IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 108 OF 2016

BETWEEN:

UVW

Applicant

And

XYZ
(A Registered Agent)

Respondent

Appearances:

Mr Andrew Willins, instructed by Messrs Appleby for the Applicant
Mr Peter Ferrer, instructed by Messrs Harney Westwood & Riegels for the Respondent

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2016: September 19; October 13; 18; 27

JUDGMENT

Norwich Pharmacal – post-judgment – in aid of enforcement – overseas proceedings – willful evasion.

A judgment creditor seeking to enforce overseas judgments identified a company registered in the TVI belonging to the judgment debtor. The judgment debtor demonstrated a pattern of concealment of assets to frustrate enforcement. The judgment creditor applied to this court seeking third party disclosure orders against the local registered agent to obtain information which could lead to the identification of assets available for enforcement. The registered agent took a position of neutrality but sought to

test the merits of the application. The registered agent queried as a matter of principle whether the court has jurisdiction to make third party disclosure orders post-judgment in aid of enforcement, and whether such relief is available to an applicant to assist him in securing compliance with interlocutory freezing orders. *Cur. adv. vult.*

Held: Norwich Pharmacal relief is in principle available:

1. post-judgment in aid of enforcement, where there is reasonable suspicion for believing that a disclosure defendant is mixed up in the willful evasion of another's judgment debt;

2. to assist in securing compliance with freezing orders, including such orders made by foreign courts.

[1] **Wallbank J [Ag]:** 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.

[3] I will be delivering an oral ruling determining this application on the facts and the usual Norwich Pharmacal principles. Those facts are somewhat particular. To preserve anonymity, this written decision only addresses a number of legal aspects which Counsel for both parties urged are likely to be of general interest to the TVI financial services community.

[4] The Respondent remained neutral in relation to the application. It is understandably caught between its duty of confidentiality towards its client and its duty of disclosure, such as this court might find it to be. The Respondent properly seeks to test the application and raised a number of arguments for the court's consideration. I will deal with the more significant of those arguments here.

Omar, and necessity

[5] The Respondent argued that Norwich Pharmacal orders should not be granted in aid of foreign proceedings, on the basis set out in **Regina ex p. Omar & Ors v Secretary of State for Foreign and Commonwealth Affairs**[1]**.**

[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

[1] [2013] EWCA Civ 118.

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.

[7] It is also no answer for the Respondent to point to other possible remedies, such as a receivership over the TVI corporate vehicle. In theory a receivership is potentially available, but it is an expensive remedy. Then there is the factor that the Applicant has no direct evidence that the judgment debtor is using the TVI vehicle to conceal assets. A receivership might thus be refused. Or if a receivership were to be granted, and no other assets found, it would be pointless. As the Applicant submitted, a receivership would only apply to that TVI corporate vehicle, not to other entities the judgment debtor may have with the Respondent.

[8] I bear in mind that Norwich Pharmacal relief is not a remedy of last resort.[2] It may be granted where an applicant has no straight forward or available means of finding out the information and when the other conditions for obtaining the relief are met. It has been said that another way of describing the requirement of necessity is whether it would be just and convenient for the relief to be ordered in the interests of justice.[3] Further, as stated in **Macdoel Investments v Federal Republic of Brazil**, '*the determinative question in any particular case is whether justice requires discovery to be ordered.*'[4] Thus the Applicant need not be put to complex, costly and potentially nugatory procedures before being accorded Norwich Pharmacal relief.

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[2] Cf Campaign against Arms Trade v BAE Systems [2007] EWHC 330
[3] President of the State of Equatorial Guinea v Royal Bank of Scotland International [2006] UKPC 7.
[4] [2007] JLR 201.

Existence of the jurisdiction to grant post-judgment Norwich Pharmacal relief

[9] The Respondent contends that the English Courts have doubted whether the Norwich Pharmacal jurisdiction exists after a judgment has been rendered. It cites **NML Capital ltd v Chapman Freeborn Holdings Ltd et al.**[5] in support of this proposition. If the jurisdiction is nonetheless available, the Respondent argues that its role as registered agent makes it fall outside involvement in wrongdoing. The Respondent equates itself with Chapman Freeborn in that case.

[10] Chapman Freeborn was an aircraft chartering broker. The Republic of Argentina had incurred judgment debts which had been bought by 'vulture funds'. The Republic feared that the funds would distrain against its aircraft if they flew to jurisdictions where they could be seized. The Republic therefore chartered a private jet to carry the President on an overseas trip. One of the judgment creditors sought Norwich Pharmacal disclosure orders against the chartering broker. The wrongdoing which the applicant sought to vindicate was the Republic's alleged evasion of its obligation to pay the debt. The English Court of Appeal ruled that the chartering broker had not been mixed up in wrongdoing. It had had no more than an ordinary trading relationship with the Republic. The latter had no obligation to fly its aircraft to jurisdictions where execution could be levied against them. The Court of Appeal stated:

> "[I]*t 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*

[5] [2013] EWCA Civ 589.

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. There is no connection between Chapman Freeborn's activity as chartering broker and the Republic's failure to sell the aircraft. In truth however the relevant wrongdoing here in my judgment lies simply in the failure to satisfy the judgment debt. That is the transaction in which NML must show that Chapman Freeborn has become involved or mixed up. Its conduct is in no real sense connected with the relevant wrongdoing. At the very least, the connection is remote and insufficient." [6]

[11] The Respondent argues that it is in an equivalent position. All it did was create and maintain a company for the judgment debtor. It was not involved in any wrongful use of that company by him. Here too the wrong lies 'simply' in failure to satisfy the judgment debt, says the Respondent. It must be noted however that the Applicant squarely put it that the present wrongdoing consisted of deliberate concealment of assets, so being more than mere non-payment of the debt.

[12] As a matter of law the Respondent's reasoning ignores the decision in **JSC BTA Bank v Fidelity Corporate Services Limited et al.**[7] A registered agent (or other corporate service provider, depending upon the type of services provided) does

[6] At para [26].
[7] BVIHCVAP 2010/0035.

more than trade with a company or its underlying owner. By its very role a registered agent facilitates the functioning of a company. It is involved in a company's affairs, even if the registered agent does not know what the company is being used for.

[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**[8] 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.

[8] At para. 33.

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 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.

[15] The Respondent queried whether this court has jurisdiction at all to grant Norwich Pharmacal relief post–judgment in aid of execution. The Respondent rightly pointed to Tomlinson LJ's observation in **NML** that the English Court of Appeal's decision in **Mercantile Group (Europe) AG v Aiyela**[9] '*does not compel the conclusion that it is*' available post judgment in aid of execution. The court in **NML** did not consider it necessary to decide the point, but the length of Tomlinson LJ's opinion suggests that he considered it likely that the remedy is indeed available.

[16] He explained that in **Aiyela** the disclosure order had been ancillary to a Mareva injunction, with the Court's power to grant such an ancillary disclosure order being derived from section 37(1) of the English Supreme Court Act 1981, and the court's ancillary power to ensure that such an order is effective. The ancillary power is

[9] [1994] QB 366.

also implicitly provided by section 37, by sub-section 2. Section 37(1) and (2) are materially identical to section 24 of our Eastern Caribbean Supreme Court (Virgin Islands) Act:[10]

"*A mandamus or an injunction may be granted…by an interlocutory order of the High Court…in all cases in which it appears to the Court…to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court (…) thinks just.*"

[17] Tomlinson LJ observed further[11]: *"…(1) that the Norwich Pharmacal jurisdiction is an equitable jurisdiction, as appears clearly from the speeches in that case and (2) that the starting point of the exercise of Mareva or freezing injunction relief in aid of enforcement is that the respondent has, or arguably has, within its control assets of the judgment debtor against which the judgment creditor can enforce. The control of such assets raises wholly different considerations from mere trading with a judgment debtor."*

[18] The English Court of Appeal in **NML** did not need to address in any depth the question whether or not Norwich Pharmacal relief is available post judgment in aid of execution. Its observations concerning this issue cannot have been intended to be definitive. Such an exercise would undoubtedly have led the Court of Appeal to consider the numerous authorities which consider the fundamental bases of the Norwich Pharmacal jurisdiction. In our own jurisdiction there is the Court of Appeal decision in **A, B, C, D v E**[12], binding upon this court, in which it was held after an

[10] Formerly the West Indies Associated States Supreme Court (Virgin Islands) Act, Cap. 80, Revised Laws of the Virgin Islands 1991.
[11] At para. 31.
[12] Anguilla HCVAP2011/001 at paras. [9] to [17], dated 19 September 2011.

extensive review of authorities that Norwich Pharmacal orders are a type of injunction.

[19] Our Court of Appeal there adopted the English court's approach to Norwich Pharmacal orders as authoritative:

> "*Given the very origin of the* ***Norwich Pharamcal*** *principles can it be seriously argued that the English courts' treatment and acceptance of such an order as an injunction is merely persuasive on this Court? I would think not in the circumstances. Indeed given the court's adoption and full embracement of the principle, the English courts' treatment and view of the nature of such an order as borne out by the cases as well as the academic writers can only be treated to all intents and purposes as being of authoritative force*."[13]

[20] It is well settled under English law that freezing orders are available post-judgment in aid of enforcement.[14] I am unaware of any authority to the contrary in this jurisdiction. The jurisdiction conferred by section 24 to grant a mandamus or injunction by an interlocutory order suggests that this power applies only at an interlocutory or pre-judgment stage, but I doubt such a restrictive interpretation is correct. As Lord Hobhouse stated in **Turner v Grovit**:

> "*It was the courts of equity that had the power to grant injunctions and the equity jurisdiction was personal and related to matters which should affect a person's conscience*."[15]

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[13] At para [16], by Pereira, JA (as she then was).
[14] E.g. Stewart Chartering v C & O Managements SA (The Venus Destiny) [1980] 1WLR 460.
[15] [2001] UKHL 65 at para. 24.

[21] The jurisdiction to grant injunctions predated the United Kingdom **Supreme Court of Judicature Act 1873**, which combined the courts of equity and common law. That Act was the precursor to the more recent Supreme Court acts.

[22] Although the criteria for granting a Norwich Pharmacal order are different from those applicable to freezing orders, both are types of injunction. The criteria are different for several reasons. With the case of Norwich Pharmacal orders, the jurisdiction is triggered when a person who is not a mere witness comes under a duty to provide 'full information' by reason of having become 'mixed up' in 'wrongdoing' (in all the various gradations of those words discussed in the authorities). This is, in one sense, a form of specific performance of the disclosure defendant's obligation, hence an equitable remedy. The court's equitable jurisdiction is aligned with its statutory power to grant injunctive relief. Upon a conceptual analysis it would seem correct to say that the equitable jurisdiction runs in parallel[16] with the statutory jurisdiction. They appear to be separate but complementary. As stated by **Gee**, "*The court has powers which can be used to make interim orders to preserve the position so that in due course, if appropriate, an effective order for specific performance of a contract can be granted. It may be necessary to grant mandatory relief simply to enable a plaintiff to preserve the possibility of specific performance*." [17] Thus, if the court's equitable jurisdiction becomes spent the statutory jurisdiction would continue where equity stops short, and vice versa. I note, with deference, that Tomlinson LJ in **NML** stated that he

[16] I purposefully avoid using the classifications 'concurrent' and 'auxiliary' jurisdictions, which, as Gee explains, have been heavily criticized: Commercial Injunctions, 5th Ed. Para 1.002. Further, their significant has been severely eroded, if not removed altogether, with the fusion of the courts of law and equity.
[17] Commercial Injunctions, 5th Ed. Para 7.12, citing Astro Exito Navigacion SA v Chase Manhattan Bank (The Messiniaki Tolmi) [1983] 2AC 787; HL and Continental Grain Company v Islamic Republic of Iran [1983] ; Lloyds's Rep. 620.

was not convinced that the court's equitable jurisdiction becomes spent when judgment is obtained.[18]

[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**.[19] 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.*"[20]

[24] The terminology used here, referring to the third party as 'mixed up' in the transaction concerning which discovery is required, is the same as in the test for Norwich Pharmacal relief. The reference to 'just and convenient' tracks the terms of section 37(1) of the Supreme Court Act 1981. The same phrase is used in relation to the circumstances when a Norwich Pharmacal order can be ordered as

[18] At para. 32.
[19] QBCM1 93/0579/B.
[20] Page 6 of the judgment.

propounded by the Privy Council in **President of the State of Equatorial Guinea v Royal Bank of Scotland International.**[21]

[25] With **Aiyela,** a very strong English Court of Appeal held that the jurisdiction exists for the court to make a third party disclosure order post-judgment in aid of enforcement. In line with the dicta of Pereira, JA (as she then was) in **A, B, C, D v E** at paragraph [16][22] this court should also treat that decision as authoritative.

[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**[23] 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.[24] 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*

[21] [2006] UKPC 7.
[22] Anguilla HCVAP 2011/001, dated 19 September 2011
[23][1981] 1 QB 923.
[24] At page 21 A- B of the judgment transcript.

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**:[26]

> "*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*

[25] BVIHCV2009/339
[26] [1998] QB 818.

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**.[27] 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.

Whether corporate vehicles must be created for wrongful purposes

[29] The Respondent argued that the Applicant would need to bring cogent evidence identifying a specific transaction where the alleged wrongdoer has transferred assets to the TVI corporate vehicle for no reason other than to avoid execution. The Respondent submits that the Applicant cannot do that because the TVI corporate vehicle was created before any alleged wrongdoing. The Respondent concluded from this that the company was not created for the purpose of insulating the alleged wrongdoer from a judgment.

[27] BVIHCV2009/339 at para. [11].

[30] The Respondent interprets the Court of Appeal's decision in **JSC BTA Bank v Fidelity Corporate Services Limited et al**.[28] as saying that if a company was not created by a registered agent for wrongful purposes then the registered agent does not come under a duty to provide information. The Respondent relies upon the following sentence in paragraph [27]: "*Registered agents and registered office service providers who are used by others to create and maintain for them corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them seeking discovery of the names and addresses and other information and documents that will enable the perpetrators to be discovered and the misappropriated assets traced*".

[31] With respect I do not agree with this submission. First, this sentence does not say a corporate service provider will only be liable to give disclosure if a company was created for a fraudulent purpose. It is axiomatic that an innocent service provider will not know what the vehicle was intended to be used for. Secondly, the sentence states 'create **and maintain**' (emphasis added). The use of a company can change over time. It might be created for a legitimate use, but then evolve into something used wholly or partially illegitimately. There is nothing about the creation of a company which fixes the registered agent with liability to give disclosure. The point the Court of Appeal was making was that if a corporate service provider involves itself in the life or affairs of a company that is, or becomes, used for wrongful purposes, he can expect to be required to give disclosure of information within its possession. This analysis is consistent with how the English courts treat with piercing the corporate veil. One of the requirements that must be established if the court is to pierce the corporate veil is that the company has been misused as a device or façade to conceal wrongdoing,

[28] HCVAP2010/035 at para [27].

and a company can be a façade for such purposes even though not incorporated with deceptive intent.[29]

[32] I also do not agree that an Applicant has to show a particular transaction where assets have been transferred to the corporate vehicle for no reason other than to avoid execution. A general pattern of willfully evasive conduct suffices. 'Reasonable suspicion' that the third party has been mixed up in the wrongdoing was the evidential threshold applied by the Jersey Court of Appeal in **Macdoel Investments Limited et al. v Federal Republic of Brazil et al.**[30] The Court there explained that 'reasonable suspicion' is 'something less than prima facie evidence'.[31]

'Fishing'

[33] The Respondent submitted that an order should not be made in this case on grounds that the Applicant is 'fishing' for information. The Respondent described the Applicant's claim as not so much a fishing trip as an 'industrial trawl'. I will deal here only with the underlying principle.

[34] Historically the court would not make a third party disclosure order if an applicant seeks to use the court's procedure to gather evidence to decide whether or not to sue.[32] Fishing has been characterized by a situation where there is a dearth of material[33] as a starting point.

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[29] VTB Capital plc v Nutritek International Corp & ors [2012] EWCA Civ 808 at para 78.
[30] [2007] JLR 201 at para. 48.
[31] Ditto, at para 49.
[32] Cf dicta of Webster JA in A,B,C,D v E AXAHCVAP2011/001 at [42], dated 22 April 2013.
[33] Ditto.

[35] The Applicant urged that 'fishing' is now to be regarded as a 'discarded test'. It quotes **Hollander**:[34]

> "*It has been said that using the jurisdiction to find information, for example, to plead a claim would be a 'fishing expedition', but this is not a word used in recent authorities: if there are respectable grounds for thinking that there may be a claim and the claimant simply wants additional documents to plead the claim or which will enable him to ascertain whether an action would have reasonable prospects of success, an application could no more be described as a fishing expedition than could many applications for pre-action disclosure. Norwich Pharmacal orders are rarely intrusive, in that they can usually be complied with relatively readily. It now looks relatively clear that the Norwich Pharmacal jurisdiction can be used in these circumstances too, which involves a significant extension of the jurisdiction*".

[36] I am grateful for this summary of the current state of the way in which the jurisdiction is applied and see no reason for this court to depart from it. While it may be a significant extension of the jurisdiction, other traditionally accepted checks and balances continue to apply to inform the exercise of the court's discretion. These include, as stated in **Aiyela,**[35] the need to exercise with care a jurisdiction which invades the privacy of an innocent third party, and whether the Applicant has other straight-forward or available means of finding the information,[36] and, in the context of post-judgment enforcement, the important

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[34] "Documentary Evidence", para 4-02, p.72.
[35] Page 7 at A.
[36] President of the State of Equatorial Guinea v Royal Bank of Scotland International [2006] UKPC 7.

consideration that a judgment debtor is entitled to the court's assistance for obtaining enforcement of judgment debts.

[37] For these reasons, therefore, I shall proceed on the basis that

i. Norwich Pharmacal relief is in principle available post-judgment in aid of enforcement, where there is reasonable suspicion that a disclosure defendant is mixed up in the willful evasion of another's judgment debt;

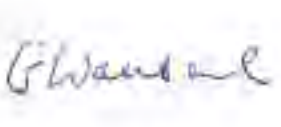
ii. Norwich Pharmacal relief is in principle available to assist in securing compliance with freezing orders, including such orders made by foreign courts.

Costs

[38] In this case the parties have commendably agreed the basis for an award of costs based upon the principles laid down by the English Court of Appeal in **Totalise plc v Motley Fool et al,**[37] should this court order disclosure. Not all Norwich Pharmacal applicants are as responsible. There have been instances of applicants failing to make good on their undertaking to meet a disclosure defendant's costs. This court can require the undertakings to be fortified by a reasonable payment on account, or in escrow, of anticipated costs of compliance pursuant to CPR Part 26.1 (3), (4) and (5). Should this court order disclosure in this instance the discovery defendant will be at liberty to apply for such fortification but I trust that will not be necessary here.

[37] [2002] 1 WLR 1233.

[39] I thank learned counsel for both sides for their assistance.



Commercial Court Judge

27th October 2016