IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No 15 of 2019
(Formerly FSD 2 of 2019 (IKJ))

IN THE MATTER OF AN APPLICATION FOR A DISCLOSURE ORDER

BETWEEN:

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

Defendants/Appellants

AND:

ARCELORMITTAL USA LLC

Plaintiff/Respondent

BEFORE:	**The Rt Hon Sir John Goldring, President** **The Rt Hon Sir Bernard Rix, Justice of Appeal** **The Hon John Martin, Justice of Appeal**
Appearances:	**Mr Vernon Flynn QC instructed by Mr Marc Kish and Mr William Jones of Ogier for the Appellants** **Mr Ian Mill QC instructed by Mr Paul Smith, Mr Conal Keane and Ms Anya Park of Harneys for Respondent**
Heard:	**6 November 2019**
Draft Circulated:	**29 December 2020**
Judgment delivered:	**3 May 2021**

Judgment

MARTIN JA:

1. This is an appeal from an order dated 31 May 2019 of Kawaley J. By that order, made pursuant to what is known as the *Norwich Pharmacal* jurisdiction, the judge ordered the appellants, Essar Global Fund Limited ("EGFL") and its subsidiary Essar Capital Limited ("ECL"), to provide to the respondent ArcelorMittal USA LLC ("AMUSA") information and documentation relating to the assets and affairs of another of EGFL's subsidiaries, Essar Steel Limited ("ESL"). AMUSA is a creditor of ESL under an arbitral award, and the underlying

allegation made by it is that EGFL and ECL are mixed up in steps wrongfully taken by ESL to avoid enforcement of the award.

2. EGFL is the principal holding company for the Essar group of companies, a substantial conglomerate with interests across a range of industrial sectors including steel production. ECL acts as the investment manager of EGFL. Both EGFL and ECL are Cayman companies. ESL is incorporated in Mauritius.

3. AMUSA is a company organised under the laws of the state of Delaware. It is part of the ArcelorMittal group of companies, one of the world's leading steel and mining businesses.

4. The ArcelorMittal group and the Essar group are substantial commercial competitors.

5. In December 2012, AMUSA entered into an agreement with two other companies in the Essar group, Essar Steel Minnesota LLC ("ESML") and Essar Resources Inc ("ER"), for the sale by ESML and ER and the purchase by AMUSA of iron ore pellets over a period of ten years. In January 2014 the agreement was amended to substitute ESL for ER as co-obligor with ESML. The effect was to make ESL guarantor of ESML's obligations under the agreement. In May 2016, AMUSA terminated the agreement, asserting breaches by ESML. In July 2016, ESML filed a petition in the United States seeking Chapter 11 bankruptcy protection.

6. In August 2016, AMUSA commenced arbitration proceedings against ESL on the basis that ESL was jointly and severally liable with ESML. In December 2017, an ICC arbitral tribunal made an award ("the Award") in AMUSA's favour against ESL for US$1.38 billion plus interest.

7. ESL has not satisfied the award. AMUSA's case, as recorded by the judge, is that "*since the ICC Award was made on December 19, 2017*, [ESL has] *made no attempts whatsoever to pay off even one cent of a debt now in excess of US$1.5 billion*".

8. ESL was placed into administration in Mauritius by directors' resolution on 26 March 2019. AMUSA has challenged the administration in Mauritius. It has obtained judgments recognising the Award in the state of Minnesota (the seat of the arbitration), in England and Wales and (subsequent to the first instance hearing) in this jurisdiction. A world-wide freezing order has been obtained in England and Wales in respect of ESL's assets. AMUSA has also obtained a provisional order enforcing the Award in Mauritius; but that has been challenged

by ESL, and a decision on the challenge had not been given at the time this appeal was heard (nor have we subsequently been notified that one has been given).

9. These proceedings were commenced on 10 January 2019. The relief sought was an order requiring EGFL and ECL to provide information and documents in relation to ESL's financial affairs, AMUSA contending that it required such information in order to assist it in enforcing the Award and in identifying assets against which it could take enforcement action.

10. On 15 January 2019 Kawaley J made an interim order ex parte. A contested hearing of the application took place on 13 February 2019, following which (by ruling dated 29 March 2019) the judge dismissed an application by EGFL and ECL to set aside the ex parte order but reduced its ambit. The order dated 31 May 2019 which is the subject of this appeal gave effect to the judge's ruling.

11. The order prohibited the destruction, deletion or alteration of any document relating to certain matters concerning the disposal and whereabouts of ESL's assets, and required the preservation of such documents; required EGFL and ECL to provide copies of such documentation to AMUSA's attorneys; and required them to make affidavits providing full information relating to the matters. The matters to which the documentation and information related were set out in paragraph 4 of schedule B to the order, and were in the following terms:

> "*(a) Any direct or indirect disposal of* [ESL's] *assets to related parties from 1 March 2015 to the date hereof which has resulted in or contributed to a net reduction in* [ESL's] *assets;*
>
> *(b) Any disposal of* [ESL's] *assets at an undervalue from 1 March 2015 to the date hereof;*
>
> *(c) What has become of such assets as described in paragraphs 4(a) and (b) above;*
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> *(d) The identity, location and extent of* [ESL's] *assets as at the time the Order is served;*
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> *where the asset has or at the time of the disposal had a value of more than US$250,000*".

12. EGFL and ECL (hereafter together "the appellants") appealed the order on three main grounds: that the court had no jurisdiction to make a *Norwich Pharmacal* order (a "NPO") in support of potential foreign proceedings - *"*the jurisdiction point"; that there was no arguable case of wrongdoing by ESL - "the wrongdoing point"; and that a NPO could not properly be granted

to support a foreign award which was not enforceable in the Cayman Islands – "the enforcement point".

13. It is convenient to take these points in the reverse order.

The enforcement point

14. Fundamental to AMUSA's case is the contention that ESL is indebted to it. To make that case, it relies upon the Award. A foreign arbitral award is not automatically enforceable in the Cayman Islands; but, if leave is given on an application made under Order 73 of the Grand Court Rules, the award may be enforced pursuant to the *Foreign Arbitral Awards Enforcement Law (1997 Revision)*. At the time of the proceedings in the Grand Court, leave had not been given to enforce the Award; and it was the appellants' contention that the Grand Court had no discretion to make a NPO in aid of enforcement of an award which was not itself enforceable in the Cayman Islands. The judge thought otherwise. By the time of the hearing of the appeal, however, leave had been given to enforce the Award, with the consequence that the appeal on this point had become academic. It was said by the appellants that the point involved an important issue of practice and principle which the Court of Appeal could and should address; but, as we made clear in the course of argument, we do not think it appropriate to deal with this point. In the majority of cases, obtaining leave to enforce an award is a straightforward matter; and we do not consider that the enforcement point is of sufficient practical importance to justify departing from the general practice that the court will not ordinarily address a point which has ceased to have relevance to the parties.

The wrongdoing point

15. The *Norwich Pharmacal* jurisdiction takes its name from *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. The underlying complaint in that case was of patent infringement by illicit importation of infringing articles; but Norwich Pharmacal, the patent holder and intending plaintiff, did not know the identity of the importers. That information was, however, available to the Commissioners, and an order was sought for disclosure of the relevant names and addresses. An allegation that the Commissioners were themselves liable for infringement by allowing the articles to be imported was abandoned, so that the action was solely one for discovery. In a well-known passage, Lord Reid said this (at p175 B-C):

> "[The authorities] *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 wrong-doing 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 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".

16. It is now well established that the requirements for the grant of a NPO are as follows:

> "*(i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;*
>
> *(ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and*
>
> *(iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued*": *Mitsui & Co Ltd v Nexen Petroleum Ltd* [2005] 3 All ER 511 at [21], Lightman J.

17. *Mitsui* was one of a number of cases which expanded the scope of the *Norwich Pharmacal* jurisdiction beyond mere identification of the wrongdoer. As Lightman J said in that case at [19]:

> "*Relief can be ordered where the identity of the claimant is known, but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw*".

18. The law has developed since *Mitsui* was decided, and the emphasis in limb (iii)(b) on legal proceedings ("*to enable the ultimate wrongdoer to be sued*") may in some circumstances be too narrow. In *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm); [2016] 2 CLC 896 ("*Ramilos*") Flaux J (as he then was) stated that limb of the test in a way which did not confine it to actions or lawsuits, but included "*other legitimate redress for the wrongdoing*". Similar glosses have been placed on the test in the Cayman Islands: see *Braga v Equity Trust Company (Cayman) Limited* (2011 (1) CILR 402) and *Discover Investment Co v Vietnam Holding Asset Management Ltd* (unreported judgment of Kawaley J, FSD 76 of 2018, 5 November 2018). For reasons which will become apparent, the *Ramilos* gloss is important in the present case.

19. As to the first part of the test, the "*ultimate wrongdoer*" in the present case is said to be ESL. The wrong asserted by AMUSA is, in the terms of its skeleton argument for the ex parte application, "*concealing and/or stripping assets with the effect of frustrating or evading enforcement of the ICC Award*". Unlike the liability of ESL to AMUSA, which is established by the Award, concealment or stripping of assets by ESL has not been established anywhere. In consequence, what AMUSA asserts is that such conduct has "*arguably*" been carried out.

20. There was a dispute between the parties as to what "*arguably*" meant in this context. AMUSA contended that it meant what it said, the appellants that what was required was a good arguable case.

21. This topic was addressed in *United Company Rusal plc v HSBC Bank plc* [2011] EWHC 404 (QB). Tugendhat J said this:

> "*[50] There is no dispute that the standard of proof which an applicant must attain before a* [NPO] *may be granted is that he has at least an arguable case*…. In *Ashworth [Hospital Authority v MGN Ltd* [2002] 1 WLR 2033] *Lord Woolf CJ said that a claimant must identify* "*clearly the wrongdoing on which he relies in general terms*". *But there is little guidance in the cases as to whether more than that is required. One reason for this absence of authority is that in most Norwich Pharmacal applications the applicant plainly has a very strong case that it has been the victim of wrongdoing. It is commonly a breach of confidentiality or other relatively straightforward type of legal wrong.*
>
> *[51] Norwich Pharmacal applications are one of a number of different types of applications which require the court to be satisfied as to matters which will never be the subject of a final determination at a trial before the court considering this application. In this case such questions include whether there has been wrongdoing, and if so whether the respondent has facilitated it. So an order may be made on a factual basis that will never be determined, and may therefore be mistaken. A similar risk has long been recognised as inherent in applications for permission to serve proceedings out of the jurisdiction, and it is inherent in some decisions made under the Civil Jurisdiction and Judgments Act. The standard for such cases is generally that of a good arguable case.*
>
> *[52] In that context, in the case of Bols Distilleries BV v Superior Yacht Services Ltd* [2007] *1 WLR 12 the Privy Council summarised the test at para*

[28] as requiring the court to be as satisfied as it can be, having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction, or that the applicant has a much better argument than the defendant. That test is appropriate in Norwich Pharmacal applications."

22. However, in *Ramilos* Flaux J disagreed with the suggestion that the "*much the better of the argument*" gloss was appropriate in relation to applications for *Norwich Pharmacal* relief. Instead, he considered (at paragraph 14) that

> "*the appropriate analogy is not with service out, but with applications for freezing orders, where the test for when the requirement of a "good arguable case" is satisfied is well-established. The test laid down by Mustill J (as he then was) in The Niedersachsen [1983] 2 LI Rep 600 at 605 (lhc) has been followed and applied many times since*:
>
> > "*I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success".* "

23. I agree that the test for obtaining *Norwich Pharmacal* relief when wrongdoing has not been established is not merely arguability (which would include a case which was barely capable of serious argument) but the existence of a good arguable case. I agree also with the conclusion reached in *Ramilos* that the expression has the meaning given to it by Mustill J in *The Niedersachsen* – although, as Rix JA points out in his judgment below (with which I agree), it is doubtful if there is a difference of substance between that meaning and the "*much better argument*" one proposed in the *Bols Distilleries* case. If there is a difference, then requiring an applicant to demonstrate that he has much the better of the argument on wrongdoing than the putative wrongdoer imposes too high a threshold. A high threshold might be justified in a case in which leave to serve out of the jurisdiction is sought, since the consequence of granting such leave will be to render a person liable to the court's jurisdiction to adjudicate upon his substantive rights. By contrast, although compliance with a NPO may impose a substantial burden on the respondent to the application, the court is not seeking to enforce substantive rights against him. What is required is that there should be sufficient evidence of wrongdoing to make it just to order disclosure against the respondent; and that requirement will be satisfied if a good arguable case of wrongdoing in the *Niedersachsen* sense can be made out. The need to avoid imposing too high a threshold is exemplified by a case such as the present, where the

disclosure sought is of information necessary to enable the applicant to succeed against the wrongdoer; in such a case, it would be self-defeating to require the applicant to establish that he would have the better of the argument against the wrongdoer without benefit of the very information that he seeks to obtain by the NPO.

24. To succeed on this aspect of the appeal, the appellants must accordingly establish that the judge could not properly have concluded that AMUSA was able to demonstrate a good arguable case in the *Niedersachsen* sense of dissipation or concealment of assets by ESL, and that that dissipation or concealment amounted to wrongdoing.

25. AMUSA's case on wrongdoing was primarily contained in evidence sworn in the English proceedings. It was summarised in the skeleton argument produced by AMUSA for the purpose of the ex parte application to the Grand Court, and the relevant parts of that argument are set out in full in paragraph 24 of the judgment below. As the judge identified in paragraph 26 of the judgment, they encompass both past and future steps to impede enforcement of the Award. In essence, the allegations are as follows:

    (1) In 2012 and 2013 ESL transferred valuable shareholdings in two subsidiaries to another corporate structure under EGFL's control in which ESL had no interest. AMUSA says it is reasonably to be inferred that there was no consideration for the transfer.

    (2) EGFL and other Essar group companies have been implicated in findings or allegations of serious wrongdoing made in foreign proceedings, including in the context of insolvency proceedings in respect of ESL's subsidiaries. AMUSA says these suggest the involvement of the Essar group and those behind it in a pattern of wrongdoing characterised by dealings in bad faith, a disregard for prevailing standards of corporate governance, and the transfer of assets within the Essar group to the prejudice of creditors.

    (3) The structure of the Essar group involves a complex chain of companies and offshore trusts. AMUSA says it is reasonably to be inferred that such structures have been used by EGFL and those behind it to obscure the manner in which assets are held within the group, to the prejudice of creditors.

    (4) ESL failed to conduct the arbitral proceedings in good faith, in particular by failing to comply with orders for the disclosure of documents regarding its financial position and by terminating its participation in the arbitration at a late stage.

    (5) ESL has declined voluntarily to comply with the Award. AMUSA says it is reasonably to be inferred that ESL will not engage with the Award unless its

assets are liable to enforcement action; and AMUSA believes that ESL accordingly has an incentive unjustifiably to dissipate its assets to impede such action.

26. At the inter partes hearing on 13 February 2019, AMUSA relied in addition upon a deterioration in ESL's financial position revealed by disclosure given in the English proceedings in which the freezing order was granted. In general terms, the disclosure revealed that ESL's assets now have a value of US$2.4 million, in contrast to the asset figure of US$3.166 billion shown in ESL's 2015 financial statements. More specifically, a debt of approximately US$1.5 billion shown in ESL's 2015 financial statements as owed to it by EGFL is now said to have been written off as part of a capital reduction, and its inclusion as a receivable in ESL's 2015 financial statements to have been a mistake. In the English proceedings, Jacobs J described this as an extraordinary mistake to make.

27. AMUSA has instituted separate proceedings ("*the conspiracy proceedings"*) in England and Wales against EGFL and others (but not including ESL), alleging an unlawful means conspiracy to frustrate enforcement of the Award. Particulars of the alleged conspiracy include allegations that the defendants conspired to procure or induce ESL to breach its obligations under the Award and to strip ESL of its assets, so impeding AMUSA's efforts to enforce the Award. In relation to the allegation of asset stripping, reliance is placed among other things on a restatement of ESL's accounts in 2016 to re-characterise as an equity interest what had in the 2014 and 2015 accounts been described as a "*receivable*" in the sum of almost US$1.5 billion due to ESL from EGFL. It is clear that this re-characterisation is what Jacobs J was commenting on.

28. AMUSA applied in the conspiracy proceedings for a worldwide freezing order against two of the defendants, including EGFL. That application was refused by Henshaw J, in an impressive judgment handed down on 20 March 2020 (long after the hearing of this appeal): [2020] EWHC 740 (Comm). In relation to the re-characterisation of the US1.5 billion debt, Henshaw J said this:

> "*98. For these reasons, far from Essar Steel having had a clear debt claim against EGFL as at the date of the change in accounting treatment, it is well arguable that the previous accounting treatment in 2014 and 2015 was incorrect and would have radically overstated a highly contestable asset.*

> *99. In any event, even on the footing that there was and is an arguable claim by Essar Steel against EGFL, I do not consider that the evidence establishes a cogent case that the September 2016 change in accounting treatment amounted to a dissipation of any such asset, or an attempted dissipation of it*".

29. By letter dated 7 April 2020 addressed to us, the appellants' attorneys suggested that the conspiracy proceedings were "*the very proceedings which AMUSA claimed it was unable to bring without obtaining Norwich Pharmacal relief in these proceedings. The English Judgment accordingly shows that the Norwich Pharmacal relief sought by AMUSA is clearly no longer needed (to the extent that it was ever needed at all).*" The letter indicated that the appellants intended to apply to the Grand Court to discharge the order appealed against on the ground that circumstances had accordingly changed.

30. It seems to me that it would be wrong for us to take the outcome of the application made in the conspiracy proceedings, or the judgment of Henshaw J, into account in determining this appeal. The question for us on this aspect of the appeal is whether or not the judge had sufficient material before him to justify his finding that a good arguable case of wrongdoing had been established. If new material has come to light, it is for the Grand Court to decide if the material warrants a discharge or variation of the order.

31. I therefore return to consider whether the judge was entitled to take the view that the matters set out in paragraph 25 and 26 above established a good arguable case of wrongdoing. His conclusion that they did was expressed as follows in paragraph 95 of his judgment:

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

*what point in time, it is realistic to assume that the Plaintiff may be able to assert applicable avoidance claim*s".

32. The process of reasoning which led to this conclusion is discernible from earlier parts of the judgment, in particular paragraphs 87, 89, 91 and 94. It is necessary to quote selectively from these paragraphs.

> "*87. However this authority* [Felderhof and others v Deloitte & Touche Incorporated [2011 (2) CILR 35]] *does not entirely undermine the central thesis of Mr Flynn QC, which was, in effect, that seeking to defeat Court orders might well constitute wrongdoing; but seeking to make oneself judgment proof in the absence of any positive legal restraints would not. In the present case substantial reliance was placed on historic asset dissipation activities and there is no suggestion that any pre-judgment orders were contravened. As is clear from my ex parte Ruling, I regarded the historic conduct to be relied upon as evidence of a propensity for future dissipation steps being likely to happen. However, properly understood, AMUSA's case also is that it suspects that further dissipation may also have occurred after the ICC Arbitration was commenced and after the ICC Award was obtained.…*
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> *89. The real point is that no authority was cited by Mr Flynn QC which unambiguously supported the Defendants' central hypothesis that (a) the qualifying wrongdoing had to be capable of precise legal formulation at the date the application was made and (b) the information could not be sought in aid of the foreign enforcement efforts. The present application for the NPO was based on two key assertions:*
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> *(a) AMUSA believed that asset dissipation had been occurring and would continue to occur but lacked the information to (1) verify this and (2) identify what form of relief was appropriate; and*
> *(b) there was in any event a risk of key documents being destroyed at the direction of the Defendants, and this possibility had to be forestalled.*
>
> *…*
>
> *91. The Law Debenture case* [see paragraph 34 below] *cannot be read as a debtor's charter legally validating for all purposes any asset dissipations which do not entail a breach of a freezing injunction. Further and in any event, the wrongdoing relied upon here would clearly involve deliberate*

steps to avoid compliance with the ICC Award as enforced by the English Court and the English WFO. This would in my judgment quite clearly constitute legal, not simply moral wrongdoing.

...

94. These observations [from the judgment of Tomlinson LJ in NML Capital Limited v Chapman Freeborn Holdings Limited [2013] 1 CLC 968] *provide strong support for the proposition that a deliberate strategy of evading execution "would arguably be in itself for relevant purposes wrongful". It is true that these remarks were strictly obiter. ... The repeated use in the quoted passage of the word "arguably" reflects the fact that Norwich Pharmacal applicants need only show that it is arguable that the conduct of which they complain amounts to wrongdoing. It is only if a substantive claim for wrongdoing is actually made, be it a claim in equity or tort or indeed a statutory avoidance claim, that the applicant (like the plaintiff in Law Debenture) will be required to establish the viability of a specific cause of action.*"

33. The appellants' principal argument was that the matters relied on by AMUSA showed at their highest that ESL had a propensity to dissipate assets for the purpose of avoiding liabilities. There was, however, no evidence that assets had been dissipated for the purpose of avoiding enforcement of the Award, and the mere fact of non-payment did not itself demonstrate wrongdoing.

34. The cornerstone of the appellants' argument was a passage from the judgment of Sir Thomas Bingham MR in an English Court of Appeal case, *Law Debenture Trust Corporation v URAL Caspian Oil Corporation Limited* [1995] Ch 152. That case concerned the availability to Law Debenture of a cause of action against the ultimate recipient (Caspian) of shares acquired by the ultimate transferor (Hilldon) from a party (Overseas) which was contractually bound to Law Debenture not to transfer them.

"It is not in dispute that Hilldon could, on timely application, have been ordered to retransfer the shares to Overseas and restrained from transferring them on to Caspian or anyone else. It is said that Hilldon could only be restrained from acting unlawfully and that it would not be liable to such restraint if such onward transfer were lawful. Therefore onward transfer is to be regarded as unlawful, as violating Law Debenture's right that it should not take place. As

a party to this onward transfer Caspian are party to the unlawfulness and so liable.

To my mind this chain of reasoning harbours a fallacy. It is of course true that the courts restrain the commission of unlawful acts such as threatened breaches of contract or torts or breaches of trust and grant mandatory orders for the doing of things which it would be unlawful not to do. But all injunctive orders are not of this kind. The court will restrain a defendant and potential judgment debtor from making himself judgment-proof by dissipating his assets and may order him to give disclosure of assets in support of the injunction. But the defendant violates no legal right of the plaintiff if he makes himself judgment-proof by dissipating his assets before he is enjoined from doing so and he does not act unlawfully in failing to give disclosure before he is ordered to do so. These are measures the court adopts to protect the efficacy of its orders.…

Caspian can be liable to Law Debenture if and only if Hilldon's transfer of the shares to it was tortious. But at the time this transfer was made Hilldon was the full legal and beneficial owner of the shares. It had no contractual relationship of any kind with Law Debenture. It was liable to Law Debenture for its tortious conduct in procuring Overseas' breach of its contract with Law Debenture, but that was all. It was open to Law Debenture to seek an interlocutory injunction restraining Hilldon from making onward transfer and a final injunction ordering retransfer, but application had not been made and injunctions had not been granted. Until some injunction was granted, Hilldon was in my judgment entitled to do what it would with its own. I cannot regard the onward transfer as an actionable wrong, and it would in my view defeat the ingenuity of any pleader to frame a plausible statement of claim based on that transfer alone" (at 165H-166F).

35. Building on this passage, the appellants said that allegations of asset dissipation or asset shielding without more do not amount to allegations of wrongdoing: unless the dissipation or shielding contravenes some relevant legal or equitable rule, it is no more than an instance of an owner's entitlement "*to do what it would with its own*". The fact that a freezing injunction might have been granted to restrain a disposition does not mean that a disposition in the absence of such an injunction is unlawful. The criteria for grant of a freezing order and a NPO are different. To obtain a freezing order, an applicant must show that he has a good arguable case in relation to a substantive cause of action against the respondent, and a real risk that the respondent will engage in illegitimate (but not necessarily unlawful) acts of asset dissipation.

But it is not sufficient for an applicant for a NPO to establish merely a real risk of dissipation: he must show a good arguable case that asset dissipation has occurred in circumstances rendering it wrongful. Accordingly, the applicants say, where the wrongdoing in respect of which a NPO is sought consists of alleged asset dissipation, it is necessary for the applicant to establish a good arguable case in relation both to the fact of dissipation and to the grounds on which such dissipation is said to be unlawful. It is only then that the applicant can be said to have established a good arguable case in relation to wrongdoing. In the present case, the appellants contend, AMUSA has failed to put forward any sufficient case as to why the asset dissipation it suspects has occurred contravenes any relevant legal or equitable rule preventing disposal of the assets. On proper analysis, AMUSA's case amounted to no more than an assertion that ESL had a propensity to engage in illegitimate asset dissipation in order to avoid enforcement of the Award and speculation that ESL had acted in accordance with that propensity. The disclosure sought under the NPO was for the purpose of enabling AMUSA to see whether its speculation was justified, and if it was to fashion a case of wrongdoing which did not otherwise exist. That was wrong in principle. It appeared from the judge's judgment – and in particular the statement in paragraph 95 that "*AMUSA's belief that wilful attempts to evade enforcement of the ICC Award have been made and will likely continue to be made are sufficiently cogent to substantiate an arguable case of wrongdoing in the requisite legal sense*" – that he had treated AMUSA's suspicions of wrongdoing as sufficient to justify the grant of the NPO; but, whether that was right or not, he had been wrong to accept that a good arguable case of wrongdoing had been made out.

36. In order to obtain *Norwich Pharmacal* relief, AMUSA must establish wrongdoing. The relevant wrongdoing is not the conduct that led to the making of the Award: ESL's liability for that has been established by the Award without need for any of the information ordered by the NPO. To justify the making of the NPO, AMUSA must show that the failure to satisfy the Award is the consequence of some further or different wrongdoing. That is not demonstrated merely by the failure to satisfy the Award, since that failure might be explained by the fact that ESL simply has no assets with which to satisfy it. Moreover, it is not necessarily enough that ESL's inability to pay stems from steps it has taken to dispose of its assets or shield them from execution: as Sir Thomas Bingham MR pointed out in the *Law Debenture* case, in the absence of an injunction ESL is on the face of it entitled to dispose of its own property as it wishes. Nor is it enough simply to take the view that wilful evasion of an established liability is morally wrong or offends against a public policy that judgment debts should be satisfied: in order to constitute wrongdoing for the purposes of the *Norwich Pharmacal* jurisdiction, it is necessary that the applicant should show an arguable case of the existence of some remedy – by action or lawsuit, or, in the words of the *Ramilos* gloss, "*other legitimate redress*" – available to him.

That is because a NPO will not be made without purpose; and if the applicant cannot show that the ultimate wrongdoing of which he complains is of such a nature as to give him a cause of action or some other right of redress the provision of the information he seeks serves no legitimate purpose.

37. It follows from what I have said that I do not accept in the terms in which it was stated that a satisfactory basis for the grant of a NPO is provided by the view expressed by Wallbank J in the BVI case of *UVW v XYZ* BVI HC (Com) 108 of 2016, and relied on by the judge in the present case, that the purpose of the *Norwich Pharmacal* jurisdiction is to do equity and that strategies to obstruct and delay enforcement are wrong because they frustrate enforcement and thereby work against the very purpose of the courts and legal system. However, the concept that wilful evasion of an established debt is wrongful underlies the anti-avoidance provisions, often but not always to be found in insolvency regimes, that exist (as the appellants accept) in most systems of law. In this jurisdiction an example of such provisions is to be found in section 147 of the Companies Act, which empowers a liquidator of a company that is being wound up to apply to the court for an order requiring persons who were knowingly parties to the carrying on of any business of the company with intent to defraud creditors of the company or creditors of any other person to make contributions to the company's assets. In England and Wales, section 423 of the Insolvency Act 1986 gives the court jurisdiction to unravel transactions at an undervalue entered into for the purpose of putting assets beyond the reach of a person who is making, or at some time may make, a claim. The victim of such a transaction may himself apply for an order if the transferor is not insolvent. The origins of this provision may be traced back through section 172 of the Law of Property Act 1925 to the Statute of 13 Elizabeth, sometimes known as the Fraudulent Conveyances Act 1571, which had the effect of avoiding transactions intended to delay, hinder or defraud creditors and others of their just and lawful actions, suits and debts. Thus for almost 450 years the law of England and Wales has recognised that deliberate evasion of liabilities is wrongful and has provided redress for such conduct.

38. As I have indicated, the appellants accepted that anti-avoidance provisions directed at such conduct exist in most systems of law. They contended, however, that the precise scope and effect of such provisions often differed substantially from jurisdiction to jurisdiction. It could not therefore simply be assumed that a particular asset disposal would inevitably fall foul of any insolvency law which might happen to be capable of applying to it. Accordingly, so the appellants said, it was necessary for AMUSA to go at least some of the way to showing how a particular asset disposal would arguably fall foul of some relevant anti-avoidance provision.

39. The judge rejected this suggestion (paragraph 95 of the judgment, quoted in paragraph 31 above: "*I reject the submission … that it is incumbent on the Plaintiff to identify statutory insolvency avoidance provisions which might be invoked by a liquidator of* [ESL] *before this Court is entitled to find that an arguable case of wrongdoing is made out"*). In my judgment, he was right to do so. AMUSA cannot be expected at this stage to identify every – or, indeed, any – jurisdiction in which it will seek to invoke the local anti-avoidance provision. To require it to do so would be to impose too high a burden on AMUSA: the whole point of AMUSA's application is that it does not at this stage have sufficient information to enable it to identify whom it might wish to pursue or where it might wish to pursue them. As in the case of the appellants' argument that AMUSA needed to show that it would have the better of the argument against the wrongdoer (see paragraph 23 above), it would be self-defeating to require AMUSA to identify the jurisdiction in which it would seek redress without benefit of the very information which it seeks to enable it to identify that jurisdiction. It is sufficient in principle for AMUSA to establish a good arguable case of wilful evasion of the Award, since most jurisdictions will recognise that such conduct is wrongful not merely in the generic sense but in the sense of affording a remedy. If that remedy is, as is often the case, one which can only be pursued by a liquidator or equivalent office-holder as part of an insolvency regime, it will nevertheless provide "*legitimate redress for the wrongdoing*" as contemplated by the *Ramilos* gloss. It seems to me immaterial that in the event AMUSA may find that the acts of which it would wish to complain occurred in a jurisdiction which has no mechanism for affording such redress: it is enough for it to show a good arguable case of conduct which will generally give rise to a remedy.

40. On that basis, the question becomes whether the material relied on by AMUSA before the judge established a good arguable case of wilful evasion of the Award. The appellants say that all that the material established was at its highest that ESL had not attempted to satisfy the Award (a factor which was itself neutral) and that it had a "*propensity*" to arrange its affairs so as to leave itself without means to satisfy its liabilities.

41. It is evident that the judge regarded AMUSA's material as sufficient to justify the granting of the NPO. The process of reasoning that led him to the conclusion is, however, less evident. The summary of his conclusions contained in paragraph 106 of his judgment states that "*the deliberate steps to avoid enforcement of the ICC Award which AMUSA believes the Defendants have facilitated constitute an arguable case of wrongdoing*"; and that reference is susceptible of the interpretation that the judge regarded AMUSA's belief as sufficient. In order to determine whether or not that is the right interpretation, it is necessary to go back to the reasons given ex tempore by the judge when he originally granted the NPO on 15 January 2019. Those

reasons are set out in paragraph 31 of the judgment under appeal, and contain the following statements:

> "*3… The claim for Norwich Pharmacal relief is advanced on the basis of two main strands, as I view the material. Firstly, there is evidence of what has been referred to as propensity evidence indicating various forms of the historic wrongdoing which were set out and summarised in paragraph 16 of the Skeleton Argument. That evidence, in my judgment, does nothing more than to set the scene for looking at the wrongdoing which is complained of in a substantive way in a more cynical light than might otherwise be justified had the Defendants been companies with an unblemished record.*
>
> *…*
>
> *8. The central wrongdoing of which complaint is made is the evasive conduct of Essar Global Fund Ltd* [a mistake for ESL] *since the Final Award was entered against it. That, as I said earlier, cynical view of the evasive conduct is* [fortified] *by the evidence of historic conduct which does include matters other than those to which I have just referred* [i.e. matters referred to in a judgment of the Ontario Court of Justice].
>
> *…*
>
> *10. I was also assisted by being referred to the judgment of Butcher, J who viewed largely the same evidence as was placed before me and he made a number of findings which are helpful in fortifying the view that I would likely have reached on my own of the material placed before me. At paragraph 28 of his ruling, Butcher, J said this:*
>
> > *"I also accept that AM can show, on the basis of material which is present before me, that there is a real risk, judged objectively, that the judgment would not be met because of an unjustified dissipation of assets. For the purposes of the present application the wrongdoing that is complained about is feared steps to dissipate assets and generally thwart the ability of the plaintiff to enforce its arbitration award".*
>
> *11. At paragraph 40 Butcher, J said this:*
>
> > *"I should say that on the basis of the material which has been put before me, while the claim in the arbitration was not a claim in fraud there appear to be grounds to consider that the Essar Group has been operating to the detriment of its creditors and has engaged in conduct in bad faith".*"

42. In my view, these passages indicate that the judge was founding himself on an objective view of the facts, not on AMUSA's belief that there had been dissipation of assets. There was in any event enough material available to the judge to justify the grant of the NPO. The question turns on the way in which ESL's undoubted failure to discharge any part of the Award is to be characterised. Such a failure may be innocent or wrongful. In the present case, AMUSA was able to point to circumstances which, if not explained, would suggest that the failure to pay amounted to deliberate evasion of the liability. Those circumstances included a reduction in ESL's assets from US$3.166 billion shown in its 2015 accounts to a figure of US$2.4 million stated in its evidence in the English freezing order proceedings; the purported writing off of a debt of US$1.487 billion owed to ESL by EGFL in return for ESL purportedly buying its own shares from EGFL (and to effect a reduction in capital); and an apparent attempt by the Essar Group to prefer some creditors over others by shielding bank financing from existing and potential litigants, AMUSA not being included in the preferred creditors. In addition, ESL's conduct in the arbitration (see paragraph 25(4) above) was capable of giving rise to an inference that it intended to frustrate the arbitration process, including enforcement of any adverse award. These matters were not then explained away either by ESL or by the appellants. Taken together, they were in my view adequate to raise a good arguable case, which did not depend merely on AMUSA's suspicions, that ESL's failure to take steps to satisfy the Award was attributable to deliberate evasion and not to an innocent inability to pay.

43. Accordingly, in my judgment the challenge to the judge's conclusions on the wrongdoing point fails.

The jurisdiction point

44. It is the appellants' contention that, as a matter of principle, *Norwich Pharmacal* relief can never be granted if the information or disclosure sought is for the purpose of enabling the applicant to pursue foreign proceedings. This is said to be because the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 ("the Evidence Order") provides the exclusive means of obtaining information or documents for use in overseas litigation. According to the appellants, previous Cayman Islands authorities, as well as the judge in the present case, were wrong to conclude otherwise.

45. Section 1 of the Evidence Order provides as follows:

> "*Where an application is made to the Grand Court for an order for evidence to be obtained in the Cayman Islands, and the court is satisfied –*

(a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ("the requesting court") exercising jurisdiction in a country or territory outside the Cayman Islands; and

(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the Grand Court shall have the powers conferred on it by the following provisions of this Act".

The relevant powers are set out in section 2, and include orders for the examination of witnesses and for the production and preservation of documents. However, section 2(4) provides as follows:

"*An order under this section shall not require a person –*

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

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

46. The appellants' argument is conveniently summarised in paragraph 8 of its Memorandum of Grounds of Appeal as follows:

"8.1. Relief under the Evidence Order is available in respect of both actual and contemplated proceedings before a foreign court. If foreign proceedings are either on foot, or sufficiently in contemplation, then the Evidence Order applies, and there is no room for the court to exercise a parallel Norwich Pharmacal jurisdiction. This is so even if the claimant is not in fact able to obtain any relevant request for assistance from the foreign relevant court (with the result that it cannot invoke the Evidence Order at all).

8.2. If the foreign proceedings are not sufficiently in contemplation (and/or their nature and scope cannot be formulated with sufficient precision) so as to engage the Evidence Order, then the Evidence Order itself is obviously inapplicable. However, in those circumstances, Norwich Pharmacal relief is also not available because the claimant will, by definition, be unable to formulate its case in relation to the relevant

foreign wrongdoing with the precision and/or certainty necessary to establish a "good arguable case" on the merits.

8.3. In other words, in every case concerning actual or potential foreign proceedings, either: (a) the Evidence Order will apply so as to exclude the possibility of a party obtaining Norwich Pharmacal relief; or (b) the Evidence Order will not apply because the foreign proceedings are so speculative that they are not "contemplated" for the purposes thereof – in which case the claimant will also necessarily fall short of showing a sufficient case on the merits to justify Norwich Pharmacal relief.

8.4. There is not, as a matter of analysis, any intermediate situation in which the foreign wrongdoing alleged by the claimant is sufficiently ill-formulated for there not to be contemplated proceedings (for the purposes of the Evidence Order) but nonetheless discloses a good arguable case (for the purposes of Norwich Pharmacal relief).

8.5. Accordingly, Norwich Pharmacal relief is never available where disclosure and/or the provision of information is sought in aid of potential foreign proceedings."

47. The starting point of the appellants' argument is the proposition that no order for the provision of evidence in or in support of foreign proceedings may be made unless authorised by statute: see, for example, *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*; *Westinghouse Electric Corp Uranium Contract Litigation MDL Docket 235 (No. 1) and (No.2)* [1978] AC 547 (per Lord Diplock at 633: "*The jurisdiction of English courts to order persons within its jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory*"); *In Re Pan American World Airways Inc* [1992] QB 854 (per Lord Donaldson of Lymington MR at 859: "*It is common ground that any power to make the order sought must be found in the* [Evidence (Proceedings in Other Jurisdictions) Act 1975 – "the 1975 Act"]*, since the English courts have no inherent jurisdiction to act in aid of a foreign court and, as a matter of English domestic law, treaties only take effect as part of that law to the extent that they are incorporated by statute, with or without modification"*); and *Singularis Holdings v Pricewaterhouse Coopers* [2015] AC 1675 ("*Singularis*") (per Lord Sumption SCJ at [20]: "*the English courts … have always disclaimed any inherent power to compel the furnishing of evidence for use in foreign proceedings*"). Although each of these statements is obiter, they undoubtedly express a principle which applies in the Cayman Islands as well as in England and Wales.

48. The appellants' argument then proceeds by reference to two cases: the decision of the English Court of Appeal in *R (Omar) v Foreign Secretary* [2014] QB 112 ("*Omar*"), and the decision of Flaux J in *Ramilos*. In *Omar*, the background was criminal proceedings in Uganda, in which the appellants, who had been arrested in Kenya, were charged with murder and other offences in respect of a bombing in Uganda which had resulted in the deaths of 76 people. The appellants had petitioned the Constitutional Court of Uganda, claiming that the prosecution was an abuse of process and unconstitutional in that their rendition from Kenya had been unlawful and they had been tortured and ill-treated. They had started judicial review proceedings in the United Kingdom for *Norwich Pharmacal* relief, seeking from the Foreign Secretary information and evidence in relation to their alleged rendition and ill-treatment. The Queen's Bench Divisional Court dismissed the proceedings on the ground that the only means by which evidence for use in foreign criminal proceedings could be obtained was pursuant to the Crime (International Co-operation) Act 2003 ("the 2003 Act"), and that in consequence the court had no jurisdiction to grant *Norwich Pharmacal* relief. An appeal to the Court of Appeal was dismissed. The leading judgment in the Court of Appeal was given by Maurice Kay LJ, with whom the other two judges agreed. The following parts of his judgment are relevant:

> "*[10] The issue can be encapsulated in short form. There is domestic legislation which deals with circumstances and procedures wherein and whereby the courts of this country will assist in obtaining evidence required for use in proceedings in other jurisdictions. It is currently found in* [the 1975 Act] *and* [the 2003 Act]. *The question is whether Norwich Pharmacal relief is excluded where a statutory regime covers the ground. Put another way, do the terms of the statutory regime preclude the judicial development of an overlapping or adjacent remedy? …*
>
> *[11] The judgment of the Divisional Court … includes an historical survey of the development of the law from its judicial origins in the 19th century, particularly in the Court of Chancery, through the early statutory innovations (the Foreign Tribunals Evidence Act 1856 …, the Evidence by Commission Act 1859 …, the Extradition Acts 1870 … and 1873 …, up to the repeal of almost all of that legislation by the 1975 Act. Its conclusions appear in the following passages, …*
>
> > "*63. Outside those statutes the courts had and have no jurisdiction to use their processes for the purpose of providing evidence for proceedings in foreign states….*
> >
> > *64… the power of the courts to use Norwich Pharmacal proceedings must, in our view, be developed within the confines*

> *of the existence of the statutory regime through which evidence in proceedings overseas must be obtained. Norwich Pharmacal proceedings are not ousted, but where proceedings, such as the present proceedings, are brought to obtain evidence, the court as a matter of principle ought to decline to make orders for the provision of evidence, as distinct from information, for use in overseas proceedings. It cannot permit the statutory regime, with* [its] *safeguards…to be circumvented….*
>
> *66.… the statutory regime is the only means by which evidence for use in foreign proceedings may be obtained and, save in* [two cases] *where the point was not taken, Norwich Pharmacal proceedings have never been used to obtain evidence for use in proceedings. The jurisdiction of the court is confined to the statutory regime*".

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

…

[21] The development potential of the Norwich Pharmacal remedy (and its limitation by the criterion of necessity) were described by Lord Woolf CJ in Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2033, para 57:

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

On the other hand, and axiomatically, it cannot penetrate an area fenced off by statute.

[22] It is pertinent to relate the way in which the issue of statutory exclusivity has been viewed in relation to the 1975 Act in the context of civil litigation. In In re Westinghouse Electric Corpn Uranium Contract Litigation MDL Docket (Nos 1 and 2) [1978] AC 547, Lord Diplock began his speech with these words, at pp 632G-633A:

> "*My Lords, the jurisdiction and powers of the High Court to make the orders that are the subject of this appeal are to be found in*

> *sections 1 and 2 of [the 1975 Act], and nowhere else. … The jurisdiction of English courts to order persons within its jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory.*" (Emphasis added.)

[23] That was said on 1 December 1977, two years after the enactment of the 1975 Act and four years after Norwich Pharmacal [1974] AC 133. Although Ms Kaufmann seeks to diminish its authority by reference to a passage in which it was considered by Lord Goff of Chieveley in In re State of Norway's Application (Nos 1 and 2) [1990] 1 AC 723, 796C–F, that, it seems to me, was at most a disagreement about interpretative technique rather than substance. Distinguished leading counsel and this court in In re Pan American World Airways Inc's Application [1992] QB 854 took Lord Diplock's propositions to be authoritative: at p 859A. Moreover, in the recent case Shlaimoun v Mining Technologies International Inc [2012] 1 WLR 1276, upon which Ms Kaufmann seeks to place reliance, Coulson J did not fly in the face of Lord Diplock's proposition. He considered, at para 24, that it was "dealing principally with proceedings in foreign jurisdictions which are up and running by the time of any possible crossover with the powers of the UK courts". The present proceedings in Uganda are plainly "up and running" and so, to the extent to which Coulson J may have identified a limitation upon the width of Lord Diplock's proposition, his judgment does not dilute the relevance of the decision in In re Westinghouse [1978] AC 547 in the present case.

[24] Ultimately, we are concerned not with the 1975 Act (which is structurally different from the 2003 Act but which also contains national security and Crown servant exceptions: sections 3(3) and 9(4)), but with the 2003 Act. The approach to interpretation when considering the relationship between a statutory remedy and a common law remedy has recently received attention in the Supreme Court in R (Child Poverty Action Group) v Secretary of State for Work and Pensions [2011] 2 AC 15, which does not appear to have been cited in the Divisional Court in the present case. The Child Poverty Action Group case was concerned with whether the Secretary of State could avail himself of a restitutionary remedy at common law to recover overpaid benefits or whether a purpose-built statutory remedy was exclusive. Dyson JSC's judgment contains statements of principle in a number of passages. The following, at paras 33–34, will suffice for present purposes:

> "*33. If the two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will*

almost certainly have been excluded by necessary implication. To do otherwise would circumvent the intention of Parliament ….

"34. The question is not whether there are any differences between the common law remedy and the statutory scheme. There may well be differences. The question is whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme …. The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended [to] co-exist with it."

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

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

49. The proposition that *Norwich Pharmacal* relief in relation to foreign proceedings may be excluded by statute was applied in circumstances where the relevant English statute was the 1975 Act, not the 2003 Act, in *Ramilos*.

50. In that case, Ramilos was a 50% shareholder in a Cypriot company, APG, which itself held shares in a Russian plastics company operating in Russia, Ukraine, Kazakhstan and Belarus. The other 50% of the shares in APG were held by another Cypriot company, Strongfield. According to Ramilos, the relationship between Strongfield and Ramilos was governed by a 2012 shareholders agreement, which provided for Cypriot arbitration pursuant to Cypriot law. Ramilos applied to the English Commercial Court for a NPO against a British citizen, resident in the UK, who was a managing partner of Strongfield and chairman of the board of directors of the Russian company. Ramilos asserted that there were real grounds for suspecting wrongdoing by Strongfield and its managing partners in relation to the affairs of the Russian company. The application was refused by Flaux J, among other grounds on the basis that the vast preponderance of any claims Ramilos wished to bring would be subject to the foreign arbitration provisions of the 2012 shareholders agreement and the *Norwich Pharmacal* jurisdiction was excluded in relation to foreign proceedings by the 1975 Act.

51. This issue was addressed in a section starting at paragraph 63 of Flaux J's judgment and continuing to paragraph 134. The analysis is close and detailed; but the following points are said by the appellants to be particularly relevant for the present proceedings:

(1) At paragraph 99, the judge regarded it as clear that the Court of Appeal in *Omar* considered that its reasoning would be equally applicable to the statutory regime under the 1975 Act.

(2) At paragraphs 120 and 121, the judge said this:

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

> *wrongdoing, in which case the claimant cannot show a sufficiently good arguable case to entitle it to Norwich Pharmacal relief.*
> *I agree … that it is not permissible to bypass the statutory regime simply by asserting that the case is at some earlier stage before the institution of proceedings abroad is contemplated."*

(3) According to the appellants, this amounts to a statement of principle to the effect that, if the relevant foreign proceedings were not sufficiently in contemplation for the purposes of the statute, the applicant would necessarily be unable to demonstrate that it had a sufficiently arguable case for the purposes of obtaining a NPO.

(4) At paragraph 123, the judge said this:

> *"If, as I have held, the 1975 Act is engaged in respect of any attempt to obtain information or evidence, but the claimant is unable to obtain an order of the foreign court or a letter of request, that unavailability of relief from the foreign court is no answer to the argument that the statutory regime is engaged and precludes any common law remedies under the Norwich Pharmacal jurisdiction. This follows from [66] of Omar in the Divisional Court, and there is no residual discretion to grant Norwich Pharmacal relief in such a case. As Sir John Thomas P said: "The jurisdiction of the court is confined to the statutory regime"."*

This is again said by the appellants to be a statement of principle to the effect that the existence of the 1975 Act excluded the possibility of a parallel *Norwich Pharmacal* jurisdiction even if relief under the 1975 Act was not available on particular facts.

(5) Finally, between paragraphs 129 and 133 the judge set out the considerations which led him, at paragraph 134, to conclude that "*the statutory regime under the 1975 Act is engaged in this case, that there are such substantial differences and that, accordingly, this court has no jurisdiction to entertain the claimant's Norwich Pharmacal application to obtain evidence in support of foreign proceedings*". Those considerations were the requirement under the statute of a request from a foreign court, not from the individual claimant or applicant (paragraph 129); the fact that an order made under the 1975 Act was limited to the documents specified in the order, so that it was not possible to obtain disclosure in general terms (paragraph 132); and the exceptions in relation to national security and Crown servants (paragraph 133). In the last of those paragraphs, that judge made clear that he was dealing with questions of principle:

> "*The question is one of principle not tied to the facts of any particular case: are there substantial differences between the structure of the statutory regime and the common law remedy, such that Parliament could not have intended the common law remedy*

to survive the introduction of the statutory scheme. If there are, then the common law remedy cannot be relied upon in any case where the statutory regime is engaged".

52. On the basis of these statements, the appellants contended that the existence of the Evidence Order represented an absolute bar on the use of *Norwich Pharmacal* relief for the purposes of foreign proceedings. It was said in particular that the considerations referred to in paragraphs 129 and 132 of *Ramilos* (see paragraph 51(4) above) applied equally to the Evidence Order, and evinced a clear legislative intention to provide an exclusive regime with which the *Norwich Pharmacal* jurisdiction could not stand.

53. The judge's conclusion on this aspect, reached after a careful consideration of the local authorities and of *Omar* and *Ramilos*, was as follows (paragraphs 70-73 of the judgment):

> "*Whether the statutory jurisdiction displaces the equitable jurisdiction cannot be properly determined in a simple formulaic fashion. There is no inflexible legal principle that debars litigants from seeking to obtain information invoking this Court's equitable jurisdiction solely because the information will likely be deployed in overseas proceedings; nor indeed because the wrongdoing involves a breach of a foreign law….*
>
> *The most critical considerations in the present case are that although it is true that the information sought appears likely to be deployed in proceedings abroad, I am satisfied that:*
>
> *(a) AMUSA does not yet have sufficient information to commence substantive remedial proceedings abroad; and*
>
> *(b) having regard to the risk of information being destroyed, deploying the statutory regime for obtaining the information is a world away from being an available effective alternative remedy which AMUSA should be left to pursue.*
>
> *For these reasons I find that the jurisdiction to grant equitable relief has not been displaced by the availability of the statutory regime under the Evidence Order for obtaining evidence for use in foreign proceedings*."

54. Although the judge's wording gives rise to the concern that he may have allowed his view that the *Norwich Pharmacal* jurisdiction was not ousted to be influenced by his view that there was a risk of destruction of documents (which would be relevant to the grant of relief only if the

separate question of jurisdiction had already been determined in favour of its existence), I consider that his conclusion was correct. That is for the following reasons.

55. First, the Evidence Order only concerns the giving of evidence (whether oral or documentary) for the purposes of foreign proceedings, whereas the *Norwich Pharmacal* jurisdiction cannot as a matter of principle relate to evidence at all. This is clear from the *Norwich Pharmacal* case itself, where the distinction was drawn between the equitable remedy of discovery (which was the remedy utilised in *Norwich Pharmacal*) and the ability to compel the giving of evidence. Thus, at pages 173E-174C Lord Reid said this:

> "*Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a party in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage. Such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought.….*
> *But it is argued for the respondents that it was an indispensable condition for the ordering of discovery that the person seeking discovery should have a cause of action against the person from whom it was sought. Otherwise it was said the case would come within the "mere witness" rule.*
> *I think that there has been a good deal of misunderstanding about this rule. It has been clear at least since the time of Lord Hardwicke that information cannot be obtained by discovery from a person who will in due course be compellable to give that information either by oral testimony as a witness or on a subpoena duces tecum. Whether the reasons justifying that rule are good or bad is much too late to inquire: the rule is settled. But the foundation of the rule is the assumption that eventually the testimony will be available either in an action already in progress or in an action which will be brought later. It appears to me to have no application to a case like the present case. Here if the information in the possession of the respondents cannot be made available by discovery now, no action can ever be begun because the appellants do not know who are the wrongdoers who have infringed their patent. So the appellants can never get the information.*
> *To apply the mere witness rule to a case like this would be to divorce it entirely from its proper sphere. Its purpose is not to prevent but to postpone the recovery of the information sough*t."

See also Lord Morris at 178F:

> "*... as a broad and general rule it is true to say that a court will not order discovery against a mere witness. On behalf of the plaintiffs it is not sought to challenge this. A witness is one who may be able to give testimony in either pending or anticipated proceedings. Here there are no pending proceedings and unless the plaintiffs secure the help of the court there are no anticipated proceedings. If the names are given and if the plaintiffs take proceedings it is unlikely that there would be any need to rely on any evidence from the commissioners."* Also at page 179H: *"Numerous cases firmly recognised the rule that a bill of discovery would not lie against a mere witness. ... Someone who was not being sued and could not be sued would be regarded as a mere witness.*"

And again, Lord Cross at page 192E:

> *"But the "mere witness" rule has in principle nothing to do with the question whether or not a defendant to a bill should be obliged to disclose the identity of someone against whom the plaintiff wishes to claim relief. In such cases there can be no question of calling the defendant to give the evidence at the hearing since without the disclosure of the name proceedings cannot be brought at all".* And at page 195A: *"... the "mere witness" rule could have no application to a case where all that was being asked for was the identity of a wrongdoer whom the plaintiff would be unable to sue unless the defendant gave it to him*".

56. It is true that the further the *Norwich Pharmacal* jurisdiction gets from its roots, the greater the risk that orders will be made for the production of what on proper analysis is evidence, not merely information. The risk is the greater because of the lack of a clear conceptual distinction between information and evidence (see *Omar* at [12], cited in paragraph 48 above, and the conflicting views expressed by Lord Sumption and Lord Mance SCJJ in *Singularis* at [20]-[22] and [141]-[142] respectively). But so long as care is taken to confine the *Norwich Pharmacal* jurisdiction to its proper scope, there can in principle be no overlap between that jurisdiction and the statutory regime relating to evidence in foreign proceedings, and accordingly no reason to regard the former as excluded by the latter.

57. The second reason why I consider the judge reached the right conclusion is this. I accept that the courts in the Cayman Islands, like those in England and Wales, have no inherent jurisdiction to order evidence to be provided for the purposes of foreign proceedings. I also accept that where provision is made by statute for the production of such evidence, there will

be an implied exclusion of any overlapping jurisdiction that might otherwise exist. But the basis of the *Norwich Pharmacal* jurisdiction is not an obligation to provide evidence: it is a duty to provide information about wrongdoing. There is no obvious reason why that duty should be confined to domestic wrongdoing. Nor is it easy to see why legislation dealing with the giving of evidence in foreign proceedings should be treated as impliedly excluding jurisdiction to order the provision of information necessary to enable foreign proceedings to come into existence at all – such as, in *Norwich Pharmacal* itself, information about the identity of the wrongdoer. Such considerations suggest that care is needed to establish what the legislature must have intended by implication to exclude when enacting the Evidence Order. In my view, that is primarily to be determined by considering the circumstances in which the Evidence Order is capable of operating. As defined by section 1(b) of the Evidence Order, those circumstances require a request for evidence "f*or the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated*". Because the request must be made by the foreign court, not by a litigant, the reference to proceedings "*whose institution before that court is contemplated*" can only refer to proceedings in a court whose procedures allow for the taking of evidence, whether documentary or oral, before substantive proceedings are started – otherwise there never can be a request by the foreign court before actual institution of proceedings. Viewed in that light, the reference to contemplated proceedings must be narrowly construed, and cannot apply more generally to proceedings which the putative plaintiff is thinking of pursuing.

58. This is enough to fault the appellants' contention, supported by paragraphs 121-2 of *Ramilos* (paragraph 51(2) above), that if foreign proceedings are in contemplation or are on foot the Evidence Order applies to exclude the *Norwich Pharmacal* jurisdiction; and if they are not sufficiently in contemplation, an applicant inevitably cannot satisfy the test of a good arguable case of wrongdoing. But in any event, in my view it is not necessarily the case that there is any such illogicality, and no room for an intermediate course. This may be illustrated by assuming a case where the only information sought under a *Norwich Pharmacal* order is the identity of a foreign wrongdoer so that the applicant may sue that wrongdoer in a foreign country. This is what occurred in *Smith Kline and French Laboratories Ltd v Global Pharmaceutics Ltd* [1986] RPC 394, where the information sought was the identity of the supplier to the UK-based defendant of Tagamet obtained from the plaintiff's Spanish licensee who was licensed to distribute only in Spain. It is clear from the judgment of Browne Wilkinson LJ at page 400 that the intention was to use the information as to identity to sue in the relevant foreign court. In such a case, just as in *Norwich Pharmacal* itself, there is a clear case of wrongdoing, but the prospective plaintiff does not know whom to sue or where to sue him. Until he has that

information, the plaintiff cannot contemplate proceeding in any given jurisdiction, although the likelihood will be that he will eventually institute foreign proceedings. The same applies in this case.

59. But the point about the narrow construction to be given to contemplated proceedings goes further than that. If proceedings have not been instituted in a foreign jurisdiction and are not contemplated in a jurisdiction with pre-action disclosure procedures, I cannot see a logical basis for treating the Evidence Order as impliedly excluding the *Norwich Pharmacal* jurisdiction: there is in the factual circumstances no overlap between the two regimes.

60. A similar conclusion was reached by Coulson J (as he then was), on broadly similar grounds, in *Shlaimoun v Mining Technologies International Inc* [2012] 1 WLR 1276. This was a claim for recovery of US$2 million. The plaintiff obtained a NPO/Bankers Trust order against two banks requiring them to disclose information about the defendant's bank accounts. The documents which were provided by the banks formed an important part of the company's claim, subsequently brought in foreign proceedings, for the return of the US$2 million. The defendants applied for an injunction to restrain the company from using the documents in the foreign proceedings on the ground that the company was bound by the collateral undertaking to use documents only for the purpose of the proceedings in which they had been disclosed, which did not include the foreign proceedings. The application was dismissed, on the basis that, where an order requiring a third party to disclose documents was sought on the express basis that subsequent proceedings were likely, the court in making the order was implicitly giving permission to use the documents in those subsequent proceedings. The significance of the case lies in the following statements:

> *"[20] Mr Hanham's abuse submissions were predicated on the assumption that it must have been apparent to the respondent when it made its applications to the Masters in February and early April 2011 that these claims were going to be pursued against the applicants, and others, in Ontario. However, on the evidence before me, I do not accept that such an assumption is well founded. On the contrary, it seems to me clear that, even at the time of the second application in early April, the respondent remained unsure of what proceedings were going to come out of the Bankers Trust/Norwich Pharmacal applications, or indeed whether any proceedings were even viable. The whole point of the applications was to try and obtain sufficient information to allow the respondent to come to a careful and considered view as to what claims could be made, and where they should be launched. Given the huge range of*

potential jurisdictions open to the respondent…it does not seem to have been obvious at all that these proceedings would inevitably be commenced in Ontario. It was a possibility; no more and no less.

[21] Accordingly, this is emphatically not a case in which a Bankers Trust/Norwich Pharmacal application was made for the disclosure of documents which the applicant always knew would not be deployed in proceedings in the UK. I find on the evidence that, at the time of the applications, the respondent did not know what claims were going to be commenced, let alone where they were going to be commenced. Thus, at the time of the making of the applications, they were not and could not be an abuse of process. …

[23] There is a second reason why I consider that it was not an abuse on the part of the respondent to obtain documents pursuant to the Bankers Trust/Norwich Pharmacal principle and then use those documents to start proceedings in Ontario. Let us assume that, at the time of the original applications, the respondent was aware that there was at least a possibility that subsequent proceedings would be issued in Ontario. Does that mean that the Bankers Trust/Norwich Pharmacal application should not have been made? In my judgment, it does not. [The judge then cited Omar at first instance.] *Moreover, whilst I accept that an application could have been made under … the 1975 Act, I do not accept that this was a clear and obvious course, particularly in circumstances where it was unclear as to what claims, if any, were open to the respondent. On any view, the 1975 Act is much more focused on the problems of oral evidence in ongoing foreign proceedings.*

[24] I take the view that, depending on the facts, there is no reason why a Bankers Trust/Norwich Pharmacal application should not be made in circumstances where there is the possibility that the ultimate proceedings would be commenced in a foreign jurisdiction. I consider that Lord Diplock's dicta is dealing principally with proceedings in foreign jurisdictions which are up and running by the time of any possible crossover with the powers of the UK courts. That was emphatically not the case here."

61. It is noteworthy that the Court of Appeal in *Omar* did not disapprove of this reasoning: see paragraph [23], cited in paragraph 48 above. I accept it as correct. In my view, the Evidence Order is to be treated as impliedly excluding *Norwich Pharmacal* relief in support of foreign proceedings only, if at all, where those proceedings are on foot or where the applicant has available to him in the relevant jurisdiction procedures for pre-action disclosure or the

provision of non-documentary evidence. It should go without saying that *Norwich Pharmacal* relief is unlikely to be granted where an applicant could have started his projected foreign proceedings, or applied for pre-action relief, but has chosen not to do so in the hope of obtaining a NPO instead of using the Evidence Order procedure.

62. There is a third reason why I think the judge was right on this aspect of the matter. Section 11A of the Grand Court Act (2015 Revision) gives the court power to grant interim relief in relation to foreign proceedings. So far as relevant, it is in the following terms:

> "*(1) The Court may by order appoint a receiver or grant other interim relief in relation to proceedings which- (a) have been or are to be commenced in a court outside of the Islands; and (b) are capable of giving rise to a judgment which may be enforced in the Islands under any Law or at common law.*
>
> *(2) The Court may, pursuant to this section, grant interim relief of any kind which it has power to grant in proceedings relating to matters within its jurisdiction. ...*
>
> *(4) Subsection (1) applies notwithstanding that - (a) the subject matter of those proceedings would not, apart from this section, give rise to a cause of action over which the Court would have jurisdiction; or (b) the appointment of the receiver or the interim relief sought is not ancillary or incidental to any proceedings in the Islands. ...*
>
> *(6) In exercising the power under subsection (1), the Court shall have regard to the fact that the power is- (a) ancillary to proceedings that have been or are to be commenced in a place outside the Islands; and (b) for the purpose of facilitating the process of a court outside the Islands that has primary jurisdiction over such proceedings*."

63. Although the relief sought in this case was not sought under this section, it clearly provides a basis for the grant of relief in support of foreign proceedings. On the face of it, that relief would include *Norwich Pharmacal* relief: although such relief is final as between the parties to the application, section 11A is clearly contemplating relief that is "*interim*" in relation to the actual or projected foreign proceedings. The judge was understandably hesitant about the effect of this provision in circumstances such as the present (paragraphs 100 and 101 of his judgment); but it seems to me that the existence of this power makes it impossible to assert

that the overall intention of the legislature is to exclude *Norwich Pharmacal* relief in support of foreign proceedings.

64. In reaching the conclusion I have, I have not thought it necessary to refer to the two cases in this jurisdiction that support that conclusion. That is notwithstanding that one of them, *Gianne v Miller* (Appeal No. 24 of 2016, 20 July 2007), is a decision of this court. The reason is that, although I agree with the outcome of the decisions, and with the reasoning in this Court and of Henderson J in *Gianne v Miller* and of the Chief Justice in the other case, *Braga v Equity Trust Company (Cayman) Limited* [2011 (1) CILR 402, both of them were decided before the decision of the English Court of Appeal in *Omar*, which was the first case extensively to articulate the proposition that statutory provisions such as the Evidence Order might exclude the availability of *Norwich Pharmacal* relief in aid of foreign proceedings. Similar considerations apply to a decision of the Guernsey Court of Appeal, *Systems Design Ltd v President of Equatorial Guinea* 2005-06 GLR 65, which held in terms that the Royal Court had jurisdiction to make a *Norwich Pharmacal* order in support of proceedings in England, provided that in all the circumstances such an order was necessary and appropriate. These decisions do, however, reflect the law as I find it to be.

65. For these reasons, I consider that the appellants fail on the jurisdiction point as well as on the enforcement and wrongdoing points; and I would dismiss the appeal.

RIX JA:

66. I agree.

67. I only wish to add a few words on the subject of the applicable test of good arguable case. I agree that it is the applicable test. It was submitted, nevertheless, that the test was not that of a good arguable test but an allegedly stiffer test of "*much the better of the argument*". Flaux J rejected a similar submission in the context of an application for *Norwich Pharmacal* relief: see *Ramilos* and para 23 of Martin JA's judgment above. I would merely observe that the so-called "*much the better of the argument*" test, which derives from *Canada Trust v Stolzenberg (No 2)* [1998] 1 WLR 547, [2002] 1 AC 1, is itself only a gloss on the time-honoured "*good arguable case*" test: see Lord Sumption in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 at paras [5] – [7], where Lord Sumption restored "*good arguable case*" as the litmus test of jurisdictional gateways.

68. *Four Seasons* came after Flaux J's judgment in *Ramilos* or Tugendhat's earlier judgment in *United Company Rusal* and the *Bols Distilleries* case there referred to. I am therefore doubtful that there are a multitude of different tests for different gateways. It is simply that the application of the good arguable case test may vary in different circumstances, provided that the court is properly and sufficiently satisfied, having regard to the limitations required of the interlocutory process, that it is just to exercise the power or jurisdiction in question

GOLDRING P:

69. I agree with both judgments.