

**EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SUIT NO: NEVHCV2010/0156

BETWEEN:

- [1] FRANTISEK STEPANEK (APPLICANT "A")**
- [2] JAROSLAV ROKOS (APPLICANT "B")**
- [3] SOKOLOVSKA UHELNA, PRAVNI NASTUPCE A.S (APPLICANT "C")**

Claimants

and

- [1] AQUA INVESTMENTS LTD (COMPANY NUMBER C27157) (RESPONDENT "A")**
- [2] MORNING STAR HOLDINGS LIMITED (RESPONDENT "B")**
- [3] CONRAD SMITHEN (RESPONDENT "D")**

Defendants

[1] ELIZWOOD TRADINGS LTD.

Interested Party

Appearances:

Mr. Gerhard Wallbank with Ms. Rayana Towden for the Claimants.
Ms. Dia Forrester with Mr. Gyan Robinson for the Defendants.
Ms. Farida Hobson (watching brief for Elizwood Tradings Ltd.)

2014: May 7, 8, July 21
2015: February 11

JUDGMENT

- [1] **WILLIAMS, J.:** The Claimants have brought this Claim against the Defendants seeking orders of the Court for disclosure of documents and Information, entity or entities and of persons allegedly engaged in acts of wrongdoing.
- [2] The Claimants claim that one or more of the Defendants have information which requires Disclosure by an Order of the Court, which they require to pursue legal proceedings in the Czech Republic to prevent further wrongdoing.
- [3] The Claimants are:
- (a.) Sokolovska Uhelna, Pravni Nastupce A.S. (hereinafter referred to as SUPN) is a company registered in the Czech Republic company registration number 2634839)having its registered office on Stare Namesti 69 Street, Sokolov, Czech Republic. The Company deals mainly with Lignite mining activities and production of Electrical energy.
- [4] The Company has three shareholders Frantisek Stepanek of the Czech Republic owns 40% of the registered shares of the Company; Jaroslav Rokos owns 30% of the Company's registered shares and Jan Krouzecky owns 30% of the company's registered shares.
- [5] The Defendants are as follows:
- a. Aqua Investments Limited a Nevis registered company formed pursuant to the Nevis Business Corporation Ordinance.
- b. Morning Star Holdings Ltd. Which is the registered agent for Aqua.
- c. Conrad Smithen who is an employee of Morning Star, and recorded as the Incorporator and first shareholder of Aqua Investments Ltd.
- [6] It is the Claimants' case that the Defendants have become mixed up in actionable wrongdoing against them, in particular by Jan Krouzecky.

- [7] The Claimants claim that Aqua Ltd. is a party to a purported loan credit agreement with Jan Krouzecky which is a sham and a device to circumvent an offering duty relating to his shares and conditions/restrictions on transfer of Mr. Krouzecky shares contained in the Amended Articles of Association of SUPN and a shareholder's agreement.
- [8] The Claimants further state that Morning Star the 2nd Defendant became mixed up in wrongdoing by virtue of incorporating and maintaining Aqua Ltd. and by assisting the persons behind Aqua Ltd to further the sham transaction used to circumvent the offering duty and conditions/restrictions on transfer of Jan Krouzecky's shares by means of making voluntary filings with the Nevis Companies registry.
- [9] The Claimants also state that Conrad Smithen became mixed up in wrongdoing by acting as the incorporator of record for Aqua Ltd. and first subscriber to Aqua Ltd's share capital.
- [10] The Claimants case is that they need the Information to turn suspicions of wrongdoing on the part of Mr. Krouzecky and other involved persons into sufficient information, in order to take steps to prevent the wrongdoing being pursued and to pursue causes of action against Jan Krouzecky and others for compensation and other relief for Loss, Damage and Prejudice caused by the wrongdoing.
- [11] The Defendants trenchantly deny the Claimants claim and state that the Loan agreement with Jan Krouzecky referred to by the Claimants was at arm's length and was not a sham or orchestrated to circumvent his obligations under the Shareholders' Agreement and Articles of Association of SUPN.
- [12] The Defendants also state that the 4th Defendant while he assisted with the administration of the 1st Defendant as an employee, he was not mixed up in any wrongdoing.
- [13] The Defendants deny that they possess information to prevent any alleged wrongdoing or to pursue causes of action against Jan Krouzecky and others.

[14] The Defendants further state that the Claimants would only be entitled to the information in relation to their clients' records if they are successful at the Trial. The Defendants also claim that it is highly prejudicial for the Claimants to rely on and invite the Court to rely on documents that are false as evidence to establish the beneficial ownership of the first defendant.

[15] The Defendants also state that the issuance of Orders sought in the Nevis Court is not the only source through which the requested information or documents can be obtained, since the competent Courts of the Czech Republic where the alleged causes of action shall be litigated have Jurisdiction and/or competence and discretion for the issuance of Orders for disclosure, not only against the person who is sought to be made a Defendant, but also against third Parties according to applicable law.

[16] The Defendants contend that Article 8 of the Articles of Association of the 3rd Defendant is the only evidence provided by the Claimants to the Court for consideration of its request for a Norwich Pharmacal Order.

The Defendants state that Article 8 requires Jan Krouzecky to give the 1st and 2nd Defendants the option to purchase his shares in the 3rd Claimant before that of an outside party.

The Defendants also argue that the Claimants have attempted to rely on a breach of the shareholder's Agreement as a basis for their application to the Court for a Norwich Pharmacal Order. However they contend that the said shareholder's Agreement was never presented to the Court and therefore the Court cannot adjudicate on a document that is not before it.

[17] The Defendants state that the Claimants have already commenced legal proceedings in the Czech Republic against Jan Krouzecky, Aqua Investments Ltd, Pavel Tyrac and Elizwood

Trading Ltd as the alleged wrongdoers, and refer to the 10th Affidavit of Radka Simkova filed on the 7th May 2013 and exhibited as “RSI”.

The Defendants state that this claim in the Czech Republic courts is for compensation for Damages sustained which the Czech Courts have already rejected.

[18] The Defendants therefore question the action of the Claimants in seeking a Norwich Pharmacal relief in this Court when they are unable to substantiate the Claim in the Czech Republic.

[19] The Defendants urge the Court to address the issue of the omission of the Privatisation Agreement, and its disclosure to the Court which would have substantiated the Claimants’ allegations of wrongdoing. The Defendants also contend that there has been no suit commenced, or other claim by the Government of the Czech Republic against the 3rd Claimant for any transfer of shares in breach of the Privatization Agreement.

[20] The Defendants contend that the Claimants have failed to establish that the 1st Defendant and Jan Krouzecky entered into a sham agreement.

The Defendants state that the connection between the 1ST Defendant and Jan Krouzecky is that they are parties to a Credit Agreement dated 17th August 2006 where Jan Krouzecky was loaned US\$30 million.

There is also an Executor’s Deed dated 28th August 2006 and a 2nd Executor’s Deed dated 9th October 2009. The Defendants further state that the Claimants have placed heavy reliance on a Call Option Agreement, two Powers of Attorney, and several newspaper articles in support of their Claim.

[21] The Defendants further contend that there is no restriction in the Articles of Association or any other Agreement before the Court precluding Jan Krouzecky from entering into a Call Option Agreement with respect to his shares.

Whilst the Claimants allege that the Call Option had been retrospectively papered up since a portion of the option was paid prior to the call option being signed, the Defendants contend that the call option was entered into on the 6th January 2006 and that consideration for the call option was already paid before the execution of that Agreement. Further the Defendants argue that Clause 1.1 of the call option expressly states that the option to purchase can only be exercised if all conditions for a valid and effective transfer of the shares have been satisfied, that is any consents required by Law, constitutional documents of the 3rd Claimant and contractual obligations.

[22] The Defendants argue that the Claimants' contention that the alleged wrongful act of Mr. Jan Krouzecky consisted in the breach of the Privatization Agreement is absurd, because of the fact that the restriction of transferability relating to SUPN shares was never breached by Jan Krouzecky or any of the Defendants and that Mr. Krouzecky is still the owner of the respective SUPN shares and therefore no real damage could have occurred.

[23] The Defendants further contend that the Privatization Agreement created certain obligations relating only to the shares that were subject to the Privatization Agreement, that is shares currently representing approximately 49.99% of the registered capital of SUPN; but there are another approximately 50.01 percent of SUPN shares to which no such obligation could apply, and therefore there is no possible transfer of SUPN shares to which any such obligation could apply, and therefore no possible transfer of SUPN shares owned by Jan Krouzecky could be considered as breach of the Privatization Agreement. Moreover the Privatization Agreement could not impose an obligation on Mr. Jan Krouzecky or the Defendants who were not a party to it and therefore no damages could be attributable to them.

[24] The Claimants on the other hand submit that there could be additional damage caused to SUPN and its shareholders due to breach of a Privatization Agreement whereby the Czech state allowed SUPN to come into existence as a private company after the end of the communist state-owned era. It is however pointed out that the breach of the Privatisation Agreement is mentioned by the Claimants only as background argument showing that the Defendants, Mr. Krouzecky and other co-operating entities unlawful activities are far more reaching.

The Claimants state that their case is based on crucial breaches of Articles of Association and Shareholders Agreement irrespective of the existence of the Privatization Agreement and its provisions.

[25] After a review of the Evidence, and in the interest of Transparency and Justice, I consider that the Privatization Agreement and the Shareholders Agreement must be produced in Court so that both sides can have first-hand knowledge of the obligations created thereunder in relation to the shares that were subject to the Privatization Agreement, and the restriction on transferability that were placed on SUPN shares pursuant to the said Agreement.

[26] With respect to the Claimants claim on the Power of Attorney granted by Jan Krouzecky to Emil Holub and Radik Blaha, the Defendants state that there is no restriction in the Articles of Association or any portion of any agreement precluding Jan Krouzecky from entering into a Power of Attorney with respect to his shares. The Defendants claim that the submissions of the Claimants are inconsistent with the legal concept of a Power of Attorney, and an individual's ability to act freely, and was a further attempt to support a wrongful premise of the existence of a sham.

[27] The Defendants state that Article 4:1 of the Executor's Deed of 2006 expressly gives Jan Krouzecky's consent, if he fails to honor his commitments in the Credit Agreement to be subject to the Execution Procedure Code and Act relating to Public Auctions in the Czech Republic. The Defendants contend that the Claimants have attempted to mislead the Court by asserting that Jan Krouzecky consented to have a public auction of his assets if he breached his obligation by using the Executor's Deed to orchestrate a sale of his shares in the 3rd Claimant.

The Defendants state further that the assertion is misleading because Execution proceedings in the Czech Republic are conducted by a Court appointed Executor or Distrainer, who determined the method of Execution to be used in each execution.

[28] The Defendants contend that it was only when Jan Krouzecky failed to pay his obligations to the 1st Defendant and Execution proceedings were commenced, that the Executor sought to execute on the dividends of Jan Krouzecky in the 3rd Claimant, and that subsequently the Executor put the shares of Jan Krouzecky in the 3rd Claimant up for Public auction.

[29] The Defendants also refer to the Executor's Deed of October 2009 and state that Jan Krouzecky entered into that agreement without any form of collateral, but a promissory note. However according to the Defendants in the Czech Republic, an Executor's Deed is also a form of security for the Credit Agreement in the form of the two Executor's Agreement of 2006 and 2009 and the promissory note.

[30] In relation to the Newspaper articles, the Defendants contend that the Articles contain quotations primarily from the 1st Claimant to the press which are without merit, and therefore cannot be taken as an Independent source. The Defendants state further that the Articles are self-serving and in furtherance of the Claimants' agenda of a conspiracy

theory, and therefore the Court cannot rely on speculation and conclusions of other people who have not validated these conclusions.

[31] The Defendants state that the Claimants have not been forthright in the evidence that they have provided, and have attempted to link the contents of a letter written by Pavel Tykac to the 1st and 2nd Claimants to a three paragraph excerpt from the Newspaper article at page 53 Bundle 3D Part I.

The Defendants contend that the letter of Pavel Tykac was written before the Newspaper article and therefore cannot be used to validate the Newspaper article.

[32] The Defendants state that the 1st Claimant as Chairman of the 3rd Claimant wrote to the 1st Defendant in August 2010 and offered to purchase from the 1st Defendant, the receivables of Jan Krouzecky. The Defendants therefore argue that it was the Claimants who were actively attempting to gain leverage on Jan Krouzecky and his shares in the 3rd Claimant. According to the Defendants the 1st Defendant having refused to sell its receivables, have made the Claimants disgruntled and they have now raised issues of suspicion and illegality of the Defendants.

[33] The Defendants contend that the Resolution of the Czech Supreme Court of 25th February 2010 held that the business companies may not distribute royalties to the members of its bodies where they simultaneously do not distribute dividends to the shareholders. The Defendants refer to Exhibit "RS2" of the 9th Affidavit of Radka Simkova dated 8th October 2013.

[34] The Defendants further contend that this resolution was then followed by the Czech Courts decision on a Claim between the 3rd Claimant represented by its shareholder Jan Krouzecky against the 1st and 2nd Claimants and the Board of Directors of the 3rd Claimant for improper business practice. The Czech Courts concluded according to the

- Defendants that the Board of Directors did not act with due managerial care regarding the payment of royalties, and it breached its duty to act with managerial care.
- [35] Still further according to the Defendants, the main beneficiary from the Resolution of the Czech Supreme Court was Jan Krouzecky as he was the only shareholder who was not a member of the 3rd Claimant's Board of Directors receiving royalties although no dividends were paid. Consequently the Defendants contend that it would not be absurd for the 1st Defendant to permit Jan Krouzecky to repay his debt by instalments and they therefore deny that the 1st Defendant is mixed up in wrongdoing because of his refusal to sell the receivables to the Claimants.
- [36] In relation to **Alternative Avenues other than Norwich Pharmacal Relief**, the Defendants submit and reiterate that the Claimants must illustrate to the Court that a Norwich Pharmacal order is needed to enable an action to be brought against the ultimate wrongdoer, because there must be necessity for the Court to exercise its Jurisdiction. The Defendants also argue that the Order sought must be a necessary and proportionate response in the circumstances of the case which the Defendants state is not the case in this claim.
- [37] The Defendants submit that the Claimants claim for Damages is statute barred, and therefore the Disclosure requested by the Claimants cannot be used to pursue the alleged wrongdoing. The Defendants also contend that under the Civil Code in the Czech Republic a claim to Damages becomes statute barred after two years from the day when the aggrieved party became aware of the Damage and ascertains who is responsible for such Damage. The Defendants state that the Norwich Pharmacal Relief is to be used for the specified purpose identified in the Order.

- [38] The Defendants strongly contend that the Expert reports of the Parties confirm that disclosure is available to the Claimants in the Czech Republic.
- The Defendants argue that there is no evidence before the Court that any alleged wrongdoers cannot be identified in the Czech Claim already filed, and that the option of seeking disclosure before the Courts of the Czech Republic has been explored.
- [39] The Defendants submit that the interests of the Claimants in obtaining the information sought is outweighed by the Public interest and the private interest of the Defendants who have committed no wrongdoing.
- [40] The Defendants contend that the conduct of the Claimants obtaining disclosure orders in other legal proceedings and using that information in an unauthorized and unintended purpose, illustrates that they have ulterior motives fuelling their activities. The Defendants refer to an Order of the High Court of 13th December 2012, whereby the Claimants were prohibited from continuing to engage in an unauthorized manner, and relying on confiscated documents obtained from Elizwood Trading Limited. The Defendants submit that the Claimants' conduct is such that they consequently engage in unauthorized activities with respect to information obtained by way of Disclosure orders.

The Czech Republic Proceedings

- [41] According to the 4th Affidavit of JuDr Petr Malek dated the 16th October 2012, the background to this Application is the claim in the Czech Republic, in The District Court of Limassol Cyprus for an Interim Norwich Pharmacal Order against the Cypriot Company known to the Claimants to be or to have been the secretary of the 1st Defendant Aqua Investments Ltd, the company Avila Management Services Ltd, and its known former principal Mr. Flemming Edsberg, a former shareholder and Director of Defendant A, Aqua Investments Limited.

The Defendants in those proceedings are (a) Avila Management Services Ltd. (b) Mr. Fleeming Edsberg (c) Vumond Investments Limited.

On the 19th December 2011, the District Court of Limassol delivered an interim decision by which the first two of the aforementioned Defendants were ordered to disclose the documents sought by the application. The First and Second Defendants to those proceedings filed an Appeal, which was dismissed on the 27th June 2012 by a final decision of the Supreme Court of Cyprus.

[42] On the 9th July 2012 the Claimants legal representatives in Cyprus were served with Affidavits of Avila Management Services Ltd and Mr. Flemming Edsberg in response to the decision of the Cyprus Court.

[43] The Cyprus Court ordered inter alia that Avil Management Services and Flemming Edsberg and/or their officers and/or Directors disclose under oath to the Claimant/Applicants specific documents that relate to shares of the Plaintiffs that are in the custody, possession or control of a third person that relate to Aqua Investments Ltd. Jan Krouzecky and Elizwood trading Limited.

[44] The material allegations in the Czech Proceedings are well documented in the written submissions of both learned counsel and in the numerous affidavits of Petr Malek and Radka Simkova whose Affidavit evidence is intended to buttress the case of the Claimants and the Defendants respectively.

[45] According to the Claimants the present application before this Court is made to enable the Claimants to obtain documents and Information to pursue legal proceedings in the Czech Republic to claim compensation for damage caused to them in breach of Czech Law, and for relief to prevent further wrongdoing, and another unlawful Execution leading to a sale of shares.

The Law relating to Norwich Pharmacal Order

[46] The principles under which the Court will grant Norwich Pharmacal Orders are well settled. The power of the Court to compel a third party to disclose information in its possession to enable a party to establish the identity of its wrongdoer and/or the wrongdoing has its genesis in the case of Norwich Pharmacal vs. Commissioners of Customs and Excise.¹

It was held that a person who was innocently mixed up in the wrongdoing of another, so that he was more than a “mere witness” could be compelled to disclose the identity of the actual wrongdoer, in order that proceedings could be taken by the victim against the appropriate defendant.

At page 175 of that Judgment, Lord Reid stated:

“They seem to me to point to a very reasonable principle, that if through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability, but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong doers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense, the person seeking the information ought to reimburse him. But Justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”

[47] The Norwich Pharmacal principle has been further extended to embrace causes where what is sought is not only restricted to the identity of a wrongdoer, but can extend to “full

¹ [1974] A.C 133

information required for this purpose, including information about what the wrongdoer has done with his assets.” **See Mercantile Group AG vs. Aiyela** ²

[48] The key to the Jurisdiction is that it enables the Claimant to obtain legitimate redress for a wrong which otherwise would not be available to him.

In Mitsui & Co. Limited vs Nexen Petroleum ³Lightman J reviewed the authorities in explaining the Norwich Pharmacal Principle and re-stated at paragraph 19 the following; “In subsequent cases, the Courts have extended the application of the basic principle. The Jurisdiction is not confined to circumstances where there has been tortious wrongdoing and is now available where there has been contractual wrongdoing.”

“Relief can be ordered where the identity of the Claimant is known, and where the Claimant requires a missing piece of the Jigsaw: “

See AXA Equity & Law Life Assurance Society PLC vs. National Westminster Bank PLC. ⁴

[49] Norwich Pharmacal relief is a flexible remedy capable of adaptation to new circumstances. Lord Woolf C.J noted in

Ashworth Hospital Authority vs MGN Limited. ⁵

“New situations are inevitably going to arise where it will be appropriate for the “Norwich Pharmacal” Jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its Infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.”

² [1994] Q.B 366

³ UK [2005] 3 AllER 511

⁴ [1998] CLC 1177

⁵ [2002] UKHL 29

[50] The Jurisdiction is available to ensure that there is Justice to the wronged person/entity. It can in appropriate circumstances be extended to see that Justice is done since it is an equitable remedy. However the Jurisdiction cannot be used as a Fishing Expedition to enable a Claimant to decide whether or not to sue, where or not to sue, where the identity of the wrongdoer is known. If it is possible to plead a case without the Information, then the Norwich Pharmacal Jurisdiction is not available.

[51] The three conditions to be satisfied for the Court to exercise the power to **order Norwich Pharmacal** relief are:

- a) There must be an apparent wrong carried out, or arguably carried out by an ultimate wrongdoer
- b) There must be the need for an Order to enable action to be brought against the ultimate wrongdoer; and
- c) The person against whom the Order is sought must (a) be so mixed up in as to have facilitated the wrongdoing and (b) be able to provide the Information necessary to enable the ultimate wrongdoer to be sued.

[52] Additionally even if these conditions are satisfied, the Court has a residual discretion whether it is right that an Order be made in all the circumstances.

The Issues

[53] The main issue in this case is;

Whether the Applicants have set out a good and arguable case for a Norwich Pharmacal Order to be granted.

[54] The threshold test for a grant of a Disclosure Order is that the Applicant must disclose a good arguable case that a wrong has been committed.

See: **Bankers Trust Co. vs. Shapira**⁶

Lord Denning stated at page 1282,

“This new jurisdiction must of course be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer’s account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the Bank is the Plaintiff’s money- as for Instance, when the customer has got the money by fraud- or other wrongdoing and paid it into his account at the bank...”

[55] The Respondents Counsel Ms. Dia Forrester argues that the Claimants have commenced this Claim on the basis that the Credit Agreement between the 1st Defendant and Jan Krouzecky is a sham and that they are fishing for evidence that there is wrongdoing in relation to the Credit Agreement. The Respondents assert that there is no evidence of wrongdoing only speculation indicated to distort what are uneventful matters.

[56] The Respondents contend that if the credit agreement was part of an orchestrated sham, then the parties to the Agreement which was entered in 2006, should not have waited four years later to start Execution Proceedings to take title to the shares.

[57] The Respondents also submit that the other two shareholders in the 3rd Claimant could top the highest bid at the public auction of Jan Krouzecky’s shares and get ownership of his 30% interest in the 3rd Claimant. Therefore an Investor would have to buy those shares in an Auction and be exposed to other shareholders having a right to top the highest bid. The Respondents therefore contend that there was no financial benefits from having those shares in the 3rd Claimant.

⁶ [1980] 1WLR 1274

[58] Further according to the Respondents submissions, there were no dividend payments, no majority interest in the 3rd Claimant to change the price of coal or any position on the Board of Directors of the 3rd Claimant which would have been available from owning Jan Krouzecky;s shares. Therefore the Respondents contend that since there has been no transfer of Jan Krouzecky's shares, there has been no breach or wrongful evasion as alleged by the Claimants.

[59] The Respondents submit that the evidence does not substantiate the Claimants request for Norwich Pharmacal relief and there is no basis for the Order.

[60] The Respondents say that the Applicants case is speculative and should be dismissed with costs.

[61] The Respondents also submit that it is well established Law that there must be involvement on the part of a Respondent to justify the Discovery that is being sought.

In the case of **The President of the State of Equatorial Guinea vs. The Royal Bank of Scotland International & Ots**⁷, the Board was of the view that the Bank was involved, albeit innocently as the Intervener accounts at the Bank were likely to identify some of those involved and had done so.

[62] In the present application, the wrongdoers are known to the Claimants/Applicants. The Claimants are of the opinion that the moving spirit behind the 1st Defendant and Elizwood is the same person Mr. Tykac. They contend that Mr. Tykac seeks to acquire Mr. Krouzecky's shares using a sham device to circumvent the restriction on transfer contained in Sokolovska's amended Articles of Association.

[63] The Claimants submit that the Articles of Association of the 3rd Claimant as well as the Shareholders Agreement (which has not been disclosed to the Court) enshrine that in case

⁷ [2006] UKPC 7

any shareholder expresses his will to transfer his shares, they have to be offered to the other shareholders for a fixed purchase price determined according to a specific formula provided in the Articles of Association and the Shareholders Agreement. Further that a necessary condition for transfer of company's shares to third persons is the consent of the company's Board of Directors.

[64] According to the First Affidavit of Petr Malek attorney at Law of the Czech Republic dated 15th July 2011 who avers that he is personally aware of the facts of this matter, a shareholder who intends to transfer his/her shares and not offer them to other shareholders, breaches the respective provisions of the Articles of Association, as well as Czech laws. Furthermore, the only person with a right to exercise corresponding Sokolovska "SUPN" shareholders' right is the shareholder.

By allowing third persons to exercise shareholder's rights would arguably constitute an act of unfair competition and there could be damage caused to SUPN and its shareholders due to a breach of the Privatization Agreement concluded between SUPN and the Czech state. **(This document is not produced in evidence before the Court).**

[65] The Claimants further submit that Mr. Krouzecky drew up Executor Deeds with Aqua Investments Ltd.- the 1st Defendant which was followed by Execution proceedings initiated by Aqua Investments Ltd in which Mr. Krouzecky suggested a sale of his shares to settle the alleged debt; such series of actions would allow him to avoid his offering duty in connection with his shares; and to transfer the said shares to a third party.

[66] The Claimants contend that this unlawful activity is confirmed by existence of documentary evidence for example, the Call option agreement and the Power of Attorney, but that the documents and Information sought in the Nevis Court by the Claimants cannot be obtained in the Czech Republic within the scope of Czech laws.

- [67] The Claimants also state that they have not been able to obtain the documents and information sought in Cyprus despite a Norwich Pharmacal Order from the Court in Cyprus.
- [68] The Claimants contend that the Defendants have resisted the disclosure sought by the Claimants and have filed ten affidavits in opposition to the Application from Ms. Radka Simkova its Czech Attorney.
- Also they submit that statements made by Mr. Pavel Tykac, a competitor of SUPN in the media, and Mr. Radik Blaha who represents Mr. Krouzecky appear to indicate that Mr. Krouzecky's interest in Sokolovska had ended and that he had signed a "special contract" with an Investor.
- [69] According to the Claimants submission a Call Option agreement which was entered into on the 6th January 2006 between Mr. Krouzecky and a Cyprus off-shore company Elizwood Trading Ltd conferred on Elizwood, an option to purchase Mr. Krouzecky's shares.
- [70] In that said agreement according to the evidence of the Claimants a sum of US\$4.2 million has already been paid to Mr. Krouzecky and there has been a "papering up" of the call option agreement.
- [71] The Defendants however vigorously denied this claim and contend that there is no restriction in the Articles of Association or any other agreement precluding Jan Krouzecky from entering into a Call option Agreement.
- "The Call option" agreement according to the Defendants is between Jan Krouzecky, Miroslava Krouzecka, Ales Krouzecky as sellers and Elizwood Trading Ltd as buyer of the sellers shares in the 3rd Claimant. Also consideration for the Call option was already paid before the Execution which consideration was 100 million crowns. This payment the

Defendants state does not give rise to an assumption that the call option was subsequently papered up for an ulterior motive.

[72] The Claimants have also raised issues with the two Executors Deeds entered into between Mr. Krouzecky and Aqua Investments Ltd. They claim that in those said Deeds Mr. Krouzecky and Aqua have entered into a Loan Credit Agreement dated 17th August 2006 whereby Aqua has loaned Mr. Krouzecky approximately \$30 million which is a sum similar to the price of the shares stated in the call option agreement.

The Claimants also contend that the Executors Deeds are security for the loan and the 1st Executor's Deed was executed eleven days after the loan credit agreement, whereas the second Executor's Deed provides that the Loan Credit agreement had already been amended by the date the 1st Executor's Deed had been executed.

[73] The Claimants argue that the alleged Loan was not secured against specific property and at no point did Mr. Krouzecky offer his shares for sale to the other shareholders, Claimants (a) and (b) as he was contractually bound to do pursuant to the Offering Duty.

[74] Further the Claimants contend that Aqua Investments Ltd sought to have Mr. Krouzecky's shares sold off at public auction, even obtaining a Europe wide Execution Order. Aqua Investments Ltd. claimed that it was suffering high damages and stated a contractual repayment date in August 2013, although Mr. Korouzecky had not yet failed to pledge his shares. The Claimants have therefore determined that the sale of the shares was obligatorily proposed by Mr. Krouzecky himself and this only further illustrated the unlawful scheme.

[75] According to the Claimants evidence in November 2010, Aqua Investments Ltd discontinued the Execution proceedings in the Czech Republic after they had obtained the

ex-parte Anton Piller/ Norwich Pharmacal Order in Nevis claiming that it reached an amicable settlement with Mr. Krouzecky.

[76] The Claimants argue that no such loan was made, and the only evidence for that is what was declared in the Executors' Deed; therefore the Aqua Investments Ltd loan scheme was a sham device calculated to produce a "default" which would enable Aqua Investments Ltd to have Mr. Krouzecky's shares sold off at a public auction to a pre-determined buyer.

[77] The Claimants also contend that they have discovered;

- a) The control of Aqua Investments Ltd and Elizwood Ltd by Flemming Edsberg in Nevis, and in Cyprus by Andreas Karapatakis with a company called Altrolex Ltd being an indirect shareholder both of Aqua Investments Ltd and Sore Investments Ltd a company associated with Mr. Pavel Tykac a competitor of the 3rd Claimant.
- b) The amount of the alleged loan credit extended to Mr. Krouzecky by Aqua Investments Ltd of approximately US\$30 million is similar to the price for his shares that Elizwood would have to pay as recorded in the call option agreement.
- c) The scheme of the putative loan saw Aqua Investments Ltd first lending a multimillion dollar sum of money to Mr. Krouzecky, then retrospectively having Mr. Krouzecky produce the First Executor's Deed and a promissory note from his wife and finally a pledge of his shares.

The Claimant's submit that this was not an arm's length transaction and was an unlawful device to circumvent the restriction on transfer contained in the 3rd Claimant's Amended Articles of Association.

[78] The Claimants have submitted evidence from a number of sources to indicate that Mr. Krouzecky has allegedly committed wrongdoings against the Claimants.

- [79] The Independent sources are numerous articles appearing in the Czech public media relating to a Mr. Pavel Tykac reported to be a Czech billionaire and aggressive financier who has re-entered the Czech business world in 2006 after a period of absence. One of the publications **MFDNES** reported that Mr. Tykac had bought half of the major Czech coal producing company Mostecka Uhelna and had sparked a major coal delivery and price war to drive up prices of coal, and to get his money back.
- [80] In another Czech publication **Tyden** it was reported that Mr. Tykac's actions included having an influence on shareholder rights in Sokolovska Uhelena, and to have a controlling interest in controlling the whole company. The Article went on to state that Tykac's lawyer Radek Blaha was acting in the name of Jan Krouzecky who owned thirty percent shares in Sokolovsk Uhelba, and that Blaha had told **MFDNES** that Mr. Krouzecky's interest in Sokolovska had "practically ended".
- [81] The Claimants have asked the Court to note that these articles do not attribute the Information given therein to the Claimants.
- [82] The Defendants have argued in their submissions at trial that the assertions of the Claimants that wrongdoing has taken place are primarily substantiated by them by placing heavy reliance on public Newspaper publications in the Czech Republic.
- [83] I have taken judicial notice of the Newspaper publications that have been submitted by the Claimants and while not ascribing any degree of Truth or untruth to them, I will attach little or no weight to them for the purposes of analysis of this matter before the Court.
- [84] The Court will consider the totality of the evidence presented by both parties in arriving at decisions on the issues raised in this case.

The Law

[85] There are two threshold requirements for the Jurisdiction of the Court in an Application for a Disclosure order to come into existence.

First there must have been a wrong and the Applicant must disclose a good arguable case that a wrong has been committed.

“The threshold test for the grant of a Disclosure Order is that the Applicant must disclose a good arguable case that a wrong has been committed.”

See: **Al Rushard Petroleum Investment Co Ltd et al vs. TSJ Engineering Consulting CO Ltd.**⁸

Secondly, the respondent to an application for Disclosure must have become “mixed up” in it. That is the basis of the Jurisdiction.

Another principle that has to be applied after the threshold requirements have been satisfied is the one of **NECESSITY**.

[86] The dicta of Mitchell J.A in the Court of Appeal case of **JSC BTA Bank vs. Fidelity Corporate Services Limited et al**⁹ is instructive at paragraph 20.

In referencing the UK High Court case in **Campaign Against Arms Trade vs BAE Systems PLC**¹⁰, the learned judge said as follows,

“Under the heading “The exercise of the discretion- Necessity”, King J pointed out that even if this requirement that the Respondent must be more than a mere bystander is satisfied, this is not the end of the matter. It is only a threshold requirement to the exercise of what is a discretionary jurisdiction. Its satisfaction merely “triggers” the jurisdiction. The fact that there is involvement enables the

⁸ BVIHCV(com) 37 of 2010

⁹ HCVAP2010/0035

¹⁰ [2007] EWHC 330

Court to consider whether it is appropriate to make the order sought. The Jurisdiction is an exceptional one which is only to be exercised by the Court when it is satisfied that it is necessary it should be exercised. The disclosure sought has to be a necessary and proportionate response in all circumstances. This necessity requirement will however vary in its impact according to the circumstances in which the application is being made. It is clear therefore that the “Necessity” factor comes into play only as a requirement in the exercise of the Judicial discretion, after the threshold requirements have been satisfied. “

[87] **Lord Woolf** explains in the case of **Ashworth Hospital Authority vs MGN Limited** that while the requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement it is still a significant one. It distinguishes that party from a mere onlooker or witness. The need for involvement is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion.

[88] **Lord Woolf** states further that the requirement for involvement is not the only protection available to the Third party. There is the more general protection which derives from the fact that this is a discretionary jurisdiction which enables the Court to be astute to avoid a third party who has become involved innocently in wrongdoing by another, from being subjected to requirement to give disclosure unless this¹¹ established to be a necessary and proportionate response in all the circumstances. The need for involvement can therefore be described as a threshold requirement. The fact that there is involvement enables the Court to consider whether it is appropriate to make the Order which is sought. In exercising

¹¹ [(**ibid**)[2002] 4**ALLER** 193

its discretion the Court will take into account the fact that innocent third parties can be indemnified for their costs while at the same time recognizing that this does not mean there is no inconvenience to third parties as a result of becoming embroiled in proceedings through no fault on their part.

- [89] In the case of **Bankers Trust**, The Court of Appeal held inter alia that “in the new and developing jurisdiction where neutral and innocent persons were under a duty to assist Plaintiffs who were the victims of wrongdoing, the Court would not hesitate to make strong orders to ascertain the whereabouts and prevent the disposal of such property.”

Is this a proper case to grant a Disclosure Order?

- [90] I now have to consider whether there are any other alternative avenues other than the Norwich Pharmacal relief to find out the Information that the Applicants seek.

In the case of **President of the State of Equatorial Guinea et al vs. Royal Bank of Scotland**, Lord Bingham of Cornhill and Lord Hoffmann stated at paragraph 16 “**Norwich Pharmacal** relief exists to assist those who have been wronged but do not know by whom. If they have straightforward and available means of finding out, it will not be reasonable to achieve that end, by overriding a duty of confidentiality such as that owed by Banker to Customer. If on the other hand they have no straightforward or available or any means of finding out, **Norwich Pharmacal** relief is in principle or available if the other conditions of obtaining relief are met. Whether it is said that it must be just and convenient in the interests of Justice to grant relief, or that relief should only be granted if it is necessary in the interests of Justice to grant it, makes little or no difference of substance.

[91] In **Morgan and Morgan Trust Corporation Limited and Fiona Trust and Holding Corporation et al** ¹² Gordon JA approved the above cited passage and emphasised that the Norwich Pharmacal Jurisdiction is a special one to be used only where no other procedure will achieve the ends of Justice.

[92] Alternatively stated, if the grant of the Orders sought is likely to go directly to the heart of the matter the Court should grant it. As stated in **Carlton Film Distributors Ltd. vs VCI PLC** ¹³

“There was no reason why a **Norwich Pharmacal** Order should be confined to tortious wrongdoing and not be available in a contractual dispute. Well these are business contracts. There are significant sums involved. As a matter of proportionality in any event this information goes straight to the heart of the potential claim against VCI. It is the fastest, clearest and shortest way of getting there. Accordingly I propose to make the Order sought.”

[93] However, if the Claimants already know the identity of the wrongdoer and have sufficient information to commence an action a Norwich Pharmacal Order is unnecessary and should be refused.

See: Nikitin vs. Butler ¹⁴

[94] Learned Counsel for the Defendants Ms. Dia Forrester submits that the Claimants/Applicants request for Disclosure is not only unnecessary, it is disproportionate as disclosure only of documents which are found to be of relevance to the alleged breach can be sought by them. Learned Counsel contends that if disclosure should be ordered,

¹² **BVI Civil Appeal No 4 of 2006**

¹³ **[2003] EWHC**

¹⁴ **[2007] EWHC 173 QB**

- the order must relate to specific documents which can substantiate the alleged wrongdoing asserted by the Claimants.
- [95] Learned Counsel Ms. Forrester further submits that the Claimants have asked the Court to give them everything so they can assess it and determine if there was a wrong; therefore the interests of the Claimants in obtaining the information sought is outweighed by the public interest and the private interest of the Defendants who have committed no wrongdoing and are not part of any wrongdoing.
- [96] Learned Counsel for the Applicants Mr. Gerhard Wallbank submits however that it is just and convenient for the Court to grant the Orders sought because there are no other straightforward or available means for the Information and documentation sought to be obtained and outlines the reasons at Paragraph 141 (a) (b) (c) of his final submissions to the Court, I need not repeat them here.
- [97] It is quite apparent to the Court that there is difficulty in obtaining Information by the Claimants/Applicants in light of the plethora of Affidavits filed by JuDr Petr Malek and Mrs. Radka Simkova who are Czech Attorneys- at Law and who differ in their opinions on the relevant interpretations of Czech Law on the Claim filed by the Claimants.
- [98] The Court is therefore guided by the Czech Law expert Dr. Mackova, who although proffered by the Claimants, her impartiality has not been challenged by the Defendants. Dr. Mackova in her expert opinion dated 20th September 2012 presents a summary of the conclusions in relation to Czech Law on the following:
- a) Conduct that constitutes actionable wrongdoing
 - b) Liability in Damages, including the time when such liability arises;
 - c) The limitations on disclosure under Czech Law.

[99] In relation to the issue whether the Claimants have other straight forward and available means obtaining in the Czech Republic the information and documents sought,

Dr. Mackova states

“They do not have available means unless they filed procedurally admissible claims (ie) the Claim must meet all the legal requirements concerning the specification of the Claim, the identification of the wrongdoers etc, and simultaneously the proceedings initiated by such claim must reach the phase of evidence in which only the Court could exercise its powers in respect of obtaining the information and documents.

Even in such case the effectiveness of the means of obtaining the information and documents are limited; e.g. by the limited penalty for the non-compliance with the respective Court or by the limited territorial jurisdiction of the Czech Courts.

The Czech Law does not recognize the procedure of pre-trial discovery as known in the common Law Jurisdictions.

[100] Learned Counsel for the Defendants Ms. Forrester has provided the Court with attractive arguments and has sought to bolster her arguments with several Affidavits of Radka Simkova Attorney at Law in the Czech Republic particular the 8th Affidavit of Ms. Simkova dated 27th March 2013 at paragraphs 29-35.

At paragraph 29, Ms. Simkova avers that the Claim for Damages in the Czech Courts have already been statute barred and the Applicants were not able to specify the very basic and substantial elements of the main claim. Therefore no claim for Damages could be successful pursued.

[101] The Court also sought guidance on this issue by referencing the Expert report presented by JuDr. Petr Cech filed on the 21st November 2012.

Dr. Cech's opinion was sought in relation to the opinion provided in paragraph 4 of the third Affidavit of Mrs. Radka Simkova.

Mrs. Simkova had opined that

“according to the Czech Civil Procedure code, a Judge may ask any person who has in its possession a document necessary as evidence to disclose such document to the Court. By this provision a power to order a disclosure of documents in civil/commercial matter is expressly stipulated by the Czech Laws. In addition as was expressly confirmed by the Czech Court in the past, a Court can order the disclosure not only against a participant to the relevant civil/commercial proceedings but also against any 3rd party, irrespective of whether such party is an individual or a legal entity.

However Disclosure can be only ordered if the following two cumulative conditions are met (i) the requested document is indispensable as evidence to the relevant civil/commercial proceedings and (ii) the description of the requested document is sufficiently specific so that it is identifiable; importantly under certain circumstances, a Court can even have a duty to request a Disclosure;

This is the case if a Claimant in Civil Proceedings can only substantiate its case and thus have its case admissible, if these documents are at its disposal. The person against whom a Disclosure order is issued may only deny the disclosure if it is likely to lead to initiation of criminal proceedings against such person or their relatives.

It is important to note that the power of the Czech Courts to order disclosure of documents and other information extends to 3rd Parties regardless of where the 3rd Parties or documents and other information can be found.”

[102] The Claimants sought additional information on the opinion of Ms. Simkova from JuDr Petr Cech the Expert proffered by the Defendants on the 11th day of January 2013. However there was a supplemental opinion from the Defendants Expert witness on the issue, in response to the **Claimants questions** which was filed by Ms. Radka Simkova on the 25th January 2013.

In response to **Question 19** from Mr. Gerhard Wallbank, learned Counsel for the Claimants, Mrs. Simkova responded in summary thus;

“Even before the opening of civil proceedings, it is possible to secure the evidence under the provision of Section 78 Paragraph 1 of the Code of Civil Procedure which provides for that... Before the opening of civil proceedings on the merits it is possible to secure the evidence on the proposal, if there is a concern that later it will not be possible to produce evidence at all or only with great difficulties.

[103] On the 24th January 2013 DOC JuDr Bohumil Havel, the Defendants expert witness presented a supplemental expert report filed on behalf of the Defendants. In relation to the question of Disclosure, Dr. Havel opines that

“According to the Code of Civil Procedure the procedure pursuant to Section 78 of the code is in no way conditional on the requisities of a Claim pursuant to Section 79 of the code. If a party lacks all the Information (which is always the subject of assessment) pursuant to Section 79 of the Code of Civil Procedure the Party must file a motion pursuant to Section 78 with the competent Court but it must unambiguously specify the given piece of evidence.

The stated decision of the Supreme Court deals with the procedural issue of assessment of requisites of an action and the form of relief contained therein rather than with securing evidence pursuant to Section 78 of the Code of Civil Procedure. The ruling is concerned

with an action for the submission of documents where the Court infers that the Plaintiff is obliged to specify the documents at least so that they can be distinguished from other things in the possession of the Defendant.

The only relevant analogy of the cited decision with the case at hand, lies in the fact that it is always necessary to specify evidence to which the application refers, regardless of whether the Application is an action or a motion in the sense of Section 78 of the code of civil procedure”.

[104] DOC JuDr Alena Mackova in her Expert report dated 21st November 2012 filed on behalf of the Claimants underscored her legal opinion and reiterated that;

“Czech Law does not know special proceedings for disclosure of relevant documents. The Code of Civil Procedure stipulates the “Editon duty” (i.e.) the duty imposed by the Court upon the 3rd Party to disclose a document or to present a document as evidence for the purposes of the pending proceedings; Section 129 (2) of the Act No. 99 (1963; Civil Procedure Code). However such institute may only be sued by the Court in proceedings that are already pending and only under special circumstances in the phase of evidence- in a later phase of evidence if the Claim has not been refused by the Court.

In general, the Czech Court may impose a duty upon a third party to surrender a document, but it is not generally possible to impose such duty upon a party to the proceedings.

The Supreme Court of the Czech Republic in its decision of the 18th February 2009 stated as follows;

“The duty to disclose upon an inquiry of the Court, any facts that are relevant for the proceedings and for the decision applies solely to third parties and not to the parties to the proceedings. The Court cannot force a party to a dispute to disclose information that is necessary for the other party to succeed in the dispute.”

[105] In the opinion of the Court the Jurisdiction of the Czech Court to order disclosure of this kind against the Nevis defendants is improbable and there are practical difficulties with seeking to obtain such disclosure in the Czech Court.

The ruling of the Supreme Court of the Czech Republic of 1st February is persuasive authority and while not binding on this Court bears repetition. The Court ruled as follows;

“The duty to disclose upon an inquiry of the Court any facts that are relevant for the proceedings and for the decision applies solely to third parties and not to parties to the proceedings. The Court cannot force a Party to a dispute to disclose information that is necessary for the other party to succeed in that dispute.”

[106] The Court’s ruling is that in essence, the Claimants who are not third parties to these proceedings cannot obtain pre-trial disclosure, and Disclosure will only be ordered by the Court after a claim has been allowed to proceed beyond the admissibility stage.

[107] After a thorough review of the Expert opinions presented by the Experts for the Claimants and the Defendants and having read the Affidavits of JuDr Ms. Radka Simkova and JuDr Petr Malek, I am of the respectful opinion that Czech Law provides the Czech Courts with powers to order the disclosure for purposes of Evidence within pending proceedings but it does not recognize the procedure of pre-trial discovery which is available in the Common Law jurisdiction.

[108] Therefore on the totality of Evidence I am of the opinion that, the Applicants are entitled to the Norwich Pharmacal relief which they seek in order to-

- a) Pursue legal proceedings in the Czech Republic to claim compensation for damage cause to them in breach of Czech Law and for relief to prevent further wrongdoing.
- b) To prevent another unlawful Execution proceedings leading to the sale of shares.

Special Provisions of Order

[109] The learning in relation to disclosure orders of this nature is explained in the case of: **Arab Monetary Fund vs Hashim**¹⁵ as follows;

“The Jurisdiction is directed to uncovering the location of assets so that they can be prescribed, and any application for an order pursuant to this Jurisdiction should be honed so as to pursue this purpose. An Order should not be made unless there is a real prospect that as a result assets can be located and preserved.

The order should not be too general or wide. It should so far as possible be specific and directed to uncovering the particular assets which are to be traced.”

[110] In the circumstances, the Order will be limited to only what is necessary to seek redress.

[111] Likewise, the information is only to be used for the purposes for which it was obtained and not for any purpose without leave of the Court.

[112] I will therefore grant the Norwich Pharmacal Order sought by the Claimants and order the Defendants to provide full information of the specified documents requested by the Claimants.

I am grateful to Learned Counsels on both sides for their helpful submissions and assistance to the Court.

The Order of the Court is as follows,

[113] It is hereby Ordered that:

1. The Respondents must by 3:00pm on the 11th day of March 2015 provide copies to the Applicants/Claimants legal practitioners all documents in its custody, possession or control (including documents stored electronically) relating to legal proceedings in the Czech Republic to claim compensation for Damage caused to

¹⁵ (No. 4) [1992] AllER 911

them in breach of Czech Law and for relief to prevent wrongdoing, and to prevent another unlawful Execution proceedings leading to a sale of the shares. This Order also relates to the presentation of the Shareholders Agreement.

2. The Applicants shall be restrained from using any documents or information disclosed to it pursuant to the terms of this order other than for the purpose of;
 - i. Identifying the person(s) who control Aqua Investment Ltd and whether the alleged Loan from Aqua Investments to Mr. Krouzecky in fact existed as a loan.
 - ii. Producing to the Czech Courts documentary evidence of the “sham” which the Claimants must produce to admit the Claim to the stage of admissibility of the Evidence.
3. Instituting such proceedings or pleading such facts as the documents or Information reveal may be available to the Applicants unless the Court otherwise orders.

Costs

4. The Respondents shall pay the Applicants costs of this Application, such costs to be assessed if not agreed.
5. The Applicants shall pay to the Respondents reasonable costs of compliance with this Order.

Undertakings Given to the Court by the Applicant

1. The Applicants will pay the reasonable costs of anyone other than the Respondents which have been incurred as a result of this order, including the reasonable costs of finding out whether that person holds any of the Applicants assets, and if the Court later finds that this order has caused such person loss

and decides that such a person should be compensated for that Loss, the Applicants will comply with any other order the Court may make.

2. If this Order ceases to have effect the Applicants will immediately take all reasonable steps to inform in writing anyone to whom they have given notice of this order or who they have reasonable grounds for supposing may act upon this order that it has ceased to have effect.

[114] I am grateful to Counsel on both sides for their assistance. I also apologize for the protracted period taken in the delivery of this Judgment.

Lorraine Williams
High Court Judge.