal with the "*Provision of Information*" with reference to paragraphs 4(a)-(d) of Schedule B. The Defendants are required (within 21 days of service of the Order) to :

> "*...file and serve on the Plaintiff's attorneys an affidavit providing to the best of its knowledge, information, and belief, full information as to the matters set out in paragraphs 4(a) to (d) of Schedule B to this Order. Insofar as any Defendant is unable to provide full particulars of those matters, that Defendant shall:*
>
> *(a) Provide such particulars as it is able to provide to the best of its knowledge, information, and belief; and*
> (b) *Identify and give the contact details of any other entity or individual who it believes may be able to provide information of such matters.*"

128. Doubt has admittedly been cast on the theoretical value of the distinction between the terms "information" and "evidence" in the *Norwich Pharmacal* context: see e.g. *Omar* at paragraph 12; *Singularis* at paragraph 142 (Lord Mance). That can have no bearing on the ability of the Defendants, with the benefit of legal advice, to understand what

information means in the context of the above provisions of the body of the NPO as read with the following provisions of Schedule B to the Order:

> *"4. The matters in respect of which information and documentation are to be provided:*
>
> *(a)Any direct or indirect disposal of Essar Steel Limited's assets to related parties from 1 January 2012 to the date hereof;*
>
> *(b)Any disposal of Essar Steel Limited's assets at an undervalue from 1 January 2012 to the date hereof;*
>
> *(c)What has become of such assets as described in 5* [sic] *(a) and (b) above;*
>
> *(d)The identity, location and extent of Essar Steel Limited's assets as at the time the Order is served;*
>
> *where the asset has or at the time of the disposal had a value of more than US$250,000..."*

129. The complaint made in the Fourth Baid Affidavit at paragraph 13 about the difficulties of complying with a strict obligation to produce documents evidencing an indirect disposal of assets has more substance to it. It is true that some analysis will be required to decide whether a single document or multiple documents relate to a relevant transaction. However, the penal notice is not included in the Order to police matters of judgment on the minutiae of the information provision process. Clearly those involved in reviewing documents are expected to use their best endeavours to deploy a rational system for identifying relevant documents and produce what appear to be the key documents as promptly as possible, permitting the Plaintiff to make follow up requests where needed. This complaint provides no basis for varying the Order.

130. Another issue which was not addressed, as far as I could discern, in great detail was the time limits for compliance with the NPO. My sense is that due to the effluxion of time and the shifting of the ground since the NPO was initially made, some adjustment is probably now needed to the framing of the periods of time for various compliance steps to be taken. The parties should seek to reach agreement on these changes although I will of course resolve any disputes in the context of finalizing the Order required to give effect to the present judgment,

131. The bare argument that $250,000 is too low a threshold for providing information and documents is rejected. The Defendants have adduced no evidential support for the proposition that the number of transactions likely to be involved is oppressive.

132. I also reject the complaint made in the Fourth Baid Affidavit (paragraph 12) about the lack of clarity as to what an indirect disposal to a related party means. An indirect disposal would clearly include, as the Plaintiff argued, a disposal to an independent third party which then transferred it to a related party. More prosaically, it would equally obviously include the transfer of an asset in which Essar steel had an indirect interest. Mr Flynn QC sought to embellish the point by querying how many layers of connection had to be considered, without suggesting any alternative form of wording which could be used. The Defendants' submission (Skeleton Argument, paragraph 23(2)) that there "*may be many companies with no obvious connection with Essar Steel which need to be included*" confirms rather than undermines the appropriateness of the present form of Order. In my judgment the definition of "*related parties*" in paragraph 2 of Schedule B to the NPO is sufficiently clear in all the circumstances of the present case.

133. Complaint is also made that the Order will require analysis of unimpeachable transactions - in fact all of Essar Steel's transactions, including intangibles. It is not just gratuitous transactions or transactions at an undervalue which must be disclosed. This complaint merits serious consideration. It is easy to see why all transactions over the $250,000 threshold would be relevant in the context of pre-trial discovery or perhaps even a substantive enforcement proceeding. Bearing in mind that the WFO was not granted in the English Proceedings against the Defendants, it is not entirely straightforward to justify such extensive disclosure in the present proceedings under the NPO. I have found above that as a matter law it is permissible to grant *Norwich Pharmacal* relief (a) in aid of foreign enforcement proceedings and (b) to "police" a foreign post-judgment *Mareva* injunction. Attention has focussed on (a) and I have not forensically examined what (b) actually means in practical terms as regards the scope of the NPO. The main rational for the information requests has been enabling the Plaintiff to confirm its suspicions of wilful evasion of enforcement actions so that appropriate remedial steps can be undertaken. On that basis the Defendants' counsel was correct to complain about being compelled to produce information which is not likely to evidence assets dissipation.

134. Subject to the Plaintiff having liberty to apply to seek extended discovery in aid of the WFO, if so advised, I would accept that the discovery should at this stage be limited to assets transfers to related parties which have resulted in or contributed to a net reduction in Essar Steel's assets over the period (as modified by this Ruling) covered by the NPO. Schedule B paragraph 4(a) should accordingly be amended by adding the following words (or language to like effect) at the end of the sub-paragraph: "which has resulted in or contributed to a net reduction in Essar Steels assets".

135. If the NPO is amended in this respect, paragraph 4(b) will likely take on less significance although its ambit would not be precisely the same as the modified paragraph 4(a). I reject the complaint that the term is unclear in any event. Mr Flynn

QC queried why the Plaintiff suggested the obvious source of a definition for the terms "undervalue" was to be found in the English Insolvency Act, but did not suggest that there was any material difference to the concept under Cayman Islands law. There is none. Section 146(1) (e) of the Companies Law defines "*undervalue*" in relation to a company's property as:

> "
>
> *(i) the provision of no consideration for the disposition; or*
>
> (ii) *a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.*"

Summary of findings on application to set aside or vary the NPO

136. The Defendants' submission that the Court had no jurisdiction to grant the NPO because section 5 of the FAAEL required local enforcement to enable the Plaintiff to place any reliance at all on the ICC Award is summarily rejected.

137. The Defendants' further and far more substantive submission that this Court had no jurisdiction to grant the NPO because the relevant equitable jurisdiction was been displaced by statutory regime applicable to obtaining evidence for use in foreign proceedings is ultimately rejected. This was a point that had not seemingly been directly considered before under Cayman Islands law. The Evidence Order is not engaged in all the circumstances of the present case because, *inter alia*, the relief sought included (a) the preservation of documents, and (b) information needed to enable the Plaintiff to determine whether the suspected wrongdoing has in fact occurred and, if so, to seek appropriate relief. *Norwich Pharmacal* relief was necessary to preserve the ability to pursue a substantive claim and so the usual method of obtaining evidence for use on foreign proceedings was not in real world terms available.

138. The Defendants' alternative submission that wilfully evading a foreign arbitral award or judgment does not qualify as wrongdoing (so that that this Court had no jurisdiction to grant *Norwich Pharmacal* relief) is also rejected. Equitable relief may be given in aid of foreign claims and a sufficient jurisdictional connection with the Cayman Islands exists since the Defendants are domiciled here.

139. The Defendants' further alternative submission that the NPO should be set aside or varied because it is oppressive and overly broad is rejected in part and accepted in part. Subject to hearing counsel on the form of the Order, the NPO is varied to the following extent:

> (1) the date "March 1, 2015" is substituted for the date now set out in paragraph 4(a) and (b) of Schedule B;

(2) paragraph 4(a) of Schedule B is amended by adding the following words "which has resulted in or contributed to a net reduction in Essar Steels assets".

Costs

140. The Plaintiff sought the costs of the January 31, 2019 hearing and the present hearing on the grounds of the Defendants' obstructive and unreasonable conduct and failure to comply with the NPO. The usual costs rule is that the *Norwich Pharmacal* applicant pays the costs of the respondent and may only obtain costs from the wrongdoer or an innocent party who opposes the application unreasonably. In my judgment the appropriate approach is to reserve the costs of the *inter partes* hearings and to deal with costs after the NPO has been substantially complied with and/or it is clearer whether costs should be allocated based on the hypothesis that the Defendants are innocent third parties. The Defendants' conduct to date has not been so unreasonable as to justify making an adverse costs order at this stage taking into account, in particular (a) their cooperation with the preservation aspects of the Order and (b) the fact that the core foundation of the application is that the Plaintiff is presently unable to plead a case of wrongdoing against the Defendants.

HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT