IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 182 of 2017

BETWEEN

RUI MANUEL CABECADAS COELHO DE SOUSA

Claimant

and

HARNEYS CORPORATE SERVICES LIMITED

Respondent

Appearances:

Mr. Shane Donovan of Mourant Ozannes for the Applicant
Mr. Peter Ferrer of Harneys Westwood and Reigels for the Respondent
Mr. Tom Holland representing himself

2018: 25 January
28 May
5 July

JUDGMENT

[1] Adderley, J: This is a decision relating to Norwich Pharmacal relief sought by the applicant, Mr de Sousa, against the Respondent, Harneys Corporate Services (HCS) in its capacity as registered agent of Shareholder Rights Limited (SRL), a BVI incorporated investment company. The applicant is a director of Quantic Gold SA (the Company). SRL holds 12.5% of the issued share capital in the Company. The application was made on the 25 October 2017 and came on for hearing on the 25

January 2018. This hearing was adjourned to 28 May 2018, in order to give Mr Tom Holland (Mr Holland) the opportunity to make submissions to the Court on the application. Mr Holland is the director and the assumed beneficial owner of SRL, and through SRL is a shareholder in the Company. Mr Holland is an interested party in the proceedings who would be affected by the order that is sought, if made.

[2] Under the Norwich Pharmacal jurisdiction and within the framework of the BVI's anti-money laundering (AML) regime, the applicant seeks an order for disclosure of customer due diligence documentation (CDD) (otherwise referred to as "know your client" (KYC) documents) held by the respondent in relation to SRL.

BACKGROUND

[3] This application is precipitated by the Company having been struck off the BVI Register on 16th September 2016 for not having a registered agent, pursuant to section 213 (4) of the BVI Business Companies Act 2004 ("BCA"). Its former registered agent, Mossack Fonseca resigned, due to the Company's failure to provide adequate CDD documents for its members, including for SRL. Mr de Sousa wishes to make an application under section 217 of the BCA to restore the Company to the Register. However, section 217(2)(a) requires that the Registrar must be satisfied that a licensed person has agreed to act as registered agent of the Company for the company to be restored.

[4] The Applicant has submitted that an unlicensed person is unlikely to agree to act as registered agent unless the Company is able to provide that person with adequate CDD documentation. This submission is substantiated by section 23 of the Anti-Money Laundering and Terrorist Financing Code of Practice 2008 (the Code) which provides that a licensed person could only so act for a period not exceeding 30 days from the date of the establishment of the business relationship before it would be required to terminate the business relationship if it was not provided with the relevant CDD documents within that period.

[5] It is the Applicant's contention that SRL has failed or refused to provide any CDD documents as a member of the Company, and is therefore preventing Mr de Sousa from making an application to restore the Company. To date, SRL remains the only shareholder who allegedly is not willing to provide the required CDD information.[1]

[6] Quantic Gold was formerly called Highgreentree SA at the time of its registration under the International Business Companies Act, on 12th May 2004. Mossack Fonseca was its registered agent. The Company was automatically re-registered under the provisions of the BCA on 1 January 2007. Quantic Gold is an investment company involved in gold exploration. The Company is a 70% shareholder of Upperside Holdings Ltd which holds exploration permits in New Guinea. Almara Group Ltd is the seller and sole shareholder of the issued share capital of Upperside and the agreement between the parties was formalised in the Sale and Purchase Agreement of 4th January 2011. Mr Holland's investment history with the Company began in 2011 when the Company sought to raise additional share capital of $1.75 million through private investors upon terms set out in a Draft Private Placement Offering Memorandum dated 25 April 2011 (the "Memorandum"). That Memorandum noted that any investment in shares involved "a high degree of risk and immediate and substantial dilution from the offering price".[2] Mr Holland subscribed for 500,000 shares in Quantic Gold in the name of the company THR 7 Limited (THR 7) and received share certificates for each of his payments of $250,000.00 on 13 May and 29 June 2011. The Company's statement of account of 1 January to 28 February 2013 shows the other subscribers as shares in the Company as SCP Marine Life Investment, Yamab Ltd Liberia, and Stratus Venture Ltd. Also identified as a shareholder in the course of the CDD requests is Quantic Oil SAL (Offshore).

[7] THR 7 changed its name to Maximpact on 6 June 2012 and became SRL on 26 October 2016. Since the time of its incorporation as THR 7, HCS has been and remained its existing registered agent. Quantic Gold was under the administration of Mossack's client of record, the Beirut law firm Abouhamad, Merheb, Chamoun, Chedid (AMCC), which was

[1] Second Affidavit of Mr de Sousa sworn 12 March 2018
[2] Exhibit RDS-1 p.122

used by Mossack to request the CDD information from the Company's shareholders. During January 2016, emails were exchanged between Mossack and AMCC regarding AMCC's request for an up to date Certificate of Incumbency for the Company (following the resignation of one Mr Cohen as director of the Company) and Mossack's subsequent requests for CDD information in order to proceed with execution of the certificate. When this information was not forthcoming, Mossack advised AMCC of their intention to resign as the Company's registered agent. Their resignation was confirmed by correspondence to the Company's directors and AMCC in May 2016.

[8] An email from AMCC to Mr Holland on 27 September 2016 indicates that SRL remained the only shareholder not to have provided up to date documents and that the Company faced being struck off as a result. It is accepted by the applicant that the Company had in fact already been struck off by this date but Mr de Sousa states that he believes that AMCC's intent was not to mislead Mr Holland, but to put pressure on him to obtain client due diligence documentation quickly and allow the restoration of the Company.[3] In any event, the applicant's position is that relations had become difficult between the Company and Mr Holland when Mr Holland's investment performance in the development of the gold project in New Guinea was proving disappointing. Mr de Sousa says that Mr Holland began making allegations of fraud against the Company in 2013, when it became evident that the Company was unlikely to return a profit in the short term.[4]

[9] Further to AMCC's requests of 27 and 29 September 2016 and Mr Holland's refusals to these requests, Mourant Ozannes, lawyers for the applicant wrote to HCS on 7 March 2017 asking whether HCS would agree to act as the Company's registered agent by relying upon due diligence documentation that it would hold in respect of SRL in its capacity as its registered agent. HSC forwarded the request to Mr Holland on 15th March 2016 who refused by email of the same date, stating that the matter was being dealt with by BVI authorities including the FSC. In making his refusals, Mr Holland referred to fraudulent conduct of Quantic Gold.

[3] Affidavit of Mr de Sousa sworn 25th October 2017 para 24 (c)
[4] Affidavit of Mr de Sousa sworn 25th October 2017 para 14

[10] At the hearing of 25th January, Mr Holland appeared in person by telephone, and he indicated that in addition to his own interest, he also represented the interests of Quantic Gold's shareholders. The hearing was adjourned with the undertaking from Mr Holland to submit any evidence within 14 days. Mr Holland filed and served his first affidavit sworn on 9 February 2018 and an exchange of evidence took place, with Mr de Sousa responding in his second affidavit of 12 March 2018 with reply by Mr Holland in his second affidavit of 19 March 2018.

[11] Mr Holland was not present at the hearing of 28 May but his first affidavit contains his allegations of the applicant's fraud against him through the Company, in relation to the sum of $US500,000 that he paid to the Company as consideration for the issue of the shares to Maximpact. He claims that the share register and certificates are false and that the applicant has misused the assets and funds of the company for his own benefit.[5] Mr de Sousa's first affidavit set out the main tenets of Mr Holland's allegations, and I gratefully adopt those identified:

a) that SRL has never been kept sufficiently informed by the directors of the Company

b) that the Company has disposed of more than 50% in value of its assets, other than in the regular course of business in breach of s.175 BCA

c) that AMCC misled him by suggesting that the Company has been struck off as a result his failure to provide CDD information

d)that the names THR7, Maximpact and SRL have been used without authority

e) that THR7 was not issued shares in the Company in 2011 when it subscribed for 500,000 shares in the Company

f) that Mr de Sousa had falsely represented that:

i) Mr de Sousa and others had invested $3.25 million in the Company

[5] Affidavit of Tom Holland sworn on 9 February 2018 at para 4.

ii) that the Company had paid $2million for exploration rights to the three gold concessions in the Republic of Guinea.

These allegations will be considered only insofar as they are relevant to deciding the merits of the Norwich Pharmacal application in question. In his affidavit, Mr Holland acknowledges that it is not for this court on this application to determine merits of the dispute between himself and Mr de Sousa.

[12] The applicant denies the allegations of fraud and maintains that unless the Respondent is compelled to provide disclosure, it will not be possible to obtain the agreement of a licensed person to act as registered agent of the Company, and consequently, the Applicant will be prevented from proceeding with his application to restore the Company to the Register. The cause of action underlying the application to this Court is that the deliberate failure or refusal by SRL and/or Mr Holland to provide CDD documents arguably amounts to:

a) A breach of an implied term of the Company's articles of association requiring it to do so; and/or
b) An actionable conspiracy between Mr Holland and SRL.

[13] The applicant contends that in refusing to provide CDD, SRL (and its director) is preventing the Company from being able to conduct its business if unable to secure a registered agent and as such be restored to the Register and this is causing loss and damage to the Company and its investors.

[14] The question for the court is therefore whether in principle the applicant is entitled to seek Norwich Pharmacal relief to obtain information which is necessary to secure a registered agent and be restored to the Company Register.

[15] The respondent claims that the applicant has an alternative means to seek redress, through an unfair prejudice claim under the BVI Business Companies Act 2004 (**"BCA")**.

The Norwich Pharmacal jurisdiction

[16] The order is sought under the jurisdiction established in Norwich Pharmacal Co and Others v Customs and Excise Commissioners [1974] AC 133. The Norwich Pharmacal principle, as developed by the Courts of England and Wales, has been considered and applied by the BVI Court of Appeal in two cases of note: Al-Rushaid Petroleum Investment Company and others v TSJ Engineering Consulting Company Limited[6] (Al-Rushaid) and JSC BTA Bank v Fidelity Corporate Services Limited and others (JSC)[7] . When considering an application for a third party disclosure order based on the Norwich Pharmacal principle, the main issues for determination by the BVI Court (as set out in Gee on Commercial Injunctions)[8] are:

a. whether an apparent wrong has been carried out, or arguably carried out, by an ultimate wrongdoer;

b. whether there is a need for an order to enable action to be brought against the ultimate wrongdoer; and

c. whether the person against whom the order is sought is:
   (i) mixed up in the matter so as to have facilitated the wrongdoing; and
   (ii) able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

The two threshold requirements of "wrong doing" and "mixed up" form the basis of the jurisdiction and once considered, the further principle of discretion will apply[9]. Even if the principles are satisfied, the Court ought to exercise its residual discretion only where it would be necessary and proportionate to grant the order sought in all the circumstances.[10]

[6] BVIHCV (Com) 37 of 2010
[7] HCVAP 2010/035
[8] 5th edn Sweet & Maxwell, London 2004) at pages 688 - 693
[9] JSC BTA Bank, Mitchell JA at [18]
[10] *Al-Rushaid* at [18] and [19]

Is there a Case For Norwich Pharmacal Relief?

The AML regime

[17] I will first establish the AML requirements concerning CDD, as they characterise the nature of the wrong complained of. It is clear from the correspondence supplied to the court that Mossack resigned as registered agent of Quantic Gold, because the company "did not fulfil BVI law and our Due Diligence requirements." [11] Mr Donovan took the court through the main requirements, governed under the BVI Anti-Money Laundering Regulations 2008 (**"**AMLR**"**), which requires a "relevant person" to establish and maintain client verification procedures.

[18] In seeking disclosure from HCS, Mr Donovan submitted that as HCS is the registered agent of SRL, it follows that it is a "relevant person" for the purposes of the Regulations, defined under section 2 as one who carries on "relevant business". HCS's "relevant business" is that of "company management", defined under section 2 of the BVI Company Management Act 1990. Company management includes the provision of registered agent services.[12] In making the case that HCS is the registered agent of SRL, the applicant's point out that HCS likely have the necessary CDD information of SRL.

[19] The court was then taken through the client identification procedures which constitute CDD, to highlight the obligations upon registered agents in relation to licensed companies (or an "applicant for business", designated under regulation 2 AMLR). A full framework of the CDD steps required of an entity in dealing with a customer is set out in regulation 19 of the Anti-Money Laundering and Terrorist Financing Code of Practice 2009 (AMLTFCOP). A CDD process requires verification of identity and other key factors such as source of the client's wealth or funds (regulation19 (d)). Failure to obtain CDD within a 30 day period of establishing a business relationship must result in termination of the business relationship (reg.23 (2C)(b)(i). As regards the CDD sought from Quantic Gold by Mossack, correspondence shows that the requests were made between January to March

[11] Exhibit RDS-1 p.315
[12] Company Management Act 1990 s.2(b)

2016, before notice was given of its resignation. Failure to terminate the business relationship for lack of CDD is an offence under s.27 (4) of the Proceeds of Criminal Conduct Act 1997.

[20] It is submitted by the Applicant that SRL comes within the remit of a relevant entity that requires to be identified in the CDD process concerning the Company's business, as it is a beneficial owner that ultimately owns or controls issued share capital. The significance of identifying the beneficial owner is highlighted as follows:

> *(iii) It is also important that, in respect of a legal person, the entity or professional identifies the beneficial owner thereof … The entity or professional must seek to understand the ownership and control structure of the applicant for business by establishing the actual persons who hold a controlling interest in the applicant's business.*[13]

Cause of action - **Breach of an implied term in the Company's** articles

[21] As noted, the applicant bases his cause of action on breach of an implied term within the Company's Articles of Association. During the hearing on 28th May, Mr Ferrer submitted that the applicant must show that they have a right to the information sought, based on this premise alone.

[22] The articles of association of a company is a contract between the members inter se and of necessity there is an implied term that each will cooperate to prevent a company from going out of existence. The information required to keep the company from going out of existence is required by law. The BCA provides that a BVI registered company is obliged to keep a register of members which includes the names and addresses of the persons who hold registered shares in the company[14] and that the entry of the name of a person in the register of members as shareholder is prima facie evidence that legal title in the share vests in that person.[15] Mossack's letter of request of 21st January 2016 for the CDD

[13] Explanatory note to regulation 19 AMLR
[14] BCA s.41(a)
[15] BCA s.42(1)

information confirmed that for the purposes of the new Certificate of Incumbency it needed an updated copy of the Company's register of members as well as information on the corporate ID and source of funds of its members.

[23] In light of the AML and BCA requirements, it follows that there is the corresponding obligation on members or persons with an interest in the regulated company, to provide this information.

Does the failure to provide CDD amount to "wrongdoing**"** under the Norwich Pharmacal jurisdiction?

[24] In Norwich Pharmacal itself, the type of wrong in question was a tortious wrong (infringement of the appellant's property rights). Later cases have since expanded the granting of a Norwich Pharmacal order to include breach of contract[16], contempt of court[17], or other wrong.

[25] In UVW v XYZ,[18] the BVI Court ruled that the Norwich Pharmacal jurisdiction was available post-judgment in aid of enforcement of overseas judgments. Wallbank J distinguished that case from that of the English case NML Capital Limited v Chapman Freeborn Holdings Ltd [2013] EWCA Civ 589 which refused Norwich Pharmacal relief in aid of execution of a judgment debt. In UVW, Wallbank J disagreed with the respondent's position that NML demonstrated that the English Courts have doubted whether the jurisdiction exists post-judgment. Chapman Freeborn was an aircraft chartering broker which traded with the Republic of Argentina. The Republic had incurred judgment debts and to avoid having their funds seized against its aircraft if they flew to certain jurisdictions, they chartered a private jet to carry the President on an overseas trip. One of the judgment creditors sought Norwich Pharmacal orders against Chapman in view of the Republic's alleged wrongful evasion of its obligation to pay the debt in using its assets for a purpose other than satisfying the judgment debt. The application failed because there was not a clear act of

[16] Carlton Film Distributors Ltd v VCI PLC [2003] Ch FSR 47
[17] Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29
[18] BVIHC (COM) 108 of 2016

relevant wrongdoing and Chapman Freeborn could not consequently be held to have the sufficient involvement (NML, per Tomlinson LJ at para 26) per who?:

> *It follows that it is important to analyse with some care in what precisely lies the alleged wrongdoing. There is nothing inherently wrong in chartering an aircraft, unless it be said that any trading by a judgment debtor which involves using his assets for that purpose rather than satisfying a judgment debt is in itself wrongdoing. However I reject that proposition. It would lead to a jurisdiction of absurd width…It 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 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*.

[26] In UVW the respondent was a registered agent that aligned itself with Chapman Freeborn as falling outside of the necessary threshold of involvement. The judgment debtor in this case had displayed a pattern of concealment of assets to deliberately frustrate enforcement, and the relief was sought for disclosure of information held by them that could assist in the identification of assets available for enforcement. In referring to NML, the registered agent sought to avail itself of any involvement with the type of wrong identified in NML, that is, the failure to satisfy a judgment debt. The registered agent pleaded that all it did was create and maintain a company for the judgment debtor and was not involved in any wrongful use of that company by him[19].

[19] See para 11 UVW, Supra

[27] Wallbank J distinguished the position of both the registered agent and the judgment debtor in UVW. In the case of the registered agent, the respondent had overlooked the decision in JSC which found that a registered agent (or other corporate service provider) does more than trade with a company or its underlying owner. By its very role a registered agent facilitates the functioning of a company. It is involved in a company's affairs, even if the registered agent does not know what the company is being used for.[20] Secondly, in contrast to NML, the judgment debtor's conduct in UVW demonstrated a "positive act of wrongdoing" that inarguably involved the use of the registered agent's services as a corporate vehicle for the purposes of evading enforcement.

[28] In concluding that Norwich Pharmacal relief was appropriate in all the circumstances, this court in UVW was satisfied that a "general pattern of wilfully evasive conduct" suffices as wrongdoing, disagreeing that the Applicant must show a particular transaction to demonstrate the concealment of assets to frustrate enforcement of judgment debts (at [32]). Wallbank J cited Tomlinson LJ's concluding remarks (at para [33]) in NML to support his own finding that mere non-payment of a judgment debt would not be enough to trigger the jurisdiction, without the necessary "deliberate effort to obstruct or frustrate enforcement. That undoubtedly constitutes wrongdoing." [21] On the general application of the jurisdiction, Wallbank J observed (at para [14]) that "There has to be something sufficiently unconscionable in the alleged wrong doer's conduct to trigger what is ultimately a jurisdiction which seeks to do equity".

[29] On the facts of the present case I find that a relevant wrongdoing has been established, using the AML regime as a starting point. The BVI's AML requirements (which implement international standards and recommendations) demonstrate that there is a clear and necessary duty upon BVI registered companies and their registered agents to comply with the requirements of that regime so that the underlying objectives of the prevention of money laundering and terrorist financing are met. When a licensed company is struck off for non-compliance under the BCA, this is a clear example of the consequences of failing

[20] Wallbank J at para 12 UVW and Mitchell JA at para 27, JSC
[21] Wallbank J at para 14 UVW

to comply with the measures that are there to protect the integrity of the Territory's financial services industry. The CDD requirements are an integral part of upholding the AML principles as they are directly connected to vetting the legality of applicants for business and their clients in the BVI.

[30] From the limited evidence before the Court, SRL would appear to be the only member who has failed to provide the CDD since it was struck off. AMCC's email of 27 September 2016 advised Mr Holland that "*We already received from the directors the information and the documents related to all the shareholders except those of your company*." This letter is corroborated by the letter from Mourant Ozannes of 7 March 2017 requesting HCS to act as the Company's registered agent and a further letter from Parisian lawyers Simmons & Simmons of 16 December 2016 stating that the Company's striking off has been caused by "…[*your] failure to provide the Company with the documents required by the agents from any significant shareholder of a BVI company*". [22]

[31] Mr Holland claims he represents the other shareholders yet the Court was not presented with any further objections from the other investors involved in the New Guinea project, save from the production of an unverified document purporting to set out the complaints of a "Q Resources" whose role and connection as an investor is at best, vague.[23] In addition, Mr Holland provides a flowchart from the International Consortium of Investigative Journalists' website, alleging that there are many more interests in the project than the Company have let on. This flowchart reveals little of bearing to the case without any representations from the named companies and does not alter the separate issue of SRL's independent CDD obligations. It should be noted that Mossack requested information specifically from those investors identified in the Company's statements of accounts as the significant investors in the project[24] and this included Quantic Oil SAL as being the only other relevant investor that is identifiable from the flowchart produced.

[22] Exhibit RDS-1 p.350 and 355
[23] Exhibit TH/ 1B p.7
[24] Letter of 21st January p.304 Exhibit RDS-1

[32] I accept the evidence that SRL remains the only outstanding client to provide the documentation. Notwithstanding the hostile relationship with Mr Holland, the CDD requirements are a standard part of its business operation and despite the inaccuracy of AMCC's email of 27 September 2016 in misstating that the Company had not yet been struck off, this does not merit the refusal in all the circumstances. To the contrary, Mr Holland's conduct in refusing the information displays a pattern of "wilful evasion", and this seems to be linked to his own personal grudge against Quantic Gold for the poor performance of his investment. Mr Holland tells the Court that provision of the information is "*conditional upon the answering of certain pertinent questions about the company and my investment.*"[25] As previously noted, the risks of the investment were clearly stated in Company the placing and offer memorandum and moreover, the Court has not been taken to any satisfactory evidence to suggest that there has been anything untoward in the management of SRL's investment.

[33] Further evidence that Mr Holland acted with deliberate evasion is set out in his demands to Quantic Gold for their company information, the nature of which is summarised in Mr Zabaldano's letter of 8th March 2013.[26] On numerous occasions he asked for copies of the share certificates for his subscription, which were provided to him, included as enclosures to Mr Zabaldano's letter.[27] According to Mr Holland in an email of 12th March, the Company refused to deliver what they promised and links this to evidence of their fraud. In the same letter of 8th March (and on several further occasions), Mr Zabaldano expressly offered Mr Holland to pick up the originals from his office, (the office and Mr Holland are both based in Monaco), something which Mr Holland appears to overlook. The lack of substantive evidence of contact or involvement from the alleged legal team that he refers to for building his case (apart from the authorisation of his evidence by a Ms Carolyn Parkes Solicitor of England and Wales), lead the Court to conclude that his requests are without proper basis and amount to threats.

[25] 1st Affidavit of Mr Holland para 48
[26] Exhibit RDS-1 p.85
[27] Exhibit RDS-1 pp.137 and 138.

[34] Under s.100 (2) of the BCA, a member is entitled to inspect the documents listed in that section, including a) the memorandum and articles of association, b) the register of members, c) the register of directors and d) minutes of meetings and resolutions of members. The letter of 8th March and other correspondence from the Company's lawyers show that the Company went beyond what they are required to provide according to that provision, and chose not to exercise the director's right of refusal to permit inspection of the documents (s.100(2)(d)), consistent with paragraph 90 of the Company's memorandum.

[35] Mr Holland accuses the Company of having diverted US$ 2,000.000 for payment of the exploration license and the escrow agreement, which the Company maintain was used to acquire the 70% of Upperside shares and transferred to the relevant account. In his affidavit Mr Holland implies that the permits are incongruous and there is a lack of clarity as to whether the $US2m was paid out to "Upperside Holding" or "Upperside Holdings", which according to him must have different incorporation dates.[28] The Court was supplied with a copy of the SPA executed by Simmons & Simmons which details the Escrow agreement reached between the parties.[29] The Court was also supplied with the transfer notice of 10th January 2011 which it agrees is not highly legible. There is further a letter from the Registrar of International Companies of 29 March 2011 certifying the registration of "Upperside Holdings Limited" and identifying Almara Group and Quantic Gold SA as the current shareholders. There is further evidence of a letter of approval of the issuing of the permits from the Guinea Minister of Mines.[30] The documentation supplied to the Court suggests that a genuine transaction took place between the relevant parties. Mr Holland makes the allegation that Mr Thiam is now in US prison having been convicted of corruption and claims to produce evidence of this.[31] This purported evidence is merely the permit documentation granted to Upperside by the Minister and does not therefore substantiate Mr Holland's assertion.

[28] 1st Affidavit of Mr Holland, para 37
[29] SPA, Schedule 10 clauses 1.1, 3.1 and Schedule 11 Escrow Instruction
[30] Exhibit RDS-1 p.111
[31] 1st Affidavit of Mr Holland, para 36 referring to Exhibit TH/25

I therefore conclude that on the evidence and the lack of cooperation of Mr Holland, as the believed beneficial owner behind SRL, his failure to provide CDD information demonstrates a pattern of wilful and evasive conduct that amounts to wrongdoing of the type enunciated in UVW and NML.

Is HCS "mixed up**" in SRL's failure to provide CDD?**

[36] The guiding authority in the BVI on this point is JSC BTA. At first instance, Bannister J rejected the application on the grounds that merely providing incorporation or registered agent services did not equate to the registered agents becoming involved in, or facilitating the wrongdoing complained of (alleged fraud), of which they were entirely ignorant. On appeal, Mitchell JA reviewed the English authorities and concluded by citing a number of authorities from the BVI, the Channel Islands, and Hong Kong. Applying the legal principles to facts of the case, Mitchell JA held (at [27]):

…I am satisfied that the respondents by virtue of their very role in providing registered agent services to the companies, a role which is voluntary, cannot on any view be said to be considered as mere onlookers…The respondents, by incorporating and maintaining those vehicles thereby facilitated, albeit innocently, the commission of the fraud and as such were involved in the fraud perpetrated against the Bank. This renders the respondents under a duty to disclose information through Norwich Pharmacal type proceedings which may assist the Bank as the injured party in discovering the true wrongdoers.

…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.

[37] In UVW, Wallbank J rejected the respondent's submission that the Court of Appeal's decision in JSC was saying that if a company was not created by a registered agent for

wrongful purposes then the registered agent was exempt from the duty to disclose information (at para [31]):

…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.

The relevant test is therefore whether HCS as the corporate vehicle for SRL's transactions has become mixed up in, albeit innocently, in any wrongdoing against the applicant. This approach is consistent with Lord Reid's dicta in Norwich Pharmacal (at p.175):

> *"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 wrongdoers. I do not think that it matters whether he has become so mixed up by voluntary action on his part or because it was his duty to do what he did'.*

One point of note here is that since Norwich Pharmacal the jurisdiction has clearly evolved from being used to identify the wrongdoer (see: Carlton Film Distributors Ltd v VCI Ltd, Jacob J at para 11). [32]

[38] At the hearing of 28 May, Mr Ferrer said that the applicant has not sufficiently shown how HCS have been mixed-up by failing to provide as a registered agent, KYC to a higher level. The applicant referred to the decision in JSC to equate HCS with the registered agent in that case – HCS by virtue of their very role in providing registered agent services have become involved in SRL's wrongdoing. Whilst it has been established that provision of registered agent services can by its very nature involve a company in positive wrongdoing, regard must be had to how that registered agent was used in the process of that wrongdoing. It is conceivable that by simply holding the relevant information, HCS are merely fulfilling their duty as a registered agent of their client. Their inability to provide the

[32] Carlton Film Distributors Ltd v VCI PLC [2003] EWHC 616

information when requested by Mourant Ozannes to act as Quantic Gold's registered agent, could arguably be a further reflection of a merely functional role.

[39] Some analysis is therefore required of how far SRL's wrongdoing is dependent or connected to the services provided by HCS. As noted by Wallbank J in UVW, the authorities require that for involvement to exist, whilst the registered agent does not have to have been created as a vehicle for wrongful purposes, it must in some way be used as a corporate vehicle for the life and affairs of a company that is or becomes *used for wrongful purposes.* Lord Reid's analysis in Norwich Pharmacal of the involvement criteria is helpful:

> *It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession. But the respondents are in an intermediate position. Their conduct was entirely innocent; it was in execution of their statutory duty. But without certain action on their part the infringements would never have been committed*

[40] The authorities have seemingly adopted Lord Reid's principle that involvement of an innocent party has no meaning without "certain action". In Ashworth, the respondent was a publisher who had published confidential information wrongfully obtained. In JSC Bank the registered agent had set up and maintained companies that were in possession of defrauded funds. In UVW the registered agent was ultimately used by the judgment debtor to fraudulently conceal assets subject to enforcement. Carlton involved respondents who had manufactured the goods in question that went beyond the restrictions in the licensing agreement between the plaintiff and the ultimate wrongdoer. It was rightly recognised in NML that:

> *If the Norwich Pharmacal jurisdiction is not to become wholly unprincipled, the third party must be involved in the furtherance of the transaction identified as the relevant wrongdoing. King J put it well in Campaign Against Arms Trade v BAE [2007] EWHC 330 (QB) at paragraph 12 when he said:-*

> *"The third party has to have some connection with the circumstances of the wrong which enables the purpose of the wrongdoing to be furthered".*[33]

[41] The Court in Campaign was in fact using the concept of "furthered" to interpret Lord Reid's observation in Norwich Pharmacal that the third party must have somehow facilitated the wrongdoing (supra).

[42] Using these authorities as a guide, I find that SRL/Mr Holland's actions resulted in drawing HCS into the wrongdoing as the relationship he has with them has enabled him to continue to refuse the provide the information. His refusal to grant HCS the permission to disclose the information on the terms of Mourant Ozannes proposal formed part of his ongoing efforts to withhold the information. The situation may be paralleled with that in Campaign, where leaked information was received by the respondent by email. The court was satisfied that the required involvement was there because it was the plan and purpose of the wrongdoer that the document containing confidential information belonging to the applicant in connection with its proposed application for judicial review proceedings should be seen by the respondent. The court stated: (at para 73)

> *"…this is not in my judgment a case of the mere receipt of a document wrongly disclosed…it is a reasonable inference that the respondent has read the email and is fully aware of its contents. This means that the respondent has now made itself privy to the tactical advice given to the Applicant in connection with the proposed proceedings and has thereby brought about a state of affairs which was a fundamental step in the furtherance of the plan of the wrongdoer if not its completion."*

[43] In the present case, the information held by HCS is not wrongfully obtained, but it has been wrongfully refused. I consider HCS to have been made privy to circumstances that constitute SRL's wrongdoing through their receipt of Mourant Ozannes' request and related correspondence with Mossack. Moreover, they have unwittingly become part of

[33] NML, Tomlinson LJ at para 25

SRL's plan to further its wrongdoing when Mr Holland refused them permission to supply his CDD to the Company. As noted in UVW, the use of the company can change over time and I am satisfied that this shows that HCS has become a further means to SRL's end, by virtue of its role as registered agent.

[44] I say that there is a higher obligation upon HCS to provide the information under the Norwich Pharmacal jurisdiction because they are the vehicle responsible for SRL's incorporation and constitution, formalities which characterise the very nature of the documents which are at the heart of the complaint. They are therefore more than just a person who holds some document in its possession.

Is the order necessary?

[45] Having looked at the principal threshold requirements, the Court will consider whether there is a need for an order. It is established that the applicable test of necessity is not that the Norwich Pharmacal remedy must be one of last resort, discussed in Rugby Football Union v Consolidated Information Ltd [2012] 1 WLR (paras 14 – 18, referring to R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No I) [2009] I WLR 2579, para 94). This can be distinguished from the situation where it is possible to plead a case without the information then the Norwich Pharmacal jurisdiction is not available. Put another way, the jurisdiction is not to be used as a "fishing" expedition. Hariprashad-Charles J correctly stated this in Al-Rushaid (at para 17 citing with approval AXA Equity and Law Life Assurance Society v National Westminster Bank [1998] PNLR 433):

> *"…But one thing is clear: the jurisdiction cannot be used as a fishing expedition to enable a claimant to decide whether 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: Axa Equity and Law Life Assurance Society v National Westminster Bank*".

[46] In Axa Equity, the applicants sought the information to help them determine if they in fact had a case against the wrongdoer. The court rejected the application because the applicants had not shown that they had a prima facie case against the alleged wrongdoer, something of adverse contrast to the facts in Norwich Pharmacal (see Rimer J in Axa, 433)

[47] A more recent analysis of "fishing" as opined by Wallbank J in UVW, is that it has been "*characterized by a situation where there is a dearth of material as a starting point*". (para 34). He went further to quote the view in Hollander that "fishing" is now more or less a "discarded test" (para 35). I would respectfully disagree and say that fishing is still applicable in the terms of Axa Equity and arises from the very pertinent consideration of first establishing whether there is a prima facie case to be argued. In this context I am satisfied that the Norwich Pharmacal order against HCS is necessary because the applicant has established that its striking off has been caused by SRL's failure to provide CDD and consequently has what has been called a "legitimate purpose"[34] to seeking the information if it will enable it to be restored to the register. It knows that HCS holds that information on SRL as any registered agent of a BVI incorporated company must do.

Exercise of **Court's discretion**

[48] Having been satisfied of the threshold requirements, the question of whether the court should exercise its discretion in all the circumstances has been linked to the fact that it is an equitable remedy. In clarifying that the test for necessity does not require Norwich Pharmacal relief to be one of last resort (see: R (Mohamed) at para 94), Lord Tonaghmore stated in Rugby that (at para 17):

> *Rather, the essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors*.

[34] Campaign Against Arms Trade v BAE, King J at para 9

[49] The principle derived from the modern authorities in this area is that there is a need for flexibility when applying discretion to increase the ambit of the jurisdiction. In Ashworth it was held that the Norwich Pharmacal jurisdiction was sufficiently flexible for disclosure to be ordered where the information was required for a purpose other than bringing legal proceedings. Lord Woolf CJ stated (at para 57):

> "New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously."

[50] In R (Mohamed), Thomas LJ confirmed that whilst the relief may be sought only for the information that is necessary, the scope of the discovery will depend on a broad view of all the facts of the case. He expressly differed from Lightman J in Mitsui & Co, v Nexen Petroleum UK Ltd to determine that the ambit of the jurisdiction has widened since that case :

> *"In our view the scope of the information which the court may order be provided is not confined to the identity of the wrongdoer nor to what was described by Lightman J in [Mitsui] as a "missing piece of the jigsaw". It is clear from the development of the jurisdiction in relation to the tracing of assets that the courts will make orders specific to the facts of the case within the constraints made clear in Norwich Pharmacal and the cases to which we have referred."*[35]

Conclusion

[51] I agree with the applicant that the Company does not have an alternative appropriate redress through an unfair prejudice claim, on the reasoning of Re Legal Costs Negotiators Ltd [1999] 2 BCLC 171. SRL's refusal to provide CDD documents is an act (or omission) of a shareholder acting in a private capacity. Re Legal Costs concerned the refusal of a minority shareholder to sell its shares to the company. The action was dismissed because the shareholder's refusal had nothing to do with the

[35] R (Mohamed) at para 133

conduct of the company's affairs within the meaning of the s.459 remedy under the Companies Act 1985 (see Goldsmith QC pp.181-183). In Re LegaI, it was noted that whilst what the parties have agreed between them as their commercial relationship may not always be contained in the articles of association, the fact that the company's articles contained no agreement by the respondent to sell his shares, was considered as material to the validity of the claim in an unfair prejudice context. I have already stated that I am satisfied that SRL is obliged to provide the CDD information as a shareholder of a BVI incorporated company for the purposes of the Norwich Pharmacal jurisdiction. However, I consider that an express breach of a specific term within Quantic Gold's articles would more likely be required to be established for the purposes of the equivalent wording under s.184I of the BCA.

[52] Finally I can see no prejudice that would be caused to HCS in the circumstances by disclosing the information. Disclosure of this information as soon as possible would be the proportionate resolution of this matter rather than the additional time and expense involved in pursuing the possibility of a separate unfair prejudice claim.

[53] For the above reasons and upon weighing the facts of the present case I choose to exercise my discretion to make a Norwich Pharmacal order as sought.

[54] I would like to thank my Judicial Assistant, Ms. Rachel Trotman for her valuable contribution to the formulation of this judgment.

K. Neville Adderley
Commercial Court Judge

By the Court

Registrar