Ramilos Trading Limited v Valentin Mikhaylovich Buyanovsky

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Commercial Court)

Judgment Date
9 December 2016

Case No: CL-2016-000217

High Court of Justice Queen's Bench Division Commercial Court

[2016] EWHC 3175 (Comm), 2016 WL 07156922

Before: The Honourable Mr Justice Flaux

Date: 09/12/2016

Hearing dates: 27th and 28th September 2016

Representation

Mr Tim Akkouh (instructed by Hogan Lovells International LLP) for the Claimant.
Mr Jeff Chapman QC & Mr Richard Power (instructed by Mishcon De Reya LLP) for the Defendant.

Approved Judgment

The Honourable Mr Justice Flaux:

Introduction and background

1. The claimant applies by a Claim Form issued on 12 April 2016 for a Norwich Pharmacal and/or Bankers Trust order against the defendant. The schedule to the draft order sets out over six pages no fewer than 39 questions (many of which contain sub-questions) to which the claimant seeks answers. A copy of that schedule is in the appendix to this judgment. One set of 7 questions to do with alleged non-payment of dividends is no longer pursued, having been dropped shortly before the hearing. Nevertheless, and although Mr Tim Akkouh on behalf of the claimant was inclined to accept, in relation to the remaining questions, that only a much narrower set of questions would be appropriate for this form of relief, that cannot disguise that the schedule to the draft order amounts to a request for wide ranging pre-action disclosure and evidence which, on any view, goes way beyond the norm for Norwich Pharmacal and/or Bankers Trust cases. That point is highlighted by the two general questions at the end of the schedule, questions 38 and 39, which are of truly breath-taking width for a Norwich Pharmacal application.

2. The claimant is a BVI company that holds 50% of the shares in a Cypriot company called APG Polyplastic Group Ltd (“APG”). The remaining 50% of APG's shares are held by a company originally incorporated in St Vincent and the Grenadines, and which has since moved its domicile to Cyprus, called Strongfield Marketing Limited (“Strongfield”). APG holds the shares in a Russian company called Polyplastic Group LLC, which operates a plastics business in (amongst other jurisdictions) Russia, the Ukraine, Kazakhstan and Belarus. It carries on this business both itself and through a number of

subsidiaries. Those companies, including APG are referred to hereafter as the “Polyplastic Group”. The defendant is a British citizen resident in the United Kingdom. He is one of five managing partners of Strongfield and holds a 30% shareholding in Strongfield. He is Chairman of the board of Polyplastic Group LLC and Chief Financial Officer of the Polyplastic Group.

3. The ultimate beneficial owners of the claimant were originally Messrs Rappoport and Smirnov. Since 17 March 2016, the claimant has been owned by A1 Group. The claimant's skeleton argument asserts that this is a Russian investment company which is part of the Alfa Group Consortium, one of Russia's largest privately owned investment groups. However, as the defendant's skeleton argument points out, the evidence does not appear to disclose a Russian company with the name A1 Group, but a Cypriot company called A1 Group Limited. Precisely who are the individuals who are now the ultimate beneficial owners is not clear.

4. The claimant became a 50% shareholder of APG pursuant to a share sale agreement dated 7 April 2005 (referred to hereafter as “the 2005 shareholders agreement”), under which the affairs of the Polyplastic Group were to be managed by Strongfield and its managing partners. The claimant is a silent investor whose two nominee directors on the Polyplastic Group LLC board were contractually obligated to vote in the same way as Strongfield's nominees. That agreement provides for any dispute to be submitted to arbitration before the London Court of International Arbitration (“LCIA”) according to the laws of the United Kingdom.

5. It is important to note at the outset of this judgment that the claimant's case, as set out in the evidence of its solicitor, Mr Daniel Armstrong of Hogan Lovells International LLP (on the basis of instructions from “the Ramilos Witnesses”, who are various individuals who had acted as advisers and lawyers to the claimant and Messrs Rovnov and Alenin, who were the claimant's nominee directors from April 2012 and August 2012 respectively, and, in the case of Mr Alenin, a 50% shareholder of the claimant prior to the acquisition by A1), is that the 2005 shareholders agreement was terminated and superseded by a later shareholders agreement entered into on 31 January 2012 (which provides for Cypriot arbitration pursuant to Cypriot law). Mr Armstrong states:

> “Although the 2012 Agreement does not expressly state that it terminated the 2005 Agreement between the parties, the Ramilos Witnesses have confirmed that it was understood and agreed that the 2012 Agreement would have this effect. Accordingly, since 31 January 2012, Ramilos and Strongfield's relationship as shareholders in APG and partners in the Polyplastic Group has been governed by the 2012 Agreement as well as the Articles of Association of PG LLC”.

6. Although this position is disputed by the defendant, who does not accept that the 2005 shareholders agreement has been completely superseded by the 2012 shareholders agreement (which is governed by Cypriot law), it seems to me that, given this categorical statement of position by the claimant, it is not open to the claimant to contend that it has an arguable case in support of a potential claim against Strongfield in London arbitration. I will return to this important issue later in the judgment.

7. The Polyplastic Group was founded in 1991 and is the largest plastic processing company in the relevant post-Soviet jurisdictions. It produces two broad product ranges: (i) polyethylene pipes and accessories (for use in transporting gas, water and sewerage, as well as in other industrial applications), and (ii) composite plastic materials (used in the rail, automotive and electrical products and electronics industries). In the financial year 2012 the Group's turnover was about €668 million.

8. There is another group of companies operating in the plastics industry, the Polymerteplo Group, 100% owned by Strongfield and operating primarily in Russia, with subsidiaries in the United Kingdom, Belarus and the Ukraine. Its business is principally the production of plastic pipes for use in district heating systems. The defendant is also the Chief Financial Officer of the Polymerteplo Group. The underlying disputes between the claimant and Strongfield concern in large measure the inter-relationship between the two Groups and associated subsidiaries.

9. The basis for the claimant's application is that there are real grounds for suspecting wrongdoing by Strongfield and its managing partners on four grounds, which can be summarised as follows:

(1) Alleged improper shifting of revenue and costs between the Polyplastic Group and the Polymerteplo Group, to the detriment of the former ("the Costs Shifting Ground").
(2) The fact that the Polyplastic Group has failed to pay dividends for any year since 2010 notwithstanding that, so the claimant contends: (i) its board resolved to pay dividends for the 2011 accounting year, (ii) there has been a substantial improvement in the group's trading performance over this period, and (iii) the Polymerteplo Group—which has one-seventh of the revenues of the Polyplastic Group—has paid out over 12 times the level of dividends as have been paid by the Polyplastic Group over the same period (the "Dividends Ground").
(3) The payment by the Polyplastic Group of hundreds of millions of dollars to intermediary companies, Eurotrubplast Holding Company Limited ("ETPHL") incorporated in St Vincent and the Grenadines and Stavrochem Vegyi Kereskedelmi Kft ("Stavrochem") and Violett Polymer Kereskedelmi Kft ("Violett Polymer") incorporated in Hungary, and seemingly controlled by Strongfield, for the purposes of purchasing raw materials. Despite repeated requests, Strongfield has not provided any accounting information about the activities of these companies (the "Transfer Pricing Ground").
(4) The Polyplastic Group's receipt of loans on allegedly uncommercial terms from what the claimant contends is a connected party called Dameka Finance Ltd (the "Loans Ground").

10. Before considering the detail of the claimant's claim to relief, it is important to consider the relevant legal framework.

The legal framework

The conditions for relief

11. The three conditions to be satisfied for the court to exercise its power to grant Norwich Pharmacal relief were set out by Lightman J in Mitsui v Nexen Petroleum [2005] EWHC 625 (Ch); [2005] 3 All ER 511 at [21] (in a passage approved in the notes to *Civil Procedure 2016* at 31.18.4 and, albeit without attribution, in *Hollander: Documentary Evidence* 12th edition at [4–01]):

> "The three conditions to be satisfied for the court to exercise the power to order Norwich Pharmacal relief are:
>
> 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."

The first condition: good arguable case

12. What needs to be satisfied in relation to the first condition was usefully encapsulated by Popplewell J in the recent decision of *Orb A.R.L. v Fiddler [2016] EWHC 361 (Comm)* at [83] and [84]:

> "83. As the jurisdiction has developed there are three threshold conditions which must be satisfied.
>
> 84. The first condition is that there must have been a wrong carried out, or arguably carried out, by an ultimate wrongdoer. The "wrong" may be a crime, tort, breach of contract, equitable wrong or contempt of court. It is not necessary to establish conclusively that a wrong has been carried out; it will be sufficient if it is arguable that a wrong has been carried out. The strength of the argument will be a factor in the exercise of the discretion, but an arguable case is sufficient to meet the threshold condition. The wrongdoing must be identified by the applicant at least in general terms: see *Ashworth Hospital Authority v MGN Limited [2002] 1 WLR 2033* per Lord Woolf CJ at paragraph [60]."

13. In relation to this first condition, in the skeleton arguments there was a dispute between Mr Akkouh for the claimant and Mr Jeffrey Chapman QC for the defendant as to what the claimant had to show in terms of a good arguable case that a wrong had been committed. Mr Chapman QC relied upon the decision of Tugendhat J in *United Company Rusal Plc v HSBC Bank Plc [2011] EWHC 404 (QB)* in support of his submission that in the context of Norwich Pharmacal relief, a claimant must show that it has much the better of the argument, as in applications for service of proceedings outside the jurisdiction. At [50]-[52] of his judgment, the learned judge said:

> "50. There is no dispute that the standard of proof which an applicant must attain before a Norwich Pharmacal order may be granted is that he has at least an arguable case: see *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2009] 1 WLR 2579; [2008] EWHC 2048 (Admin)* para 67. In Ashworth 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."

14. As I indicated during the course of argument, I do not consider that the "much the better of the argument" or Canada Trust gloss (because it was refined in the context of applications for permission to serve out of the jurisdiction by the judgment of Waller LJ in *Canada Trust v Stolzenberg (No. 2) [1998] 1 WLR 547* at 555) is appropriate in relation to applications for Norwich Pharmacal relief. I agree with Mr Akkouh 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 Lloyd's 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."

15. Mr Akkouh placed particular emphasis on the decision of Sir Richard Scott V-C in *P v T Ltd [1997] 1 WLR 1309* . In that case, the plaintiff employee was dismissed for gross misconduct on the basis of information given by a third party, which the employer thought was credible, but the employer refused to provide any of the information to the employee notwithstanding that he had been dismissed for gross misconduct. The Vice-Chancellor recognised that, unlike in the Norwich Pharmacal case, the plaintiff was not able to say without more information whether a tort had been committed against him, but nevertheless concluded that justice required that a Norwich Pharmacal order be made against the employer. At 1318B-F he said:

> "The present position is that it is not possible for the plaintiff to know for certain whether he does or does not have a viable cause of action against the informant. He does not know what was the information that was supplied. As I read his affidavit, he is confident that he had committed no act justifying the description of gross misconduct, but until he knows what it is that he is said to have done his position in that regard will remain inchoate.
>
> In that respect his position is not the same as that of the plaintiff in the *Norwich Pharmacal case [1974] AC 133* . In the Norwich Pharmacal case the plaintiff was able to demonstrate that tortious infringements of patent rights were being committed. It did not know by whom. It did not know whom to sue. But that there was tortious conduct against it was not in question. In the present case it is in question whether a tort has been committed against the plaintiff. He believes that it has. The purpose of any order I make, as I suppose of any order that a judge ever makes, is to try to enable justice to be done. It seems to me that in the circumstances of the present case justice demands that the plaintiff should be placed in a position to clear his name if the allegations made against him are without foundation. It seems to me intolerable that an individual in his position should be stained by serious allegations, the content of which he has no means of discovering and which he has no means of meeting otherwise than with the assistance of an order of discovery such as he seeks from me. It seems to me that the principles expressed in the Norwich Pharmacal case, although they have not previously been applied so far as I know to a case in which the question whether there has been a tort has not clearly been answered, ought to be applicable in a case such as the present."

16. As I said during the course of argument, that is an exceptional case, generally recognised as being at the outer limits of the Norwich Pharmacal jurisdiction. As Mr Chapman QC submitted, the explanation for the decision is probably that there had been clear wrongdoing, in the sense that there had been a breach of the rules of natural justice and that is essentially what the Vice-Chancellor is saying in the passage I have just cited. It does not seem to me to be of much assistance to the

claimant either in relation to the standard of proof required for relief to be granted or in relation to the scope of relief which should be granted.

17. Nevertheless, Mr Akkouh submitted that there was some scope for the argument that P v T should be applied more widely. He relied upon the decision of Neuberger J (as he then was) in *The Coca Cola Company v British Telecommunications Plc [1999] FSR 518* . Having cited Norwich Pharmacal itself and subsequent authorities, including P v T , the learned judge set out the first requirement for relief in these terms at 523:

> "From these authorities I derive the following propositions. First, I must be satisfied that it can be said on the facts of the case that there may be a tort of which the plaintiff has cause to complain, but, as P v T , and in particular the passage I have just quoted, shows, it is enough, in certain cases at any rate, that the plaintiff has good and honest reason to believe that a tort has been committed."

Mr Chapman QC submitted that this statement by Neuberger J cannot be regarded as of general application, but is limited to exceptional cases such as P v T . In my judgment that must be correct. It is not enough to have an honest and reasonable belief that there has been wrongdoing. The claimant must show that it has a good arguable case that there has been wrongdoing.

18. In the event, in his oral submissions, Mr Chapman QC sensibly eschewed any reliance on the judgment of Tugendhat J in Rusal and on the Canada Trust gloss, concentrating on his submission that, even applying the less stringent test of good arguable case adopted in other cases, the claimant did not satisfy this first condition. In the circumstances, it is not necessary to look at all the various authorities relied upon by Mr Akkouh in any detail.

19. Mr Chapman QC placed particular reliance in the context of the first condition to relief upon the judgment of Lord Woolf CJ in the House of Lords in *Ashworth Hospital Authority v MGN Limited [2002] UKHL 29; [2002] 1 WLR 2033* . In that case, an article was published in the defendant's newspapers containing verbatim extracts of the medical records of Ian Brady, the Moors murderer, who was in custody at Ashworth secure hospital. It seemed probable that, in breach of a duty of confidentiality under his contract of employment, an employee at the hospital had supplied the records to an intermediary who had been paid by the defendant. The hospital authority sought a number of orders against the defendant including a Norwich Pharmacal order that the defendant disclose the identity of the informant and the employee. The defendant resisted the order on the basis that the information was not being sought for the purpose of bringing proceedings, but to dismiss the source of the information.

20. The House of Lords rejected this argument, holding that the Norwich Pharmacal jurisdiction was not limited to cases where the claimant intended to bring legal proceedings, but was sufficiently flexible for disclosure to be ordered where the claimant required the information for another purpose than bringing proceedings, provided that the purpose was legitimate, approving what was said by the Court of Appeal in *British Steel Corporation v Granada Television [1981] AC 1096* (see per Lord Denning MR at 1127 and Templeman LJ at 1132 cited by Lord Woolf CJ at [45] and [46] of his judgment in Ashworth).

21. One of the arguments run by the defendant in Ashworth was that if the disclosure was not linked with proceedings which would actually be brought, there would be no means by which the court could protect the defendant against misuse of the material disclosed. Lord Woolf CJ rejected that argument at [60]:

> "I agree that this is a matter for concern. However, this concern will be met if an order for disclosure is not made unless a claimant has identified clearly the wrongdoing on which he relies in general terms and identifies the purposes for which the disclosure will be used when it is made. The use of the material will then be restricted expressly or implicitly to the disclosed purposes unless and until the court permits it to be used for another purpose."

22. Mr Chapman QC emphasised the need for the claimant to identify "clearly the wrongdoing on which he relies in general terms", submitting that it was not sufficient for the claimant to show *"real grounds for suspecting wrongdoing"* as contended in its skeleton argument. Nor would Norwich Pharmacal relief be granted and disclosure of information ordered in order to enable the claimant: *"to assess whether there has been wrongdoing and (if so) what to do about it"*, again as contended in the claimant's skeleton argument. Mr Chapman QC submitted that this would be an impermissible "fishing expedition" for which the Norwich Pharmacal jurisdiction cannot be used. Many of the submissions at this stage of the case were less concerned with the first condition to relief and more with the development of the Norwich Pharmacal jurisdiction and the scope or width of Norwich Pharmacal orders granted by the courts. I propose to deal with those in a separate section of the judgment after I have dealt with the other conditions briefly.

23. My conclusion in relation to this first condition is that the correct test is indeed the same test of good arguable case as in freezing injunction cases and Lord Woolf CJ was not saying anything different in Ashworth .

The second condition: necessity

24. The second condition for relief is that the disclosure sought must be necessary in order to enable the applicant to bring legal proceedings or seek other legitimate redress for the wrongdoing and in considering the question of necessity, the cases emphasise the need for flexibility and discretion. This is clear from [57] of the speech of Lord Woolf CJ in Ashworth :

> "The Norwich Pharmacal jurisdiction is an exceptional one and one that is only exercised by the courts when they are satisfied it is necessary that it should be exercised. New situations are inevitably going to arise where it would be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which apply to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy. That new circumstances for its appropriate use will continue to arise as illustrated by the decision of Sir Richard Scott V-C in *P v T Ltd [1997] 1 WLR 1309* where relief was granted because it was necessary in the interests of justice, albeit that the claimant was not able to identify without discovery what would be the appropriate cause of action."

To the same effect is a passage in the judgment of Lord Kerr in *The Rugby Football Union v Consolidated Information Services Limited (formerly Viagogo Limited) (in liquidation) [2012] UKSC 55; [2012] 1 WLR 3333* at [15].

25. In *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118; [2014] QB 112* at [30] Maurice Kay LJ emphasised that, although necessity was sometimes referred to as if it were simply a matter for discretion, it was a threshold condition:

> "Whilst necessity is sometimes referred to as if it were simply a matter for consideration in the exercise of discretion, in truth it is more than that. It is a test which must be satisfied if Norwich Pharmacal relief is to follow. The first sentence in paragraph 57 of Lord Woolf's speech [in Ashworth] makes that plain. Nevertheless, I agree with the statement of the Divisional Court in the present case (at paragraph 83) that
>
> > 'the requirement of necessity is a requirement that must be dictated flexibly in the circumstances of each case.'

> Moreover, in this context there is no practical or substantial difference between a requirement of "necessity in the interests of justice" and a test of what is "just and convenient in the interests of justice": President of the State of Equatorial Guinea v Royal Bank of Scotland International , Privy Council Appeal No 59 of 2005, 27 February 2006, per Lords Bingham and Hoffmann, at paragraph 16. The latter is no less exacting than the former.

To like effect is the judgment of Popplewell J in Orb at [87].

The third condition: the person against whom the order is sought must be involved in the wrongdoing

26. The third threshold condition was summarised by Popplewell J in Orb at [88] in these terms: "The third threshold condition is that the person against whom the order is sought must be involved in the wrongdoing in a way which distinguishes him from being a mere witness". As in that case, it is not necessary to analyse further where the line should be drawn between involvement in wrongdoing and acting as a mere witness. It is effectively accepted by the defendant that if, contrary to his case, the claimant has a good arguable case of wrongdoing, he was involved in such wrongdoing, given his position in Strongfield.

Discretion

27. Even where the three threshold conditions are satisfied, the court still has to exercise its discretion as to whether to grant the order sought, weighing relevant factors and deciding whether to order disclosure in the interests of disclosure. Lord Kerr set out a non-exhaustive list of such factors in The Rugby Football Union case at [17]:

> "17. 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. Various factors have been identified in the authorities as relevant. These include: (i) the strength of the possible cause of action contemplated by the applicant for the order: the *Norwich Pharmacal case [1974] AC 133* , 199F-G, per Lord Cross of Chelsea, Totalise plc v The Motley Fool Ltd [2001] EMLR 750 , para 27, per Owen J at first instance, *Clift v Clarke [2011] EWHC 1164 (QB)* at [14], [38], per Sharp J; (ii) the strong public interest in allowing an applicant to vindicate his legal rights: the *British Steel case [1981] AC 1096* , 1175C-D, per Lord Wilberforce, the *Norwich Pharmacal case [1974] AC 133* , 182C-D, per Lord Morris of Borth-y-Gest, and p188E-F, per Viscount Dilhorne; (iii) whether the making of the order will deter similar wrongdoing in the future: the Ashworth case [2002] 1 WLR 2033 , para 66, per Lord Woolf CJ; (iv) whether the information could be obtained from another source: the Norwich Pharmacal case [I974] AC 133 , 199F-G, per Lord Cross, the Totalise plc case [2001] EMLR 750 , para 27, *President of the State of Equatorial Guinea v Royal Bank of Scotland International [2006] UKPC 7* at [16], per Lord Bingham of Cornhill; (v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing: the *British Steel case [1981] AC 1096* , 1197A-B, per Lord Fraser, or was himself a joint tortfeasor, *X Ltd v Morgan-Grampian (Publishers) Ltd [1991] 1 AC 1* , 54, per Lord Lowry; (vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result: the *Norwich Pharmacal case [1974] AC 133* , 176B-C, per Lord Reid; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2) [1974] AC 405* , 434, per Lord Cross of Chelsea; (vii) the degree of confidentiality of the information sought: the *Norwich Pharmacal case [1974] AC 133* , 190E-F, per Viscount Dilhorne; (viii) the privacy rights under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed: the Totalise plc case [2001] EMLR 750 , para 28; (ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed: the Totalise plc case [2001] EMLR 750 , at paras 18-21, per Owen J; (x) the public interest in maintaining the confidentiality of journalistic sources, as recognised in section 10 of the Contempt of Court Act 1981 and article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms : the *Ashworth case [2002] 1 WLR 2033* para 2, per Lord Slynn of Hadley."

The development of the Norwich Pharmacal jurisdiction and the scope of the relief

28. Before looking at the cases in detail, it is instructive to set out in summary the rival contentions. Mr Akkouh submitted on behalf of the claimant that the Norwich Pharmacal jurisdiction has developed over the forty or so years since the decision of the House of Lords, beyond ordering disclosure of the identity of and information about the wrongdoer so as to enable the claimant to bring proceedings, first to ordering disclosure of other information to enable the claimant to perfect its claim, the so-called "missing piece of the jigsaw", then in appropriate cases, of which he submitted that this was one, to disclosure of more detailed information, if that was necessary to enable the claimant to bring its claim.

29. Mr Chapman QC challenged that view of the development of the jurisdiction. He accepted that it had developed beyond ordering disclosure of the identity of and information about the wrongdoer but submitted that, on a proper analysis of the authorities, orders when made were focused and in a narrow compass, limited to what the claimant required to bring a claim or to redress wrongdoing in some other legitimate way. It was clearly established that the jurisdiction could not be used to make wide-ranging disclosure requests or to engage in a "fishing expedition". Mr Chapman QC submitted that the present was just such a case: either it was an impermissible fishing expedition to ascertain whether or not the claimant has a cause of action against the defendant or, even if, contrary to the defendant's primary position the claimant had a good arguable case, it was still a wide-ranging request for disclosure and evidence which went way beyond anything sought in any previous Norwich Pharmacal case.

30. In support of his submission that the jurisdiction cannot be used as a fishing expedition, Mr Chapman QC placed particular reliance on the judgment of Rimer J (as he then was) in *Axa Equity and Law Life Assurance Society Plc v National Westminster Bank [1998] PNLR 433* . In that case, Axa claimed to have relied on statements made by Coopers, auditors of a company, in subscribing to £19 million of mortgage debenture stock issued by the company, which then went into administrative receivership. Axa issued a writ against Coopers claiming negligent misstatement and/or breach of section 150 of the Financial Services Act 1986 , but did not serve it, asserting that it was unable to plead an adequate case of inaccuracy or negligence. Axa sought disclosure under the Norwich Pharmacal jurisdiction from the company's bankers and solicitors. Coopers resisted the application on the basis that, in circumstances where Axa could not say it had a good arguable case, the court had no jurisdiction to make the order sought. At 437–438, Rimer J concluded that the case under section 150 of the Financial Services Act 1986 was extremely weak, substantially less than a good arguable case. Although he considered that the case that Coopers owed a duty of care was more promising, the major difficulty Axa faced was in relation to breach, as whilst it believed it had a case, it did not know whether it in fact had one or if it did, on what factual basis.

31. At 445–446, having referred to the speeches in the House of Lords in the Norwich Pharmacal case (including Lord Cross of Chelsea's citation of the decision of the Supreme Court of Massachusetts in Post v Toledo, Cincinnati & St Louis Railroad Co 11 N.E. Rep 540 (1887)) Rimer J said:

> "I interpret Lord Cross as approving the whole of the passage he cited from the Post case, including the statement that bills of discovery could not be used 'to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendant'. The Norwich Pharmacal case was not about an application for discovery of that sort. It was in no sense a fishing application. It was based on the premise that the plaintiffs had a clear case for infringement against the importers and there was no question of the plaintiffs fishing for information as to whether they had any such case. Had they been, then I consider it likely that their application would have failed.
>
> By contrast with the Norwich Pharmacal case, the plaintiffs in the present proceedings do not have a prima facie case against Coopers. Nor on the material before the court do they even disclose an arguable case, since their evidence concedes that, on the information at present known to them and without the desired discovery, they cannot plead a case against Coopers and cannot hope to progress their writ to a trial. The whole point of their discovery application against the defendants is to find out if they do have a case against Coopers.

> In my judgment, Norwich Pharmacal provides no authority at all for the proposition that discovery for that purpose can properly be ordered against third parties. On the contrary, I consider that it is implicit in the judgments of most of their Lordships that such discovery cannot be ordered, and the citation from the Post case, which Lord Cross approved, includes a specific statement to that effect. In my judgment, therefore, Norwich Pharmacal itself is of no assistance to the plaintiffs on this application."

32. At 456–7 the learned judge went on to discuss the decision of Sir Richard Scott V-C in P v T in these terms:

> "…the case was of course one which cried out for the making of the order which the Vice-Chancellor made and it would appear to me to be a grave defect in our system of justice if the courts could not provide the plaintiff in that case with the remedy he wanted. It is, if I may respectfully say so, not in the least surprising that the Vice-Chancellor made the order which he did and his judgment reflects how he considered that, in the particular circumstances of the case, justice demanded that he should do so…
>
> I do not consider that he would have regarded himself as establishing a new general principle that an intending plaintiff who wishes to find out if he has a case against an intended defendant is entitled to discovery against third parties directed at assisting him in that enquiry. In my judgment, any such development would be inconsistent with the Norwich Pharmacal case itself and also with the decision of the Court of Appeal in the Aiyela case, which latter was apparently not cited in P. v. T. Ltd . In my judgment, the case is one which turned on its own very unusual facts and I do not regard it as establishing any wider principle applicable to the present case".

33. Mr Akkouh did not go so far as to submit that the decision of Rimer J was wrong, but he did submit that it took a narrow view of the law as the Norwich Pharmacal jurisdiction had developed at that time, and that other decisions took a broader view of the scope of the Norwich Pharmacal jurisdiction. He relied upon the decision of Millett J (as he then was) in *Societe Romanaise de la Chaussure SA v British Shoe Corporation [1991] FSR 1* cited by Rimer J in Axa at 448, where, in a case of infringement of copyright, the court ordered Norwich Pharmacal disclosure of full information to enable the plaintiff to decide whether it was worth suing the manufacturers of the relevant shoes, as well as the defendants who were importing the shoes. However, that case does not seem to me to add much to the argument, since it was a case where there was clear wrongdoing, and therefore a good arguable case, and the information sought was in a fairly narrow compass, certainly nothing like the extensive disclosure sought in the present case.

34. Mr Akkouh also relied upon the fact that the Court of Appeal in Axa ([1998] CLC 1177) considered that, contrary to the view of Rimer J, Axa had a good arguable case both under section 150 and in negligence but that it had sufficient material available to it already to plead its case against Coopers. In those circumstances, the order sought would offend against the "mere witness" rule which prevented a party obtaining disclosure against a person who in due course would be compellable to give that information either by oral testimony or on a subpoena. However, there is no suggestion in the principal judgment of Morritt LJ that, if the Court of Appeal had considered that, as Rimer J had held, Axa had not shown a good arguable case and was engaged on a fishing expedition, the Court of Appeal would not have dismissed the application on that ground.

35. Mr Akkouh relied upon a passage at [25] of Millett LJ's judgment, where he said that he saw much force in the argument that where there was one missing piece of the jigsaw, one fact crucial to the proper allegation of liability against the defendant, which could be ascertained from a known document in the hands of a third party, a Norwich Pharmacal order against that third party would not infringe the "mere witness" rule. However, that passage does not seem to me to be of any particular assistance to the claimant, as the Court of Appeal expressly did not decide the point and the example was of a missing piece of the jigsaw to perfect a cause of action, so that, by definition, as I see it, it would be a case where the claimant had a sufficient good arguable case.

36. Carlton Film Distributors v VCI Plc [2003] EWHC 616 (Ch) was an intellectual property case, where disclosure of the missing piece of the jigsaw was ordered. The claimant had granted licences to the defendant to make copies of various feature films. The licences contained restrictions on the quantities which could be manufactured and, as Jacob J said, the claimant had reasonable grounds for supposing that there had been over-production by the defendant, in breach of contract, even though it did not have quite enough to start proceedings and sign a statement of truth in a pleading, in other words it was a case where the claimant did have a good arguable case. Having cited the passage from the judgment of Millett LJ in Axa at [25] referred to above, Jacob J decided that that was a case where it was appropriate to make an order for disclosure to enable proceedings to be brought. It is important to note, however, that the disclosure ordered was in a narrow compass, copies of the daily machine lists held by the third party in respect of the particular films.

37. Mitsui v Nexen Petroleum was another case where the court recognised that "the missing piece of the jigsaw" could be ordered to be disclosed pursuant to the Norwich Pharmacal jurisdiction, although Lightman J refused the relief sought in that case. At [19] he said:

> "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."

38. Mitsui was also another case where the claimant had what Lightman J described as *"strong grounds for suspicion"* of commission of the relevant wrongdoing, and therefore involved a similar approach to that of the court in Carlton . However, Mitsui seems to me of limited assistance on this point, since it was common ground (see [22] of the judgment) that the first condition for Norwich Pharmacal relief, of arguable wrongdoing was satisfied, so that there was no real analysis required of the standard of proof.

39. Mr Akkouh submitted that subsequent cases had widened the scope of disclosure pursuant to the Norwich Pharmacal jurisdiction, beyond the disclosure of the identity of the wrongdoer or full information about the wrongdoer or the "missing piece of the jigsaw". He relied upon four cases in particular. The decision of the Court of Appeal in Marc Rich v Krasner (1999) (unreported) in fact preceded Carlton and Mitsui. It was a case of a Bankers Trust order against the defendants' solicitors, Rakisons, seeking all documents evidencing the ownership and control of five identified companies in support of a tracing claim in respect of a widespread conspiracy between the defendants whereby in effect the defendants had creamed off profits which should have been received by the plaintiffs. The claim was thus a proprietary one. Mr Akkouh relied upon what Morritt LJ said:

> "The purpose of the jurisdiction is to enable the applicant to obtain the information needed to trace and protect the assets he claims…
>
> In my view the ownership and control of the entities referred to is relevant to any tracing claim and may be crucial to the prompt protection of misapplied assets as they pass from one corporate vehicle to another. Likewise if the remedy is to have any worthwhile effect the documents to be produced must, in the circumstances of a case such as this, be widely defined. It is noticeable that it is Mr Krasner who objects to the width of the order not Rakisons, to whom it is directed."

40. Mr Akkouh contended that the facts of the present case were similar: the claimant was seeking to ascertain the whereabouts of monies which it suspected had been abstracted improperly from the Polyplastic Group by cost shifting and transfer pricing and the wide order sought was necessary to protect the funds in question. In my judgment, on close analysis Marc Rich does not support the claimant's case for the wide order it seeks. To begin with, any similarity between the two cases is no more than superficial: that was a clear case of dishonest abstraction of the plaintiff's money, whereas (for reasons I will examine in more detail when I come to the facts) here the claimant is not in a position to say there has definitely been

wrongdoing or to make a proprietary claim, since any money abstracted was not the claimant's but that of the Polyplastic Group, in which APG (of which the claimant was a 50% shareholder) held the shares.

41. Furthermore, although Morritt LJ refers to the order as widely defined, he also notes that the judge had taken: "evident care…to ensure that the order did not go beyond what might fairly be required of Rakisons" and that Rakisons, as the party against whom the order was directed, were not objecting to it. It seems to me that nothing in that case even begins to justify the wide-ranging detailed requests for disclosure and evidence sought by the claimant in its 39 questions in the present case.

42. In *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2008] EWHC 2048 (Admin); [2009] 1 WLR 2579* , the claimant, Binyam Mohamed, succeeded in obtaining Norwich Pharmacal relief in the form of an order that the Secretary of State disclose material which might support his defence in American criminal proceedings, to the effect that a confession had been obtained by torture and cruel, inhuman and degrading treatment to which he claimed to have been subjected by the United States authorities and others on their behalf, and which the United Kingdom security services were said to have facilitated. The wrongdoing had occurred in Afghanistan and Guantanamo Bay. In fact, it was not appreciated in the protracted proceedings in the Divisional Court and the Court of Appeal that there was a statutory prohibition against the grant of Norwich Pharmacal relief, as Lord Judge CJ pointed out in his judgment in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118; [2014] QB 112* at [2].

43. In the event, the decision in Mohamed was disapproved in Omar , on the basis that it was, in effect, decided *per incuriam* . In the circumstances, its value in the present context must be strictly limited, although Mr Akkouh is entitled to invite the court to look at the order made and to submit that, if the court had had jurisdiction to make the order, then it would have been properly made. The documents sought in that case are set out in [135] of the judgment of the Divisional Court (Thomas LJ and Lloyd Jones J, as they then were), and consisted of Type A, documents and information specific to Binyam Mohamed and Type B, general information about matters such as rendition and treatment of detainees.

44. At [128] to [132] of the judgment the Divisional Court set out the legal principles derived from Norwich Pharmacal itself, Bankers Trust v Shapira and other cases, concluding at [132]:

> "In considering the scope of what can be ordered and the application of the principles in Norwich Pharmacal in an entirely novel area outside the commercial, confidentiality and tracing cases where the jurisdiction has previously been considered, it is important to bear in mind the statements of the highest authority that the remedy is a flexible one." [The Court then cites [57] of Lord Woolf CJ's speech in Ashworth as quoted at [28] above].

45. Mr Akkouh relied in the present context on what the Divisional Court then said at [133] and [134] of its judgment:

> "133. It seems to us, therefore, that although the action cannot be one used for wide-ranging discovery or the gathering of evidence and is strictly confined to necessary information, and the court must always consider what is proportionate and the expense involved, the scope of what can be ordered must depend on the factual circumstances of each 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 & Co Ltd v Nexen Petroleum UK Ltd [2005] EWHC 625 (Ch) at paragraph 18 as "the 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.
>
> 134. We accept that the justification for the extension to the provision of more information than merely the identity of the individual or a certain specific fact was justified on the basis that equity was always prepared to assist the tracing of assets. However where in this truly exceptional case information is said to be necessary to exculpate an individual facing a possible death penalty if convicted, we consider that a court is entitled to exercise the jurisdiction to order certain specific

> information be made available to serve the ends of justice, without the narrow circumscription that some observations suggest. A system of law under which it is permissible to order the provision of information to trace a person's property, but under which it was not permissible to order the provision of information to assist in the protection of a person's life and liberty would be difficult to justify."

46. In my judgment, what is of significance in the context of the debate in the present case, as to the appropriate scope of a Norwich Pharmacal order, is that the Divisional Court makes it quite clear that the jurisdiction cannot be used for wide-ranging discovery or the gathering of evidence, but is strictly confined to necessary information. Although, as set out hereafter in relation to the question of whether the Norwich Pharmacal jurisdiction is excluded by the statutory regime under the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act"), the Court of Appeal in Omar disapproved the distinction drawn between evidence and information by Sir John Thomas P (as he then was) in the Divisional Court in that case, I still consider that what the Divisional Court said in Mohamed at [133] confirmed an important limitation on the scope of the jurisdiction: it cannot be used for wide-ranging discovery or the gathering of evidence.

47. It is also instructive in that context to see what order the Divisional Court was actually prepared to make in Mohamed . At [138] the Divisional Court dismissed any application in relation to Type B information and said:

> "In our view, there can be no warrant for seeking documents of Type B; this is a wide ranging request for discovery and not for specific information necessary for the defence of BM. In principle, specific information within Type A is, in our view, and subject to the exercise of our discretion, within the scope of a properly made request. It is not possible for us to be more precise at this stage and it is envisaged that we may need to consider each request in more detail if the parties cannot agree on what information is to be provided and the form in which it is to be provided. It may be sufficient for a statement to be provided covering the information or a redacted document or documents relating specifically to the information."

48. Then, at the end of their conclusions at [147] the Divisional Court said:

> "Relief under Norwich Pharmacal principles is an exceptional remedy and its application to the present circumstances is unprecedented. We have carefully weighed all the circumstances and considered whether we should extend the relief to the claim made in this case. We have concluded, subject to issues of public interest immunity and similar considerations that would also affect the exercise of our discretion, that we will, in the unique circumstances of this case, order the provision of the specific information broadly described as Type A in a form to be agreed or decided by us. We refuse to order the provision of information broadly described as Type B."

49. Mr Akkouh submitted, by reference to what was listed as Type A in [135], that this was a pretty wide order. I am not sure that that necessarily follows, since one does not know exactly what was ordered to be disclosed after consideration of issues of public interest immunity and the like and the exercise of discretion. As I said during the course of argument, I rather doubt that the Divisional Court will have ordered some of the Type A requests, such as item (6): *"Any evidence that the United Kingdom has failed to provide BM with assistance that should have been provided"* , on the basis that that request and some of the others as well would be regarded as requests for wide-ranging disclosure.

50. In any event, even if the order actually made was a wide one, it will have been no more than the Divisional Court considered necessary and proportionate in what they regarded as a truly exceptional case. In making his submissions about

Mohamed , Mr Akkouh was constrained to accept, it seems to me correctly, that he could not say that the present case was a truly exceptional one like Mohamed or P v T .

51. *The Rugby Football Union v Consolidated Information Services Limited (formerly Viagogo Limited) (in liquidation) [2012] UKSC 55; [2012] 1 WLR 3333* concerned tickets for the Autumn International 2010 and Six Nations 2011 matches held at Twickenham. The claimant alleged that the defendant permitted a large number of such tickets to be advertised on its website for sale at prices far above face value. It was contended that both the sellers and purchasers of such tickets had committed actionable wrongs against the claimant, which makes great efforts to prevent sales of tickets at an inflated price on a black market. The claimant contended that the defendant had become innocently involved in such wrongdoing, so that the court should make a Norwich Pharmacal order, requiring the defendant to identify the persons advertising and selling such tickets and identifying the tickets so sold by block, row, seat number and price.

52. The judge at first instance, Tugendhat J, granted the order sought ([2011] EWHC 764 (QB)) and his decision was upheld by the Court of Appeal on the basis that it was impossible to fault his exercise of discretion once it was clear that the order was necessary and proportionate: see [2011] EWCA Civ 1585; [2012] FSR 11 per Longmore LJ at [30]. The defendant's appeal was dismissed by the Supreme Court which confirmed the order made, which was as set out in [12] of the judgment of Tugendhat J:

> "a) the names and addresses of the people who have advertised for sale and/or sold RFU tickets ("the tickets") via www.viagogo.co.uk and www.viagogo.com ("the websites") and/or via the respondent directly, to the autumn international 2010 matches held at Twickenham Stadium;
>
> b) the names and addresses of the people who have advertised and/or sold tickets via the website and/or via the respondent directly to the Six Nations 2011 matches to be held at Twickenham Stadium;
>
> c) the full details of all the tickets advertised for sale on the Websites and/or otherwise via the Respondent for the Autumn International 2010 and Six Nations 2011 matches including but not limited to in the case of each Ticket the gate, block, row and seat number and the price at which the Ticket was advertised for sale;
>
> d) [similar detail as to the price at which the Ticket was sold]."

53. Mr Akkouh submitted that that was a case where the claimant had none of the information required to start an action and, given that the disclosure related not just to a few rogue ticket sellers but literally thousands of people who had used the website, it was a case of extremely wide disclosure indeed. I was not convinced by those submissions. Whilst it was the case that the claimant did not know the identity of the sellers and purchasers i.e. the wrongdoers, that was a clear case of wrongdoing, where the claimant had a good arguable case, but did not know precisely who to sue. To that extent, leaving aside the number of wrongdoers, that case was what might be described as a paradigm case for Norwich Pharmacal relief. As Longmore LJ said at [22] of his judgment in the Court of Appeal:

> "I do not consider therefore that the judge was wrong to hold that it was arguable that wrongs had been committed against the RFU by unidentified persons. Viagogo has always accepted that, if there were such arguable wrongs, they had become mixed up with them…"

54. By the time the case was before the Supreme Court, that point had been conceded. As Lord Kerr said at [6] of his judgment:

> "The RFU contends that arguable wrongs are involved in the advertisement and sale of tickets at above face value through the website. The sale of tickets at above face value, it is argued, impinges directly on the RFU's policy of promoting the sport of rugby by allowing tickets to be sold at affordable prices. It is no longer disputed that the sale of tickets in the manner facilitated by Viagogo's website arguably constitutes an actionable wrong."

55. Likewise, leaving aside the number of wrongdoers required to be identified by the order, I agree with Mr Chapman QC that what was ordered was not wide-ranging disclosure, but a focused order in order to find out who it was who was selling and buying the tickets. To that extent, the order was what might be described as a paradigm, precise Norwich Pharmacal order, designed to ascertain the identity of the wrongdoers.

56. Finally, Mr Akkouh relied upon the decision of Coulson J in *Shlaimoun v Mining Technologies International Inc [2011] EWHC 3278 (QB); [2012] 1 WLR 1276* , which is a case that I will need to consider with some care in relation to the question of whether the Norwich Pharmacal jurisdiction is excluded by the statutory regime under the 1975 Act. In that case, Mr Lipic, the chief executive officer of the respondent company was introduced to a Mr Korakianitis, who explained how a deposit of U.S. $100 million could be traded in the money markets, with a return of five times the original investment within 10 to 30 days. Following a series of meetings, it was agreed that the respondent company would provide the second applicant, Infina Fund Ltd, of which the first applicant was the director and owner, with U.S. $2 million for investment purposes. The respondent company transferred that sum into the second applicant's bank account in England with NatWest on 27 May 2010. The money was promptly transferred out of that account and its whereabouts were unknown.

57. On 9 February 2011, on the respondent company's application, a Deputy Master made a Norwich Pharmacal / Bankers Trust order against NatWest, ordering the bank to disclose the balances in the applicants' accounts, all correspondence passing between the applicants and the bank since 27 May 2010 concerning the transfer of U.S. $2 million from the company to the applicants on that date, and statements and internal memoranda relating to any account held by the applicants concerning the transfer. The documents provided pursuant to that order revealed that large sums had been transferred by Korakianitis and the first applicant to an account at Barclays Bank. This led to another Master making an order in similar terms against Barclays. The documents disclosed pursuant to those orders formed an important part of the respondent company's claim against a whole series of defendants, including the applicants, for fraudulent misrepresentation, breach of fiduciary duty and conversion, in Ontario, Canada.

58. By application made to the Court in October 2011, the applicants sought to set aside the two orders and sought an injunction restraining the respondent from using the documents in the Ontario proceedings and in related proceedings in California, on the grounds that the original Norwich Pharmacal / Bankers Trust proceedings were an abuse of process, because the documents were then used for the purposes of foreign proceedings and/or their use was a breach of the collateral undertaking in CPR 31.22 .

59. Mr Akkouh relied upon this case at this stage of the argument in relation to what he described as the scope of the information sought and the reasons for seeking it. Coulson J dealt with this at [20] of the judgment:

> "Mr Hanham's abuse submissions were predicated on the assumption that it must have been apparent to the respondent when they made their 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 (see paragraph

> 9 above) 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."

60. I shall return to the point about the respondent company being unsure of what claims might be brought and where, in relation to the jurisdiction issue, but for the present, Mr Akkouh focused on the sentence: "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." He submitted that that was a neat encapsulation of where the Norwich Pharmacal remedy had got to, on the current state of the law. Mr Akkouh may well be right about that, but in my judgment, it does not assist him in relation to the wide form of relief sought in the present case. That was a case where there was the clearest wrongdoing: the respondent had been defrauded of U.S. $2 million and did not know where the money was. The orders made were not wide ranging, but in a narrow compass, focused on the banks disclosing what they had done with the money and pursuant to whose instructions, in effect to enable the respondent to follow the money.

61. In my judgment, despite Mr Akkouh's submissions to the effect that, as the Norwich Pharmacal jurisdiction has developed, the scope of orders granted has widened to include, where appropriate, extensive orders, the true position is that the jurisdiction remains in a narrow scope. In that context, there is an illuminating analysis of the scope of the jurisdiction by Lord Mance JSC in the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36; [2015] AC 1675* at [139]-[140]. Although his was a dissenting judgment on the particular issue as to whether the relevant common law power (not the Norwich Pharmacal jurisdiction) existed, this part of his judgment does not seem controversial and, in my judgment, is entirely correct:

> "139. It is notable that, even in the context of wrongdoing, the courts have been at pains to emphasise the narrow scope of the Norwich Pharmacal jurisdiction. It is "an exceptional one": *Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2033* , para 57, per Lord Woolf CJ. It depends upon the existence of wrongdoing. The person with information must have been mixed up, however innocently in wrongdoing: *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118, [2014] QB 112* . Originally the jurisdiction was confined to discovery of the identity of the wrongdoer: Ashworth Hospital Authority , para 26, per Lord Woolf CJ; *Arab Monetary Fund v Hashim (No 5) [1992] 2 All ER 911* , 914, per Hoffmann J, emphasising that it was "no authority for imposing upon 'mixed up' third parties a general obligation to give discovery or information when the identity of the defendant is already known."
>
> 140. More recently, the Divisional Court has said that Norwich Pharmacal may extend beyond the discovery of the identity of a wrongdoer or of a "missing piece of the jigsaw", but under the strict caveat that "the action cannot be used for wide-ranging discovery or the gathering of evidence and is strictly confined to necessary information": *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2009] 1 WLR 2579* , para 133, cited by the Court of Appeal in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2011] EWCA Civ 1587* , paras 4 and 18."

62. As that analysis demonstrates, the Norwich Pharmacal jurisdiction remains an exceptional jurisdiction with a narrow scope. The court will not permit the jurisdiction to be used for wide-ranging disclosure or gathering of evidence, as opposed to focused disclosure of necessary information: see the judgment of Rimer J in Axa and the Divisional Court in Mohamed at [133]. It clearly does not extend to the sort of wide-ranging requests set out in the schedule to the draft order in the present case. Furthermore, it is impermissible to use the jurisdiction as a fishing expedition to establish whether or not the claimant has a good arguable case or not. This emerges from the decision in Norwich Pharmacal itself, particularly in the speech of Lord Cross of Chelsea, in the passage where he approves the Post case to which Rimer J refers in Axa as cited at [23] above. I agree with Rimer J that Lord Cross was approving the whole of the passage he cited from the Post case, including the statement that bills of discovery could not be used: "to enable a plaintiff to fish for information of any causes of action he

may have against other persons than the defendant". For reasons I will come to when I analyse the facts more closely, this application falls foul of that restriction. In a very real sense, it is a fishing expedition.

Whether the Norwich Pharmacal jurisdiction is excluded in relation to foreign proceedings by the statutory regime under the 1975 Act

63. Mr Chapman QC submitted that, even if the claimant has a good arguable case, it is one which could only be pursued in foreign proceedings, primarily in Cyprus or in Russia and that, in view of the claimant's case in relation to the 2005 shareholders agreement as set out at [5] above, it is not open to the claimant to contend that it would have a good arguable case in any arbitration or court proceedings brought in England. In relation to any such foreign proceedings, the jurisdiction of the court to grant Norwich Pharmacal relief is precluded by the exclusive statutory regime of the 1975 Act.

64. The starting point is the 1975 Act. This provides, *inter alia* , as follows:

> **"1 Application to United Kingdom court for assistance in obtaining evidence for civil proceedings in other court.**
>
> Where an application is made to the High Court, the Court of Session or the High Court of Justice in Northern Ireland for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, 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 any other part of the United Kingdom or in a country or territory outside the United Kingdom; 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 High Court, Court of Session or High Court of Justice in Northern Ireland, as the case may be, shall have the powers conferred on it by the following provisions of this Act.
>
> **2 Power of United Kingdom court to give effect to application for assistance.**
>
> (1) Subject to the provisions of this section, the High Court, the Court of Session and the High Court of Justice in Northern Ireland shall each have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.
>
> (2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision—
>
> (a) for the examination of witnesses, either orally or in writing;
>
> (b) for the production of documents;
>
> (c) for the inspection, photographing, preservation, custody or detention of any property;
>
> (d) for the taking of samples of any property and the carrying out of any experiments on or with any property;

(e) for the medical examination of any person;

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

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

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

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

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

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

3 Privilege of witnesses.

(1) A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give—

(a) in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction; or

(b) subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction. (2) Subsection (1)(b) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either—

(a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or

(b) conceded by the applicant for the order;

and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

(3) Without prejudice to subsection (1) above, a person shall not be compelled by virtue of an order under section 2 above to give any evidence if his doing so would be prejudicial to the security of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it would be so prejudicial for that person to do so shall be conclusive evidence of that fact.

> (4) In this section references to giving evidence include references to answering any question and to producing any document and the reference in subsection (2) above to the transmission of evidence given by a person shall be construed accordingly.
>
> **9 Interpretation**
>
> Nothing in this Act shall be construed as enabling any court to make an order that is binding on the Crown or on any person in his capacity as an officer or servant of the Crown."

65. In *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] AC 547* , Lord Diplock began his speech by saying (at pages 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 Evidence (Proceedings in other Jurisdictions) Act 1975 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."

66. He went on, in a passage at 633E-634A, to say:

> "My Lords, I would not be inclined to place any narrow interpretation on the phrase "evidence … to be obtained for the purposes of civil proceedings." The Act applies to civil proceedings pending or contemplated in courts and tribunals of all countries in the world. It is not confined to countries that are parties to the Hague Convention of March 18, 1970 ; nor is it limited to courts of law. It extends to tribunals. These courts and tribunals make use of a wide variety of different systems of procedure and rules of evidence in civil matters. In many of these systems it is not possible to draw a distinction between what would be regarded in England as the actual trial of a civil action and what precedes the trial. I do not think that in relation to those countries the expression "civil proceedings" in section 1 (b) can have the restricted meaning of the actual trial or hearing of a civil action; and, if this be so, it cannot bear a more restricted meaning in relation to those countries such as the United States of America, where as in England, it is possible to draw a distinction between the trial and what precedes the trial. In my view, "civil proceedings" includes all the procedural steps taken in the course of the proceedings from their institution up to and including their completion and, if the procedural system of the requesting court provides for the examination of witnesses or the production of documents for the purpose of enabling a party to ascertain whether there exists admissible evidence to support his own case or to contradict that of his opponent, the High Court has jurisdiction to make an order under the Act. Any limitation on the use of this procedure for the purpose of "fishing" discovery is, in my view, to be found in section 2."

67. As Maurice Kay LJ pointed out in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118; [2014] QB 112* at [23], the decision in the Westinghouse case was handed down on 1 December 1977, two years after the 1975 Act was passed and more than four years after the decision of the House of Lords in Norwich Pharmacal was

handed down in June 1973. Norwich Pharmacal was not cited in the Westinghouse case, so that, by definition, no express consideration was given to the question whether Norwich Pharmacal relief would be available in aid of actual or contemplated foreign proceedings. However, it seems to me that Lord Diplock's use of the words: "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 Evidence (Proceedings in other Jurisdictions) Act 1975 and nowhere else", is a strong pointer to the exclusion of Norwich Pharmacal relief in such a case.

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

69. Similarly, in Omar v Omar [1995] 1 WLR 1429 at 1435, Jacob J said:

> "It is accepted that the disclosed documents can be used in foreign proceedings aimed at following and tracing the money. For the same reasons I think they can also be used to establish ultimate liability in those foreign proceedings. This can be done without leave. True it is that Waller L.J. in the *Bankers Trust case [1980] 1 WLR 1274* , 1283 referred to "this action" but that was in the context of the absence of any foreign proceedings. The whole purpose of permitting tracing discovery would be lost if the money could not be effectively followed once it was abroad. If I were wrong thus far then I would willingly grant leave, a distinction between use of the material for pre-trial remedies but not for trial itself serving no sensible purpose. To remove doubt I think an order granting leave should be made, even if not strictly necessary."

70. As I have already observed above, *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2009] 1 WLR 2579; [2008] EWHC 2048 (Admin)* was a case where the Divisional Court held that Norwich Pharmacal relief could be granted to support the applicant's defence in criminal proceedings in the United States. As Lord Judge CJ said in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118; [2014] QB 112* at [2]:

> "Perhaps because when Mr Binyam Mohamed was removed from Afghanistan to Guantanamo Bay he had already established connections with this country as a resident with, from 2000, exceptional leave to remain, or perhaps because it was alleged that the wrongdoing to which he had been subjected had been facilitated by the United Kingdom Security Services, the question whether there was a statutory prohibition against the grant of Norwich Pharmacal relief when he was outside the jurisdiction, and the proceedings in which he was involved were taking place abroad, was not raised as an issue for consideration either before the Divisional Court or in this Court on appeal. None of us was invited to consider, and we did not consider the statutory arrangements in the Evidence (Proceedings in Other Jurisdictions) Act 1975 and the Crime (International Co-operation) Act 2003 ."

71. I should interpose at this point that the Crime (International Co-operation) Act 2003 ("the 2003 Act") is the equivalent statute to the 1975 Act in respect of foreign criminal proceedings. Sections 13 to 19 of the 2003 Act are concerned with requests from overseas authorities for the obtaining of evidence in the United Kingdom for use in a criminal investigation

or in criminal proceedings abroad. As Sir John Thomas P pointed out in the judgment of the Divisional Court in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 1737 (Admin); [2013] 1 All ER 161* at [33], until the enactment of this separate statutory regime for criminal proceedings, the 1975 Act also covered criminal proceedings.

72. The first case in which Norwich Pharmacal relief was being sought in relation to potential proceedings in a foreign jurisdiction, where regard was had to the Westinghouse principle and the 1975 Act, seems to have been the decision of Coulson J in *Shlaimoun v Mining Technologies International Inc [2011] EWHC 3278 (QB); [2012] 1 WLR 1276* . I have already set out a summary of that case and the relief sought at [56]-[60] above. However, the learned judge does not seem to have considered that the statutory regime excluded Norwich Pharmacal relief. Indeed, at one point in his judgment at [23] and [24] (set out below) he appears to have contemplated that the 1975 Act and the Norwich Pharmacal jurisdiction provided parallel or complementary procedures for obtaining documents subsequently deployed in foreign proceedings.

73. At [17] of the judgment, Coulson J states: "…there can be no doubt that Bankers Trust / Norwich Pharmacal orders can be used in order to obtain documents which are subsequently deployed in claims made in foreign jurisdictions." He goes on to quote extensively from the judgment of Jacob J in Omar v Omar . At [19] he then states:

> "In dealing with the power of the UK courts to order evidence in foreign jurisdictions, the leading case is *Rio Tinto Zinc Corporation & Others v Westinghouse [1978] AC 547* in which Lord Diplock said at 633A:
>
> > '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. There is no presumption that Parliament, in repealing one statute and substituting another in different terms, intended to make the minimum changes in the previous law that it is possible to reconcile with the actual wording of the new statute, particularly where, as in the instant case, the new statute is passed to give effect to a new international convention.'
>
> The new Act to which he referred was the Evidence (Proceedings in Other Jurisdictions) Act 1975 . That Act is supplemented by CPR Part 34 . Rule 34.3(2)(b) sets out a procedure to be followed by a party who wishes to have sight of the documents of a non-party before the trial of the substantive issues."

74. In the Analysis which follows, the learned judge makes the point at [20] (which I have already quoted in full at [59] above), that at the time of the two Norwich Pharmacal applications, the respondent company had been unsure what proceedings would be commenced, where or even whether proceedings would be viable at all and certainly it had not been apparent to the respondent that proceedings would be commenced in Ontario. He emphasises this point at [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."

75. At [23]-[24] he goes on to deal with the alternative reason why he concludes that it was not an abuse of the process to obtain documents pursuant to the Norwich Pharmacal jurisdiction and then use them to start proceedings in Ontario:

> "23. …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. On the contrary, there is clear authority, derived from Omar v Omar [1995] 1 WLR 1429 and the passage of Jacob J's judgment set out in paragraph 17 above, that a Bankers Trust / Norwich Pharmacal order can be sought in a situation which leads on to a claim in a foreign jurisdiction. Moreover, whilst I accept that an application could have been made under CPR 34.3(2)(b) and 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. The Bankers Trust / Norwich Pharmacal procedure is a stand-alone remedy which should not, unless absolutely necessary, be constrained by the more cumbersome process in CPR Part 34 ."

76. Three points seem to me to arise from those two paragraphs of the judgment. First, as I have said, Coulson J seems to be contemplating that a Norwich Pharmacal application and an application under the 1975 Act could be pursued as alternatives. Second, he considers that the 1975 Act: "is much more focused on the problems of oral evidence in ongoing foreign proceedings". Third, he considers that what Lord Diplock said in Westinghouse is dealing principally with proceedings that are up and running.

77. It does not seem to me that any of those three points is justified. The first point cannot stand in the light of the subsequent decision of the Court of Appeal in R (Omar) v Secretary of State for Foreign and Commonwealth Affairs . Although that case was concerned primarily with the 2003 Act, for the reasons elaborated below, I consider that the reasoning in that case as to why the statutory regime under that Act precludes the Norwich Pharmacal jurisdiction, is equally applicable to the 1975 Act. To the extent that the second point is seeking to draw the distinction between obtaining information and obtaining evidence which Sir John Thomas P drew in his judgment in Omar that distinction was expressly disapproved in this context by the Court of Appeal in Omar .

78. Furthermore, in my judgment, the second and third points are inconsistent with the express provisions of the 1975 Act. Section 2(2) makes it quite clear that the Act is not just focused on oral evidence, but on a wide range of evidential matters, including production of documents and inspection and preservation of property. Equally, section 1(b) provides that an order for evidence can be made under the Act, not just where proceedings have been instituted before the requesting court (are "up and running" in the judge's words), but where their "institution before that court is contemplated". All that is required is that there is some request for assistance from a foreign court or tribunal, which could be by way of pre-action procedure.

79. In the circumstances, it seems to me that this alternative reason for concluding that the Norwich Pharmacal jurisdiction could be legitimately deployed for obtaining documents for use in proceedings contemplated in a foreign jurisdiction is not justified. The actual decision in Shlaimoun can be justified, however, by reference to the first reason given by the judge for concluding that the Norwich Pharmacal applications were not an abuse of process. There had clearly been wrongdoing within the jurisdiction, namely the defrauding of the respondent and, as Coulson J held at [20] and [21] of the judgment, at the time of the applications, the respondent was trying to find out where the money had gone, and genuinely did not know

where any proceedings would be commenced, whether in England or abroad or whether such proceedings would be viable. It seems to me that is the true ratio of the decision and, as Mr Chapman QC said, it is not a case about proceedings being contemplated in a foreign jurisdiction at all.

80. Shlaimoun was decided in December 2011 and the Divisional Court (Sir John Thomas P and Burnett J) handed down judgment in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 1737 (Admin); [2013] 1 All ER 161* , on 26 June 2012. In that case, the claimants were charged in Uganda with murder and other offences arising out of the bombing in Kampala on 11 July 2010 for which Al-Shabaab claimed responsibility, which killed 76 people. The claimants alleged that they were subjected to ill-treatment amounting to torture or cruel, degrading and inhuman treatment by United Kingdom, United States and other foreign security services. In November 2011, the claimants petitioned the Constitutional Court in Uganda, contending that their rendition from Kenya to Uganda was illegal and they had been tortured and ill-treated, so that the criminal proceedings against them before the Ugandan High Court were unlawful and an abuse of process. In judicial review proceedings before the Divisional Court, they sought Norwich Pharmacal orders to obtain information and evidence concerning their rendition and ill-treatment from the Secretary of State, for use in the criminal proceedings and proceedings before the Constitutional Court in Uganda.

81. It appears from [31] of the judgment of the Divisional Court that the issue whether the court could order the provision of evidence for the proceedings in the Ugandan courts other than through the statutory regime, was not raised by the Secretary of State at the outset, but arose from a question by the court as to the interpretation of Norwich Pharmacal proceedings and the statutory regime. The case was then adjourned and the Divisional Court reconvened to hear further argument. The Divisional Court then considered the issue of principle, whether in the circumstances the claimants could pursue Norwich Pharmacal relief or whether the existence of the statutory regime excludes the use of the Norwich Pharmacal procedure to obtain what the claimants sought for use in the Ugandan proceedings, which were all characterised as criminal.

82. Once the point had been raised, it was contended on behalf of the Secretary of State that, as Parliament had legislated in relation to the provision of assistance to overseas states in connection with legal proceedings, the courts should respect the statutory regime and not permit it to be bypassed through the use of the Norwich Pharmacal procedure. Reliance was placed on the statement of principle by Lord Diplock in the Westinghouse case, which I quoted at [65] above. Reliance was also placed on what was said by Lord Donaldson MR in Re Pan American World Airways Inc's Application [1992] QB 854 at 859.

> "It is common ground that any power to make the order sought must be found in 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 they are incorporated by statute, with or without modification."

83. The Divisional Court set out at [36] a summary of the relevant part of the 2003 Act, sections 13 to 19 :

> "The second part of Chapter 2 (s. 13–19) covers requests by overseas authorities for assistance in obtaining evidence in the United Kingdom. Section 13 provides that the request can be made by a court exercising criminal jurisdiction or any other authority in a country outside the United Kingdom to the territorial authority for the part of the United Kingdom in which the evidence is sought. Section 29(9) defines the territorial authority for England and Wales as the Secretary of State; if the Secretary of State decides to provide assistance, then a court is nominated to receive the evidence under s.15. Section 15(5) provides that proceedings are governed by Schedule 1. Paragraphs 5(4), (5) and (6) provide important exemptions:
>
> '(4) A person cannot be compelled to give any evidence if his doing so would be prejudicial to the security of the United Kingdom.
>
> (5) A certificate signed by or on behalf of the Secretary of State or, where the court is in Scotland, the Lord Advocate to the effect that it would be so prejudicial for that person to do so is conclusive evidence of that fact."

(6) A person cannot be compelled to give any evidence in his capacity as an officer or servant of the Crown.'"

84. At [38], the Divisional Court set out a summary of the regime for civil proceedings under the 1975 Act:

"Before turning to the four sub-issues which arise, it is convenient briefly to refer to the regime for civil proceedings. Note 34.21.1 to CPR Rule 34.16-34.21 summarises that regime:

> 'The 1975 Act and these Rules should be read and applied in close conjunction, for together they provide a comprehensive, self-contained code for obtaining evidence in England for use in proceedings in foreign courts.'

Section 3(3) of the 1975 Act provides that a person cannot be compelled to give evidence, if doing so would be prejudicial to the security of the United Kingdom and that a certificate signed by the Secretary of State that it would be prejudicial is conclusive. Section 9 (4) provides that a court cannot make an order that is binding on any person in his capacity as an officer or servant of the Crown. It is important also to note that under s. 2(4) there is very substantial restriction on the power of the court to order disclosure:

> '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.'"

85. The Divisional Court then went on to consider, at [40] and [41] of the judgment, precisely what was being sought in the Norwich Pharmacal proceedings. The court stated that:

"40. …During the course of oral argument, [Ms Kaufmann QC] made clear that the claimants' purpose was to seek all and any evidence that the Government of the United Kingdom may hold which suggests either that the claimants were removed from Kenya to Uganda without due process or were ill-treated thereafter. As we have set out, it was their intention to introduce such material before the Constitutional Court in support of their Petition. Whilst hoping for chapter and verse

> about rendition it would be sufficient for the claimants' purpose to adduce a statement made by or on behalf of the Foreign Secretary that Her Majesty's Government is in possession of information which demonstrates that the claimants were rendered from Kenya to Uganda.
>
> 41. Whatever difficulties there may be in delineating the information that can be sought under Norwich Pharmacal proceedings and distinguishing it from evidence, they do not arise. What is sought is clearly evidence."

86. That conclusion, that what was being sought was evidence rather than just information, was one which the Divisional Court regarded as of importance, since it considered that, whilst information for use in foreign proceedings could be obtained pursuant to a Norwich Pharmacal order, evidence for use in foreign proceedings could not, but could only be obtained under the statutory regime. At [53] of the judgment, the Divisional Court said:

> "In our view, the decision of the Court of Appeal in *Smith Kline Ltd v Global Pharmaceuticals Ltd [1986] RPC 394* clearly shows that Norwich Pharmacal proceedings can be brought to obtain information as to the identity of persons and other details about them so that proceedings can be brought in a foreign state; this is the practice in intellectual property cases and such orders are included with Freezing or Search Orders. In Manufacturers Life Insurance Company v Harvest Hero [2002] HKCA 430 and Secilpar SL v Fiduciary Trust [2003–4] Gib LR the Courts of Hong Kong and Gibraltar have accepted that Norwich Pharmacal proceedings can be used to obtain information, as distinct from evidence, for the purposes of overseas proceedings. The distinction between evidence and information in these decisions is not entirely clear, but it is of no relevance in the present case because what is sought is evidence as we have set out at [42]-[43] above." [clearly a mistaken reference to [40] and [41]]

87. From [56] onwards, the Divisional Court then set out a detailed and erudite analysis of the powers of the courts before the statutory regime and of the legislative history of the statutory regime. It is not necessary to quote that analysis in full in this judgment, but I simply summarise the matters of particular relevance. First, whilst the Court of Chancery had developed through a bill in equity for discovery a power to require the examination of a witness overseas for the purposes of proceedings in England, there was no obverse power, through a bill in equity for discovery, to compel a person in England to give evidence for the purposes of overseas proceedings ([57]-[58] of the judgment, where the Divisional Court cites as authority for that proposition *Bent v Young (1838) 9 Sim 180* and *Dreyfus v Peruvian Guano Co (1889) 41 Ch D 151*).

88. In Post , (cited with approval by Lord Cross and Lord Kilbrandon in Norwich Pharmacal), the Supreme Court of Massachusetts held that a bill of discovery could be used to obtain the names of persons whom the claimants wished to sue in Ohio and other information about them which could be obtained in Massachusetts. The Court of Appeal in the Smith, Kline & French case had relied on Post in concluding that information could be sought in Norwich Pharmacal proceedings for the purposes of bringing proceedings overseas ([59]-[60] of the judgment where the Divisional Court also noted that the courts had made orders ancillary to freezing and search orders for information to be provided for use in overseas proceedings).

89. However, the wider power in United States courts to assist in obtaining testimony for use in another state, had no precedent in the English Court of Chancery so that, as the Divisional Court said at [61]: "It therefore appears that legislation was necessary to confer on the courts power to compel the giving of evidence to be used in overseas proceedings and that therefore the jurisdiction has always been exclusively statutory." The Divisional Court then set out the legislative history beginning with the Foreign Tribunals Evidence Act 1856 and recited at [62] that, with one exception, not currently relevant, the legislative provisions had all repealed by the 1975 Act.

90. The Divisional Court concluded at [63] and [64]:

> "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. The decision in Re Pan American World Airways Inc's Application [1992] QB 854 is striking, as the court quashed an order requiring a retired civil servant employed as a forensic scientist who had investigated the Lockerbie disaster to give evidence for the purpose of New York proceedings relating to that disaster. It did so on the basis that he was covered by the exemption in s.9(4) to which we have referred at [38] above. The court made clear it had no power to compel the provision of evidence by a Crown Servant.
>
> 64. Thus 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 the safeguards to which we have referred, and will refer in more detail, to be circumvented."

91. The Divisional Court then went on to consider whether it made any difference that the claimants might not be able to obtain the information sought through the statutory scheme, both because there was no procedure in Uganda and because a defendant could not use the scheme unless the court or the prosecutor agreed. They concluded at [66] that this made no difference:

> "66. In our judgment it matters not that there may be no procedure in Uganda for obtaining evidence from the UK to be used in those courts. For the reasons we have set out the statutory regime is the only means by which evidence for use in foreign proceedings may be obtained and, save in Binyam Mohamed (No 1) and Shaker Aamer , 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."

92. In the circumstances, the claims for Norwich Pharmacal relief by way of judicial review were dismissed by the Divisional Court. That decision was upheld by the Court of Appeal (Lord Judge CJ, Maurice Kay and Richards LJJ). The lead judgment was given by Maurice Kay LJ. At [10] he set out the issue:

> "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 Evidence (Proceedings in Other Jurisdictions) Act 1975 (the 1975 Act) and the Crime (International Cooperation) Act 2003 (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? In order to answer this question, it is first necessary to determine whether the relevant foreign proceedings are criminal or civil. In the present case it is common ground that both the prosecution of the appellants in Uganda and the petition to the Constitutional Court to which it has given rise are "criminal proceedings" within the meaning of the 2003 Act. The common ground also extends to acceptance of the proposition that whether or not a statutory regime is comprehensive so that it precludes the application of a common law alternative remedy is ultimately a question of statutory interpretation."

93. At [12] he dealt with and dismissed the distinction which the Divisional Court had drawn between information and evidence:

> "It is apparent from paragraph 63 of its judgment in the present case that the Divisional Court attached some importance to the fact that what the appellants 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."

94. The subsequent decision of the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36; [2015] AC 1675* (and specifically the judgment of Lord Sumption JSC), which I will deal with in more detail below, is relied upon by Mr Akkouh to suggest that the dismissal by Maurice Kay LJ of the distinction between information and evidence may not have been entirely correct as a general proposition. However, I consider that in the specific context of applications of this kind, it was correct and, in any event, given the clear conclusion by the Divisional Court, at [41] of its judgment, that what was sought there was evidence, the distinction may not matter. Equally, in my judgment, the distinction would not matter in the present case, since what is sought in the schedule to the draft order is clearly evidence, as even the most cursory examination of the 39 questions and the various sub-questions demonstrates. The quality of the requests as ones for evidence rather than merely information cannot be altered by Mr Akkouh attempting to narrow the requests.

95. At [15] of the judgment, Maurice Kay LJ drew attention to three important features of the statutory regime under sections 13 to 19 of the 2003 Act:

> "Sections 13 to 19 are concerned with requests from overseas authorities for the obtaining of evidence in the United Kingdom. Three important features are present. *First* , a request has to be directed to "the territorial authority", who is the Secretary of State or, in Scotland, the Lord Advocate: section 28(9). He then has a discretion as to whether to arrange for the evidence to be obtained: section 13(1)(a) – " *may* arrange". When he so arranges he may nominate a court to receive the evidence: section 15. *Secondly* , the request for assistance can only be made by "a court exercising criminal jurisdiction, or a prosecuting authority, in a country outside the United Kingdom" or by a similar authority: section 13(2). It cannot be made directly by or on behalf of a defendant in the foreign criminal proceedings. He would need to persuade the foreign court or prosecuting authority to make a request in his interests. *Thirdly* , proceedings in the nominated court are governed by Schedule 1, paragraph 5 of which includes the following provisions:
>
> '(4) A person cannot be compelled to give any evidence if his doing so would be prejudicial to the security of the United Kingdom.
>
> (5) A certificate signed by or on behalf of the Secretary of State … to the effect that it would be so prejudicial for that person to do so is conclusive evidence of that fact.
>
> (6) A person cannot be compelled to give any evidence in his capacity as an officer or servant of the Crown.'"

96. He then went on to discuss what he described at [21] as the "development potential" of the Norwich Pharmacal remedy, citing [57] of the speech of Lord Woolf CJ in Ashworth , but noted that: "On the other hand, and axiomatically, it cannot

penetrate an area fenced off by statute." Immediately after that observation, he said at [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 *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] AC 547* , Lord Diplock began his speech with these words" [Maurice Kay LJ then cited the passage I set out at [65] above, with the words: "and nowhere else" emphasised].

97. Maurice Kay LJ then dealt with how that statement has been regarded as authoritative in later cases:

> "23. …Although Ms Kaufmann seeks to diminish its authority by reference to a passage in which it was considered by Lord Goff in *Re State of Norway's Application [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 Re Pan American World Airways Inc [1992] 1 QB 894 took Lord Diplock's propositions to be authoritative: at page 859A. Moreover, in the recent case of *Schlaimoun 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 paragraph 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 Rio Tinto in the present case."

98. He dealt with the question of statutory interpretation at [24]-[25] in passages which are of sufficient importance to the present case to merit quoting in full:

> "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. Lord Dyson's judgment contains statements of principle in a number of passages. The following will suffice for present purposes:
>
> > '33. If the two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will almost certainly have been excluded by necessary implication. To do otherwise would circumvent the intention of Parliament …
> >
> > 34 The question is not whether there are any differences between the common law remedy and the statutory scheme. There may well be differences. The question is whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme … The question is whether, looked at as a whole, a common law remedy

> would be incompatible with the statutory scheme and could therefore not have been intended [to] co-exist with it.'
>
> Of course, in the present case there had been no instance of the Norwich Pharmacal remedy being used before the enactment of the 2003 Act to obtain information or evidence from a court in this jurisdiction for use in foreign criminal proceedings.
>
> 25. When one considers the Norwich Pharmacal remedy alongside the regime set out in the 2003 Act, certain points stand out as differences. I refer again to the three features of the 2003 Act described in paragraph 7, 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 Lord Dyson in Child Poverty Action Group , 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."

99. In [3] of his judgment, Lord Judge CJ described this examination of the jurisdiction issue by Maurice Kay LJ as "entirely persuasive". Furthermore, although Maurice Kay LJ states that they were dealing with the 2003 Act, not the 1975 Act, it is clear from a number of passages in the judgments (specifically [2] in the judgment of Lord Judge CJ and [10], [22] and the reference to the similar provisions in the 1975 Act to those in the 2003 Act in [25] of the judgment of Maurice Kay LJ) that the Court of Appeal considered that their conclusion that Norwich Pharmacal relief was not available when the statutory regime under the 2003 Act was in play, would be equally applicable to the statutory regime under the 1975 Act. This is also the interpretation placed upon Omar by *Hollander: Documentary Evidence* 12th edition at [4–13]-[4–14]. I return to this issue in more detail below, when I consider whether Norwich Pharmacal relief is excluded in this case because of the statutory regime of the 1975 Act.

100. Before turning to that issue, I should deal with what might be described as two "codas" to Omar . The first is that, Mr Akkouh submitted, the suggestion by Maurice Kay LJ in [25] of his judgment in Omar that in Norwich Pharmacal applications, the issue of national security would be relegated to a factor to be weighed up in the discretion as to whether to grant relief or not, is not correct. CPR 31.19 contains a procedure for applying without notice to withhold disclosure on the ground that disclosure would damage the public interest. Mr Akkouh submitted that when national security is considered in that context, in relation to which there would be a ministerial certificate, the courts are extremely wary of going behind such certificates, and if properly particularised would treat such a certificate as being conclusive.

101. Mr Akkouh relied upon the decision of the Court of Appeal in *Balfour v Foreign and Commonwealth Office [1994] 1 WLR 681* . The applicant was a member of the diplomatic service who claimed he had been unfairly dismissed. In industrial tribunal proceedings, the Foreign and Home Secretaries signed various certificates claiming public interest immunity objecting to the production of any evidence, documentary or otherwise, about the organisation of the security and intelligence services, their theatres of operation or their methods. The chairman of the industrial tribunal refused to order disclosure on the ground that she had no jurisdiction to go behind the certificates. The Employment Appeal tribunal dismissed the applicant's appeal and the Court of Appeal dismissed his further appeal. In doing so, in the judgment of the Court (Russell, McCowan and Hirst LJJ), they referred at 686–8 to what they described as "powerful dicta" from the decisions of the House of Lords

in *Conway v Rimmer [1968] AC 910* and *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374* , including this passage from the speech of Lord Diplock in the latter case at 412:

> "National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."

102. The Court of Appeal declined to depart from these dicta, saying at 688G-H:

> "Even if not constrained by authority we firmly decline to accept that invitation, for it seems to us to be contrary to principle and to good sense. In this case the court has not abdicated its responsibility, but it has recognised the constraints placed upon it by the terms of the certificates issued by the executive. There must always be vigilance by the courts to ensure that public interest immunity of whatever kind is raised only in appropriate circumstances and with appropriate particularity, but once there is an actual or potential risk to national security demonstrated by an appropriate certificate the court should not exercise its right to inspect. We recognise the importance of this case to the applicant but, in our judgment, the uninhibited prosecution of his claim for unfair dismissal cannot prevail. We do not accept, as counsel submitted we should, that in such a situation a respondent should abandon his defence just as the Crown will abandon a prosecution where there exists a risk of the innocent being convicted."

103. The second "coda" is one I have already alluded to, the effect of the decision of the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36; [2015] AC 1675* . That case was not a Norwich Pharmacal application. It was a case where the liquidators of a Cayman Islands company, appointed by the Cayman Islands court, were seeking disclosure in Bermuda, from the Bermudian auditors of the company, of information relating to the company's assets, pursuant to a common law power to assist a foreign court with insolvency jurisdiction by ordering production of information. The majority of the Privy Council (Lords Clarke and Sumption JJSC and Lord Collins) recognised the existence of the common law power (see per Lord Sumption JSC at [25]), but dismissed the liquidators' appeal on the basis that the Bermudian court should not exercise the common law power, because the Cayman Islands courts have no such power (see per Lord Sumption JSC at [29]-[30]). The minority (Lords Neuberger PSC and Lord Mance JSC) dismissed the appeal on the basis that the common law power did not exist.

104. In analysing whether the common law power existed, Lord Sumption discussed, at [20] of his judgment, how the Court of Chancery had developed an inherent power to compel a person to give evidence in legal proceedings in England, but not in overseas proceedings:

> "The fundamental question is whether a power of compulsion of this kind requires a statutory basis. For this purpose, it is important to distinguish between evidence and information. By evidence, the Board means evidence to prove facts in legal proceedings. The power to compel a person to give evidence in legal proceedings was not originally statutory. Like the power to order discovery, it was an inherent power of the Court of Chancery, devised by judges to remedy the technical and procedural limitations associated with the proof of fact in courts of common law. In England, it was first put on a statutory basis by the Perjury Act of 1563, which extended the power to issue a *subpoena ad testificandum* to all courts of record. In Bermuda, its basis is now section 4 of the Evidence Act 1905 . The origins of these powers in the procedural history of the English courts go

> some way to explain why those courts have always disclaimed any inherent power to compel the furnishing of evidence for use in foreign proceedings: see *Bent v Young (1838) 9 Sim 180* , 192 (Shadwell V-C); *Dreyfus v Peruvian Guano Co (1889) 41 Ch D 151* ; R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] 1 All ER 161 (Div Ct) , paras 58-63. No such power existed in England until it was created by statute, initially by the Foreign Tribunals Evidence Act 1856 ."

105. At [21] he then emphasised that what was sought in that case was not evidence for use in proceedings, but information required for the performance of the liquidators' duty and he considered the broader significance of the distinction between information and evidence, despite what the Court of Appeal had said in Omar :

> "What is sought in this case, however, is not evidence for use in forensic proceedings but information required for the performance of the liquidators' ordinary duty of identifying and taking possession of assets of the company. In *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2014] QB 112* , at para 12 the Court of Appeal doubted whether the distinction between evidence and information was helpful, and their doubt was probably justified in that case, where information was being sought for use in foreign proceedings. But the distinction is of broader legal significance. The courts have never been as inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy calls for it."

106. He then went on to describe at [22] how the House of Lords in Norwich Pharmacal :

> "…recognised a common law power to order the production of information about the identity of a wrongdoer where the defendant had been involved, even innocently, in the wrong. Such an order, as they recognised, would not have been available to compel the giving of evidence, because of the long-standing objection of courts of equity to a bill of discovery against a "mere witness": see, in particular, pp 173–174 (Lord Reid). In *Smith Kline & French Ltd v Global Pharmaceutics Ltd [1986] RPC 394* , the Court of Appeal in England applied the same principle to information about the identity of a wrongdoer outside the jurisdiction. These decisions were founded not on the procedural requirements for proving facts in English litigation, but on the recognition of a duty to provide the information in certain circumstances. The duty of a person who had become involved in another's wrongdoing was held to be to "assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers": [1974] AC 133, 175 (Lord Reid), cf. p 195 (Lord Cross). It is, however, clear that this duty was of a somewhat notional kind. It was not a legal duty in the ordinary sense of the term. Failure to supply the information would not give rise to an action for damages. The concept of duty was simply a way of saying that the court would require disclosure. Indeed, Lord Morris of Borth-y-Gest (pp 181–182) thought that the duty would not arise until the court had held that the conditions were satisfied. Viscount Dilhorne (p 190) agreed and so, it seems, did Lord Cross (p 198). Lord Kilbrandon, citing with apparent approval the South African decision in Colonial Government v Tatham (1902) 23 Natal LR 153 , observed (p 205) that the duty lay 'rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff.'"

107. Mr Chapman QC drew the court's attention to a passage in the next paragraph of the judgment, [23]:

> "The present case is not a Norwich Pharmacal case. The significance of Norwich Pharmacal in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle. In the Board's opinion, an analogous power arises in the present case. Relief is not being sought by way of assistance to a litigant who can rely on ordinary forensic procedures for the purpose. It is being sought by the officers of a foreign court. The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation."

108. That paragraph is important, because it confirms (as does Lord Clarke JSC at [111] of his judgment), that the significance of the decision in Norwich Pharmacal in the context of that case: "is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle."

109. So far as Lord Sumption JSC's point about there still being a significant distinction between evidence and information is concerned, it does not seem to me that this assists the claimant in the present case for several reasons. First, that was not a Norwich Pharmacal case. In his dissenting judgment, to which I have already referred in the context of the question of the scope of the Norwich Pharmacal jurisdiction, Lord Mance JSC pointed out at [128], that the appellants had not relied upon the decision of the House of Lords in Norwich Pharmacal in their case before the Privy Council and that it only arose in passing, in the exchange between counsel and their Lordships in the appellants' oral submissions in reply. In any event, Lord Sumption does say that the doubt about the distinction was probably justified in Omar and, in my judgment, the doubt would be equally justified here. Mr Akkouh may submit that what is being sought here is "information", but, on any view, what is really being sought is evidence to establish the claimant's case that there was actionable wrongdoing.

110. Second, what is said by Lord Sumption in [21] is clearly obiter, and whilst it is nonetheless to be treated with great respect, I note that, in his dissenting judgment, Lord Mance JSC expressed the same scepticism about the distinction between information and disclosure as Maurice Kay LJ. At [141]-[142] he says:

> "141. Lord Sumption suggests (para 20) that it will be possible in the present situation to draw a distinction between information which can permissibly be sought and evidence which cannot. At least two problems arise in this connection. First, it is, as I have noted, unclear whether any distinction or limitation is proposed between on the one hand information and documentation relating to assets and on the other hand information and documentation relating more generally to the company's affairs. Any such distinction or limitation seems likely in any event to be in practice illusory. An insolvency practitioner is ultimately only interested in assets and their distribution. Any questioning put, or information or documentation sought, will be scrutinised with a view to identifying assets, in whatever form, even if they only consist of potential claims for maladministration or negligence.
>
> 142. The second problem is that the distinction between information and evidence seems likely also to be illusory. Evidence is at least confined to the issues in identified litigation, domestic or foreign. In contrast, the proposed relief sought against PwC is completely unconfined, in nature and scope. The later *Omar case [2013] EWCA Civ 118, [2014] QB 112* highlights (para 12) a justified

> scepticism about maintaining a distinction between information and evidence which gives cause for caution about further extension by analogy of the Norwich Pharmacal jurisdiction to circumstances where identifiable wrongdoing is not in issue."

111. Third, even assuming that Maurice Kay LJ was wrong to reject the distinction between information and evidence, all that would follow in the context of the jurisdiction issue, is that the distinction was correctly drawn by the Divisional Court. In other words, cases like Smith Kline & French which decide that the Norwich Pharmacal jurisdiction can be used to order disclosure of limited information for use in overseas proceedings, may have been correctly decided, but this in no way affects the ultimate decision, of both the Divisional Court and the Court of Appeal, that the Norwich Pharmacal jurisdiction cannot be used to obtain evidence for use in overseas proceedings, because of the statutory regime. Given that, as I have concluded, the claimant is seeking to obtain evidence, it would seem that, if the statutory regime is applicable, it will preclude any attempt to use Norwich Pharmacal to obtain answers to the claimant's 39 questions for use in proceedings in Cyprus or elsewhere overseas. It is to that issue that I now turn.

Is Norwich Pharmacal relief excluded by the statutory regime of the 1975 Act in this case?

112. In considering whether the present application is precluded by the statutory regime, an important starting point is to look at what potential remedies the claimant says it will seek, if its application is successful. These are set out at [80] of Mr Akkouh's skeleton argument in these terms:

> "If, as the Claimant suspects, it is correct that the Polyplastic Group's profits have been improperly diverted, it will (whether directly or indirectly) have a range of potential remedies, which will include:
>
> a. A claim against Strongfield for breach of the 2012 shareholders' agreement, because (for instance) it has failed to ensure that 25% of the Polyplastic Group's net profit has been distributed [clause 3.3]. Those potential claims would be subject to Cypriot law and Cypriot arbitration [clauses 14.1 and 14.3].
>
> b. Claims against Strongfield for breach of the 2005 shareholders' agreement, *if* Mr Buyanovsky is correct that it was not superseded by the 2012 Shareholders Agreement because the two agreements *"have completely different subject matters and intentions behind them"* : [a reference to [63] of the defendant's witness statement. Those potential claims would be subject to English law and English arbitration [clause 12.4].
>
> c. Potential claims against the recipients of assets which have been misappropriated from the Polyplastic Group and/or those responsible for such misappropriation. Such recipients may, for instance, include the St Vincent registered EPTH, or the Hungarian Violett Polymer, or companies within the Polymerteplo Group, or other recipients that are identified as a result of information that is given. If wrongdoing is established, the Claimant will of course have to consider how best to pursue such claims, whether by (i) persuading the current management that they should be brought, (ii) procuring changes to the directors of

> APG and thereafter PGLLC and/or (iii) seeking permission to bring derivative (or double derivative) proceedings."

113. The only one of these claims which could even arguably be brought in England is the second one, a claim under the 2005 shareholders' agreement. If, as the claimants contend (as set out at [5] above), it was understood and agreed that that agreement would be terminated and superseded by the 2012 shareholders agreement, it is difficult to see how the claimant can now say it has a sufficient good arguable case under the very agreement it says has been terminated and superseded.

114. Mr Akkouh seeks to avoid that conundrum by submitting that, on the basis of the defendant's evidence, the 2005 agreement continued to apply in respect of breaches of that agreement committed before 31 January 2012, when the 2012 shareholders agreement came into effect. Even assuming that the argument were open to the claimant notwithstanding the categorical terms of [12] of Mr Armstrong's witness statement, it is of very limited assistance to the claimant here. Any claim arising out of alleged wrongdoing by Strongfield in respect of conduct or events after 31 January 2012, whether in respect of cost shifting, non-payment of dividends, transfer pricing or anything else could not be brought under the 2005 Agreement, but would have to be brought under the 2012 Agreement which provides for Cyprus law and arbitration.

115. As is demonstrated by my detailed factual analysis set out below, the vast preponderance of any claims the claimant wishes to bring relate to the period after 31 January 2012 and, therefore, on any view, cannot be brought under the 2005 shareholders agreement. That is borne out by the fact that, other than in relation to the Loans Ground, the questions set out in the schedule to the draft order are all directed to evidence and disclosure after January 2012.

116. Furthermore, even if there were some residual claims which could be brought under the 2005 shareholders agreement, given that the claimant has not commenced LCIA arbitration against Strongfield under the 2005 shareholders agreement and it is now December 2016, obvious limitation issues would arise in respect of any claim under that agreement for alleged breaches prior to December 2010. This question was not explored at the hearing, but is an issue which bears on the question of whether the claimant has a good arguable case so far as any breaches prior to December 2010 are concerned. This is not a case in which the claimant has just discovered the matters of which it complains. As Mr Chapman QC submitted, nearly all the matters in question were known to the claimant by December 2013 at the latest. It seems to me that the only claims against Strongfield, which could be brought under the 2005 shareholders agreement which would realistically achieve even the relatively low threshold of good arguable case based on the test in The Niedersachsen , are claims in relation to alleged wrongdoing committed in a relatively narrow window between December 2010 and the end of January 2012.

117. So far as any of the vague claims against entities other than Strongfield intimated in [80(c)] of the claimant's skeleton argument are concerned, no basis is put forward for any suggestion that these claims could be brought in England: if they could be brought anywhere it would be in Russia, St Vincent or Hungary.

118. In relation to all the potential claims identified in [80] of the claimant's skeleton argument other than those which might be brought against Strongfield under the 2005 shareholders agreement, the only claims that could be brought in this jurisdiction, Mr Akkouh submitted that the statutory regime under the 1975 Act is nonetheless not engaged for a number of reasons. First, he submitted that the claimant in this case was in the same position as the claimant in Shlaimoun , that it was not sure what proceedings might be brought where, or whether any claim against Strongfield would be under the 2005 shareholders agreement or the 2012 shareholders agreement, until the disclosure sought by the draft order had been given.

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

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

121. I agree with Mr Chapman QC that it is not permissible to bypass the statutory regime simply by asserting that the case is at some earlier stage before the institution of proceedings abroad is contemplated. The reality in this case is that one of two situations must pertain. First, on the basis of the allegations which the claimant already makes, it has sufficient to launch a claim whether here or abroad, which must be *a fortiori* the position in relation to the dividends issue, where the claimant no longer pursues Norwich Pharmacal relief on the basis that sufficient information has been provided in the defendant's witness statement. This can only be on the basis that the claimant has sufficient information to plead its claim in relation to the dividends issue. Second, the alternative is that, whilst the claimant suspects wrongdoing and wishes to bring a claim against Strongfield in Cyprus arbitration or against the Polyplastic Group, Dameka Finance Limited, ETPHL or Violett Polymer in a foreign jurisdiction, the claimant cannot show a sufficiently good arguable case of wrongdoing to satisfy the first threshold condition to Norwich Pharmacal relief (even if the jurisdiction were available to obtain evidence or disclosure for use in foreign proceedings).

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

123. 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”.

124. Mr Akkouh made a valiant effort to establish that, whatever the position might be under the 2003 Act, it could not be said, in the case of the 1975 Act, that the differences between the common law remedy under the Norwich Pharmacal procedure and the statutory regime under the Act, were so substantial that they demonstrate that Parliament cannot have intended the common law remedy to survive the introduction of the statutory regime, the test formulated by Lord Dyson JSC in the Child Poverty Action Group case.

125. Mr Akkouh accepted that the third important feature of the statutory regime under the 2003 Act identified by Maurice Kay LJ in [15] of his judgment in Omar , was also present under the 1975 Act. The provisions of Schedule 1 paragraph 5 about national security and Crown servants replicate equivalent provisions in section 3(3) and 9(4) of the 1975 Act. However, he made the point which I have already addressed at [100]-[103] above, that, even outside the statutory regime, in relation to national security, a properly particularised ministerial certificate would be treated by the courts as conclusive. It follows that, contrary to what Maurice Kay LJ said at [25], issues of national security would not be relegated to a discretionary factor in a Norwich Pharmacal application. Any distinction between the position under the statutory regimes and the position at common law is more apparent than real.

126. So far as Crown servants not being compellable is concerned, Mr Akkouh accepted that it may well be that, in the case of a claim against a Crown servant, the differences between the position under the two statutory regimes and the position at common law are substantial, which he posited might be the explanation for the decision in Omar . However, the differences could not be substantial where the Crown servants exception (and for that matter the exception in relation to national security) could have no conceivable application, such as in the present case of private litigation.

127. In relation to the first two important features identified by Maurice Kay LJ at [15], that any request for assistance has to be addressed to the "territorial authority" who is the Secretary of State, and that the request can only be made by "a court exercising criminal jurisdiction, or a prosecuting authority, in a country outside the United Kingdom", Mr Akkouh submitted that there was a significant difference between the position under the 2003 Act and the position under the 1975 Act. Whereas under the former the request comes to the Secretary of State, who retains a degree of control and discretion as to whether to refer the request to the court, but if he does so, the court is obliged to give effect to the request, under the 1975 Act the request comes direct to the court, with no ministerial involvement.

128. He submitted that there was no significance in the fact that under both statutory regimes the request had to come from the overseas court (or under the 2003 Act a prosecuting authority), because the involvement of an overseas court does not risk upsetting any considerations of comity. He put forward three reasons for this: (i) that where an English court makes a Norwich Pharmacal order, it will undoubtedly have jurisdiction over the relevant defendant against whom the order is made; (ii) that where an English court makes a Norwich Pharmacal order in relation to proceedings that may be brought subsequently in a foreign court, *ex hypothesi* , there are no proceedings "up and running" in the foreign court; and (iii) the foreign court is unlikely to complain that information is being obtained in another jurisdiction.

129. Elegant though these submissions were, I cannot accept them. The alleged significant difference between the 2003 Act considered in Omar and the 1975 Act is a distinction without a difference, since there is in both statutory regimes a critical similarity: in both regimes, the request has to come from the foreign court (or under the 2003 Act the foreign prosecuting authority), it cannot come from the individual claimant or applicant, in stark contrast to the position under the Norwich Pharmacal jurisdiction. Thus in the case of both regimes, there is what was correctly described by counsel for the Secretary of State in Omar as an important constraint, one of the "sovereignty limits on the extent of assistance" (see [19] of the judgment of Maurice Kay LJ).

130. The other important constraints or sovereignty limits were identified by counsel as the discretion of the Secretary of State and the exceptions in relation to national security and Crown servants. That analysis was accepted by the Court of Appeal in the passage at [25] of the judgment of Maurice Kay LJ which I have already quoted at [98] above:

> "…the three features of the 2003 [are]: 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 Lord Dyson JSC in *Child Poverty Action Group* , Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme in this area."

131. Whilst it is true that the element of ministerial discretion is absent in the case of the 1975 Act, I do not regard that as a determinative factor suggesting that substantial differences do not exist, since in one sense, the ministerial discretion is an aspect of the overall point which I consider is the most significant difference between the statutory regimes under both Acts and the Norwich Pharmacal jurisdiction, the requirement for a request from a foreign court, not a request from the claimant or applicant himself or itself. As the Divisional Court said at [68] of Omar : "As the history of the statutory regime makes clear, the request of the foreign court has been a requirement of the schemes when proceedings are before the court and the evidence is sought for that purpose."

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

in foreign proceedings. It is certainly not permissible to seek to bypass the constraints of the statute by making the sort of wide-ranging request made in the present case.

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

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

The claimant's case on wrongdoing and the four grounds

General points in relation to the application

135. In view of the conclusions I have reached as to the correct legal analysis, it will be apparent that I have concluded that the claimant's application must fail even before one looks at the detail of the allegations made by the claimant, essentially for three reasons. First, for the reasons set out in the last section of the judgment, the court has no jurisdiction in so far as the application seeks evidence for use in foreign proceedings. In so far as it is suggested that the evidence sought is for use in LCIA arbitration in England, the claimant does not have a good arguable case under the 2005 shareholders agreement or, at best, only has a good arguable case in respect of any breach of that agreement committed between December 2010 and the end of January 2012.

136. Second, this application is a wide-ranging application for disclosure and evidence to support the claims which the claimant says it wishes to bring. The width of the application is apparent not just from the 39 questions set out in the schedule to the draft order but from [11] of Mr Armstrong's witness statement. As Mr Chapman QC submitted, this seeks what is in effect a blank cheque:

> "Ramilos now seeks to invoke the Court's Norwich Pharmacal and Bankers Trust jurisdiction in order to obtain from Mr Buyanovsky disclosure of the information and documents listed in the Schedule to the accompanying draft order. As CFO of the Polyplastic Group, Chairman of PF LLC's Board of Directors and a member of Strongfield, Mr Buyanovsky almost certainly will have relevant knowledge and documents in his control. If disclosed, this information should confirm whether, and if so, how, monies have been wrongfully diverted or extracted from the Polyplastic Group, as well as indicating the nature of any schemes by which this has occurred and the victim and quantum of any resulting loss. The disclosure sought should also indicate the individuals and entities that carried out, assisted or benefitted from any such schemes, allowing Ramilos to determine the appropriate jurisdictions and causes of action (under the relevant systems of law) by which it may seek redress (whether directly or in the form of a derivative action)."

137. Again, as set out above, this wide-ranging request goes way beyond anything which is permissible under the Norwich Pharmacal jurisdiction. None of the cases relied upon by Mr Akkouh is in the same league in terms of the breath-taking width of the application. Although he sought to submit that, in some cases, such as Mohamed , the courts had made wide orders, for the reasons I have set out above, I consider that a close analysis of those cases does not justify the interpretation which Mr

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

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

139. In addition to those matters, before considering the detail of the claimant's factual allegations, it is important to note that many of the allegations made are hotly disputed by the defendant and many of the factual disputes would appear to depend upon matters arising between the defendant on the one hand and Messrs Rappoport and Smirnov on the other. It is neither possible nor wise on this interlocutory application to seek to resolve any factual dispute. Accordingly, I do not propose to refer to all the rival allegations, but only to headline points in so far as they are relevant to the issues: (i) whether the claimant can show a good arguable case applying The Niedersachsen test; (ii) whether the claimant has sufficient information already to plead a case; and (iii) whether, in the exercise of the court's discretion, it is appropriate to grant relief.

The history of the dispute

140. Before considering each of the four grounds relied upon by the claimant for suspicion of wrongdoing, I propose to set out the history of the dispute between the parties, which seems to me to inform the three issues I identified in the previous paragraph.

141. It is the defendant's case (which the Ramilos Witnesses were not in a position to rebut) that relations between Strongfield and Ramilos were difficult from the outset, because Messrs Rappoport and Smirnov forced Strongfield to accept Ramilos as a shareholder in the Polyplastic Group in 2005. The defendant also says that ETPHL, the St Vincent and Grenadines intermediary company of which complaint is made, was incorporated in 2004 as part of the offshore structure for Ramilos to invest in the Polyplastic Group and its subsidiaries, separating it from the Polymerteplo Group which Messrs Rappoport and Smirnov were not interested in investing in.

142. The defendant's case is that, in the period between 2005 and 2010, Strongfield made substantial injections of capital into the Polyplastic Group which by the end of 2010 amounted to some U.S. $73 million and that Strongfield had pressed Ramilos on a number of occasions to match this investment or fund 50% of it, but Ramilos had consistently refused. The Ramilos Witnesses deny that any such requests were made or refused. The defendant says that eventually, Messrs Rappoport and Smirnov agreed that Ramilos would verify all the investments and credits Strongfield had provided to the Polyplastic Group and agreed that 50% of the verified sum would be owed by Ramilos to Strongfield. This was to be achieved by a credit agreement, the terms of which were negotiated over some months, culminating in a meeting on 18 January 2012 involving Mr Rappoport himself. The defendant says a final draft of the credit agreement was agreed on 19 January 2012, which he exhibits to his witness statement, although it is dated 31 December 2010.

143. Clause 3.1 and Annex 1 to that draft credit agreement provide that the total amount invested by Strongfield in the Polyplastic Group between 2005 and 31 December 2010 was some U.S. $73 million (inclusive of interest) and it was stated in paragraphs 3.2 to 3.4 that Ramilos' 50% liability in respect of that investment would be converted into a ten year loan to 31 December 2020 with interest at 7%. Clause 3.5 of the draft agreement provided that there would be two sources for repayment of the loan: the proceeds of sale of Ramilos' shares and dividends (in an amount to be agreed between the shareholders).

144. The defendant's case is that the terms of the credit agreement were agreed on 19 January 2012 and not subject to any changes communicated between the parties. On 31 January 2012, there was a shareholders' meeting he and others attended from Strongfield and Messrs Rappoport and Smirnov and others from the claimant, the purpose of which was to resolve the conflict which had arisen between the shareholders, by signing the credit agreement and the 2012 shareholders' agreement. The defendant says he signed the agreements at the meeting without reading them through again. He also says that shortly after the meeting, the Polyplastic Group resolved to pay a dividend for 2010 of the equivalent of about U.S. $12 million and that the claimant confirmed that, save for U.S. $1 million to be retained by it, this would be used to repay the loan. He says that in July 2012 he asked Ms Asadchikova of the claimant to confirm that the full amount of the dividend, less the U.S. $1 million, would be repaid to Strongfield. The response was that the claimant had decided to repay only the non-interest bearing part of the principal amount in the credit agreement (equivalent to about U.S. $4.5 million) and that the credit agreement did not require the claimant to use the dividends for repayment.

145. The defendant claims that it was at this point that he checked the signed credit agreement and found that it omitted any reference to repayment from dividends, referring in clause 3.5 only to dividends from proceeds of the sale of the claimant's shares. He emailed Ms Asadchikova and said that his original version of clause 3.5 was different from the signed version and he did not know how he had missed this. He claims that the claimant had intentionally changed the wording of the credit agreement at the last minute. The defendant also notes that the 2012 shareholders' agreement was signed on 31 December 2012 and, as already noted above, he disputes that that agreement superseded the 2005 shareholders' agreement.

146. This version of events is strenuously disputed by the claimant. Mr Armstrong exhibits to his second statement an exchange of emails on 31 January 2012, between the defendant and Ms Asadchikova. At 5.13 pm she sent him an email stating that typographical errors had been corrected in the credit agreement and enclosing a revised clean version (which did not contain the reference in clause 3.5 to repayment of the loan from dividends). At 5.21 pm he replied: "*There are no objections in respect of the agreement*". The Ramilos Witnesses also dispute that the credit agreement was signed at the shareholders' meeting. Rather, by email at 3.40 pm on 31 January 2012, Ms Asadchikova suggested to the defendant that they exchange by courier, then at 6.28 pm on 31 January 2012 she emailed him a scanned copy signed by Mr Gaivoronskiy of the claimant and later that evening the defendant's driver met with Ms Asadchikova to exchange original copies signed by Mr Gaivoronskiy and the defendant respectively.

147. In his second witness statement, the defendant claims that he did not receive or send any of those emails on 31 January 2012 and repeats that the credit agreement was signed at the shareholders' meeting on 31 January 2012. He says that he can only conclude that the emails have been fabricated. Mr Armstrong then responds in a third statement that Hogan Lovells have seen the original electronic versions of the emails and the associated metadata demonstrates that they were sent and received. Of course, it is not possible on this interlocutory application to reach a final conclusion in relation to the circumstances in which the credit agreement came to be agreed, but on the basis of this evidence, it would seem that the claimant's version of events is much more likely to be correct.

148. In his first witness statement, the defendant goes on to deal with the issue of dividends in 2012 and 2013. He says that whilst the dispute over the wording of the credit agreement remained unresolved, at a shareholders' meeting on 12 September 2012, the distribution of a dividend for 2011 of the equivalent of about U.S. $17 million was approved to be paid by 31 October 2012. Strongfield agreed to this because the partners were hopeful that the claimant would restore the original version of the credit agreement and use the bulk of these dividends to repay the debt to Strongfield. The claimant's case is that this agreed dividend corresponded to 25% of the net profit, which it had been agreed pursuant to clause 3.3 of the 2012 shareholders' agreement would be distributed by way of dividend. Clause 3.3 provided:

> "The objectives of the Parties to this Agreement are the following:
>
> > 3.3 Annual allocation of at least 25% of the consolidated net profit for payment of dividends, based on the annual consolidated financial statements according to the IFRS, audited by one of the international audit companies specified in this Agreement."

149. However, distribution of the dividend had not happened by 31 October 2012 and, at a directors' meeting on that date, it was agreed to postpone the decision on the question of the payment of the dividend. This is borne out by the minutes of that meeting. The claimant's case is that this was only agreed because clause 8.7 of the 2012 shareholders agreement required the claimants' appointed directors to vote in the same way as the Strongfield appointed directors. The claimant says that, far from agreeing this postponement, on 15 November 2012, it served a notice on the defendant, as representative of Strongfield, demanding that the dividend agreed at the 12 September 2012 shareholders' meeting be paid by 30 November 2012, on the basis that non-payment constituted a breach of clause 3.3 of the 2012 shareholders agreement. The defendant claims that he

did not receive this notice and that neither Strongfield nor the Polyplastic Group has any record of receiving it. He notes that Hogan Lovells had said that it was attached as a pdf scan to an email to the defendant of 15 November 2012, but claims that he never received that email. As with the emails of 31 January 2012, Mr Armstrong then exhibits a copy of the email with the relevant metadata, verifying that the pdf scan of the notice was created at 12.47 pm on 15 November 2012 and that the email was created and sent to the defendant at 1.05 pm on 15 November 2012. Again, despite the defendant's protestations to the contrary, it seems more likely than not that he did receive the email and attached notice.

150. However, shortly afterwards, at a further meeting on 19 November 2012, the directors of the Polyplastic Group agreed the acquisition of a pipe plant from Gazprom for the equivalent of about U.S. $17 million. The defendant says that this required the Polyplastic Group to borrow funds and prevented a dividend from being paid. On 27 November 2012, he asked the corporate secretary of the Polyplastic Group to circulate to the board a proposal to be dealt with at a directors' meeting on 29 November 2012, to postpone the payment to 31 March 2013 due to a lack of current funds. This was explained in an explanatory memorandum attached to the proposal. However, as recorded in an email from the defendant to the board on 29 November 2012, the shareholders of the claimant asked for this proposal to be withdrawn from the agenda for the board meeting until the issue had been discussed at shareholder level.

151. The defendant sent a letter to the claimant on 29 March 2013, referring to the proposal to pay the equivalent of about U.S. $17 million by way of dividend for 2011, but saying that the company did not have free cash to pay this. The letter proposed what he described as a compromise on the dividend payment, that Strongfield would arrange an unsecured corporate loan to the Polyplastic Group to enable payment of the dividend, on the basis that the claimant would agree to use its share of the dividend to repay the monies owed under the credit agreement. Mr Rappoport agreed to consider the proposal but asked for additional information about the Polyplastic Group's debts and receivables, which was provided the same day.

152. At a board meeting the same day, 29 March 2013, the directors of the Polyplastic Group formally agreed to postpone consideration of payment of the dividend again. On 8 April 2013, Mr Alenin, one of the claimant's appointed directors wrote to the defendant asking for further information needed to respond to the offer, which information was provided two days later on 10 April 2013. Notwithstanding the information provided, the defendant says that Messrs Rappoport and Smirnov subsequently rejected the proposal and stuck to the position that they should be able to retain the dividends without repaying the debt. Since the claimant has not adduced evidence from either, the claimant is not in a position to contradict what the defendant says.

153. At a board meeting of the Polyplastic Group on 28 June 2013, there was discussion of the fact that payment of the 2011 dividend was not possible due to lack of funds and of a recommendation to the shareholders that profits should not be distributed for 2012. As recorded in the minutes, the claimant's appointed directors attended the meeting but refused to vote on any of the issues discussed. Furthermore, they have never signed the minutes. As the defendant says, consistent with that position, the claimant has refused to sign the 2012 and 2013 accounts of APG, notwithstanding that at a board meeting of that company on 28 March 2014, its representative director signed the resolution approving the 2012 accounts.

154. On 4 November 2013, Strongfield wrote to the claimant setting out a repeated proposal to merge the businesses of the Polyplastic Group and the Polymerteplo Group in aid of a prospective IPO. The letter also said that the merger would help: "*resolve the long standing problem related to the conflict of interest arising between the managing partners in closing transactions between entities of the two groups*". The proposal attached a presentation showing the actual structure of the groups and their proposed structure after a merger. The proposal also exhibited an excel spreadsheet which provided the claimant with detailed financial information about both groups, including details of the dividend payments made by the Polymerteplo Group in 2011 to 2013.

155. The claimant responded to that proposal by letter dated 9 December 2013, expressing interest in the merger, but insisted as a condition of the merger that there be joint management, with the claimant having a right to participate. The claimant indicated that it wished to appoint a jointly agreed independent consultant to undertake due diligence of the two groups. The letter also requested the financial statements of ETPHL to 31 December 2012 and 30 November 2013. According to Mr Armstrong, the Ramilos Witnesses say that this resulted from concerns about the dividends, large payments to ETPHL and the conflict of interest arising from Strongfield's management of both groups. The defendant's evidence is that this proposal ultimately went nowhere, because the claimant did not want to sell its shares in the Polyplastic Group, but wanted a controlling share in the combined business without making any additional investment.

156. The defendant says that by 2014, the use of ETPHL to import goods led to an additional administrative and financial burden because, as it was a related off-shore company, the regulators would charge the Polyplastic Group an additional import duty on the assumption that this was a tax avoidance scheme to reduce taxes paid in Russia. Accordingly, he says, Strongfield

proposed and the claimant agreed that ETPHL should be no longer be used and importation should be via a new third party company, Violett Polymer. Since ETPHL had no net assets, Strongfield offered to transfer its interest in the company to the claimant, but the claimant declined. Rather than wind up the company, it was agreed to sell it to Crossway Corporation, a company which specialised in holding dormant companies, for U.S. $1.

157. In that context, in October 2014, Mr Oleynikov, the corporate secretary of Strongfield and the Polyplastic Group had an email exchange with Ms Gurova, a lawyer engaged by the claimant at that time. He asked her to return signed documents necessary to transfer the claimant's 50% shareholding in ETPHL to Crossway. She responded requesting again copies of ETPHL's accounts, to which he responded: *"[ETPHL] does not maintain accounting records"* .

158. The defendant's evidence is also that, as a St Vincent and Grenadines registered company, ETPHL was not obliged to produce accounts but, since it was a related entity of the Polyplastic Group, the transactions between it and the Polyplastic Group were scrutinised by the Group's auditors, including checking the nature of ETPHL's dealings with third parties to source the goods it supplied to the Group and the appropriateness of the margin it obtained. Although Mr Akkouh was highly critical of the defendant in relation to the absence of accounting records for ETPHL, I do not find that explanation in any way surprising or evasive.

159. Furthermore, for reasons I will return to in more detail when I consider the transfer pricing allegation, given that the dealings between the Polyplastic Group and ETPHL were related party transactions, recorded as such in the Group's accounts, it seems to me to be improbable in the extreme that the Group's auditors: (i) did not carry out an appropriate audit of those transactions by reference to available data such as purchase contracts and invoices; and (ii) did not pick up any irregularities in those related party transactions and qualify the accounts accordingly, if there was the sort of improper transfer pricing as the claimant alleges.

160. A lengthy meeting took place between the defendant and Mr Gorilovskiy for Strongfield and Messrs Rappoport, Smirnov and Alenin for the claimant on 25 February 2015. The defendant's evidence is that the claimant agreed to sign the APG accounts immediately and it was agreed the parties would meet two weeks later to discuss the strategic direction of the business. However, the claimant did not sign the accounts. Instead, at a further meeting on 19 March 2015, a letter from the claimant was handed to the defendant, in which the claimant set out its position that, at the meeting on 25 February 2015, what had been said was that the claimant had insufficient information for its nominated directors to sign the accounts and that as a first step, the claimant would send this letter setting out its requests for information.

161. The letter stated that the claimant intended to carry out an audit of the Polyplastic Group and, because the businesses of the two groups were *"very closely intertwined"* , Strongfield was asked to consent to the audit covering the Polymerteplo Group as well as the Polyplastic Group. It also sought an audit of ETPHL. The letter sought disclosure of a number of pieces of information, including the reasons for Strongfield not having complied with the 2012 shareholders agreement and paid dividends and conducted an IPO.

162. The defendant accepts that he said something to the effect that Strongfield was not prepared to accept any more blackmail and duress and that he said the claimant had not put forward any reason for the proposed re-audit or for questioning the auditing already done on the accounts by Deloitte, KPMG and Ernst & Young.

163. On 2 April 2015, the claimant wrote again expressing its willingness to sign the accounts, once it had received the information it had requested. It sought clarification of various allegations the defendant had made at the meeting on 19 March 2015. The defendant replied on 8 April 2015, taking issue with the claimant's account of the meeting on 25 February 2015 and reminding the claimant that its failure to sign the accounts was putting APG in default of its obligations in Cyprus to file accounts. He said that Strongfield's position had been made clear at the meeting on 25 February 2015, that the financial statements had to be signed first without any condition and that the claimant had agreed to do so. He referred to instructing lawyers to represent Strongfield against the claimant in Cyprus.

164. Further requests for information emanated from the claimant in May and June 2015. Then, on 7 July 2015, the claimant wrote to the Polyplastic Group seeking a cash flow breakdown of all financial investment in and supply of raw materials by, inter alia, ETPHL, accounting documents for the last five years, information about transactions between the two groups and information about loans to the Polyplastic Group. The response in September 2015 was that there would be difficulties in providing the requested documentation due to the large number of documents. In the event although various proposals were made by the Polyplastic Group for access to documents at its offices in Moscow and by the claimant for the documents to be provided electronically, nothing was ever agreed or resolved. The parties' respective positions were set out in lengthy

position statements in November 2015, which are summarised in Mr Armstrong's first witness statement, but which I do not propose to repeat here.

165. The annual general meeting of APG took place on 24 November 2015. The parties' positions differ as to what emerged from that meeting. Mr Armstrong's evidence is that the claimant was hopeful that its appointed directors of the Polyplastic Group would obtain access to the Group's documents and a further letter to that end was sent on 11 December 2015. Strongfield's position, as set out in the defendant's evidence is that at the meeting: " …Mr Smirnov again admitted that the signatures on the APG accounts had been withheld solely as a source of pressure, and promised to have the APG accounts signed the following day. " Since Mr Smirnov has not given a witness statement, nor has Mr Armstrong taken instructions from him, this is not expressly denied. All that is said in general terms by the Ramilos Witnesses is that they are unaware of it being said that there was no good reason for not signing the accounts.

166. The defendant says that Mr Smirnov reneged on that promise and that he promised again to sign by 5 December 2015, but reneged on that promise as well. It was in that context that he says Strongfield decided not to respond to the further request for information on 11 December 2015. The final decision of the Polyplastic Group not to agree to the various requests was made at the board meeting on 24 February 2016.

167. It is not possible to resolve at this stage the conflict of evidence as to what was said or agreed at the various meetings. However, what this summary of the history of the dispute demonstrates is that the parties had been in dispute about all the matters raised by this Norwich Pharmacal application for more than a year before the application was issued on 12 April 2016, in fact many of the matters had been raised by the claimant in 2012 or 2013. According to the claimant, its appointed directors' terms of appointment to the board of the Polyplastic Group expired on 31 December 2015. Whether that is correct or not, it is absolutely clear that, by April 2015 at the latest, the claimant and its appointed directors were well aware that the Polyplastic Group was not going to provide the information it was seeking. In those circumstances, it would have been open to them to make an application to the Russian courts to challenge the position being taken by the Polyplastic Group as a Russian company. The defendant's evidence is that Russian courts regularly consider and rule upon such applications.

168. Equally, to the extent that the claimant's complaint is that Strongfield was in breach of clause 3.3 of the 2012 shareholders' agreement in not paying dividends for the 2011 and 2012 financial years, the claimant was aware that the dividends had not been paid and of the reasons which were being given for such non-payment, even if it did not agree with them, by the time of the Polyplastic Group board meeting of 28 June 2013 referred to at [153] above at the latest and, in my judgment, was in a position to commence arbitration proceedings in Cyprus at that stage.

169. Furthermore, clause 8.9 of the 2012 shareholders agreement provides:

> "[The claimant] is entitled to receive all requested information on the current business and financial performance of the Company within 10 business days, and to participate in the adoption of resolutions on the investment activity of the Company, strategic plans, large transactions and related-party transactions, or receive any other information that could affect the market value of the Company. The scope of the requested information shall be reasonable and practicable."

170. In response to the obvious point that, to the extent that in the period from January 2012 onwards the claimant was seeking financial and other information on the Polyplastic Group in which APG had a 99% shareholding, it could have issued an application before arbitrators in Cyprus for an order that Strongfield cooperate and provide such information, Mr Akkouh emphasised that the provision only applied to information on current business and financial performance, not past performance. I was not over-impressed with that submission. It seems to me that, whilst it would follow that the claimant could not seek information pre-dating the 2012 shareholders agreement, on any sensible construction of the provision, the words: *"current business and financial performance"* would encompass performance after 31 January 2012, which would cover a great deal of what the claimant was seeking at the time and now seeks in the questions in the schedule to the draft order. Thus, on analysis, questions 10 to 24 and 33 to 39 inclusive all relate to the period after 1 January 2013. In the circumstances, the claimant could and should have made an application to arbitrators appointed in Cyprus. Even if the narrow interpretation of the word "current" were right, the claimant could have made a series of applications in each of the relevant years 2012 to 2015 in relation to what was "current" in that financial year.

The Costs Shifting Ground

171. As set out in the claimant's skeleton argument, the claimant relies upon five points to suggest that costs properly attributable to the Polymerteplo Group have been shunted onto the Polyplastic Group and/or that contracts between the groups for goods and services have been used to shift profits to the Polymerteplo Group. First, it relies upon the disparity in the dividends and revenues which the two groups have paid and generated. As Mr Akkouh put it: *"the Polymerteplo Group has paid out twelve times the level of dividends of the Polyplastic Group notwithstanding that its revenue is seven times lower."* I consider this point further when I deal with the Dividend Ground below.

172. Second, the claimant relies on the acceptance in Strongfield's letter of 4 November 2013 referred to at [154] above, of: *"the long standing problem related to the conflict of interest arising between the managing partners in closing transactions between entities of the two groups"*. The claimant's evidence is that, notwithstanding those clear conflicts, no consent has ever been sought from the board of the Polyplastic Group for the Group's dealings with the Polymerteplo Group.

173. Third, the claimant relies on a corporate presentation dated May 2013 prepared by the defendant. Mr Akkouh placed particular reliance on this document in his oral submissions as demonstrating that there has been significant cost shifting between the two groups and a significant overlap in activities. He drew attention to the following statements in the presentation:

> "Polymerteplo and Polyplastic Groups production activities are supported by a network of own trading houses and authorised dealers providing in depth distribution coverage of the Russian and CIS markets … In February 2013, Polyplastic and Polymerteplo Groups acquired leading British pipe manufacturer Radius Systems Limited and subsidiaries.
>
> …
>
> Polyplastic and Polymerteplo Groups are controlled by five single shareholders who are their managing partners. The groups have similar operations and share back office personnel.
>
> No formal legal structure currently links the groups. However, day-to-day operations of the Polymerteplo Group are closely aligned with the Polyplastic Group."

174. Mr Akkouh placed particular emphasis on the references to sharing back office personnel. He also relied upon later references to shared research and development facilities, particularly in the context of innovation projects for the period 2010 to 2012, which included the development of a particular pipe for use in district heating applications, the principal business of the Polymerteplo Group.

175. Fourth, the claimant relied upon another "Synergies Presentation" prepared by the defendant in May 2013. In the Section headed *"Synergy between all three Divisions"* that identifies *"Shared costs due to joint use of the same production plants"* including Cheboksary, which had been mentioned as a shared site in the first presentation. The Section then went on to identify: *"Centralised Back office (shared costs)"* and *"Centralised R & D management"* .

176. On the basis of those two presentations, Mr Akkouh submitted that it was as plain as a pikestaff that in 2013 there were shared costs between the two groups as regards back office, production plants and research and development. He submitted that the contrary position taken by the defendant in his witness statement was unsustainable. He drew attention to passages in that statement where the defendant said:

> "There are almost no common materials between the Polymerteplo and PPG products. Comparing pipes produced by the Polyplastic Group and those produced by the Polymerteplo Group is like comparing a bicycle to a rocket…

> However, the day-to-day operations are, by design, entirely independent…
>
> Polymerteplo Group was not and never has been an off-shoot of PPG."

177. Mr Akkouh submitted that those categorical statements were completely inconsistent with what was stated in the two presentations. He also submitted that the defendant's further explanation that the presentations were prepared for the purposes of the proposed merger and were dealing with a prospective rather than an actual position was equally unsustainable. Not only was that explanation inconsistent with the fact that the presentations were both expressed in the present tense describing an actual position rather than the future tense, as they would have been if they were describing a proposed position, but the reference to innovation projects for the period 2010 to 2012 gave the lie to any suggestion that this was all a projection for the future.

178. Furthermore, Mr Akkouh submitted that the defendant's explanation was wholly inconsistent with the so-called Book entitled "Twenty Amazing Years" produced by the Polyplastic Group in 2011. Although not produced by the defendant himself, he must have been aware of it and features in photographs in it. At the beginning of the Book, the chairman of the Group, Mr Gorilovskiy, states:

> "Further developments to the group's pipe manufacturing activity has resulted in the launch of production of flexible pre-insulated pipe systems for district heating networks. Furthermore, these pipe systems incorporate in-house technology…Heating pipes have determined the third and technologically most advanced path of Polyplastic's activities. Each of Polyplastic's product lines is targeted to a particular customer base and specific market. These markets, though different, have much in common as they are all markets for high technology products."

179. As Mr Akkouh submitted, these references to how technologically advanced the heating pipe systems are and to how all the products are high technology products, are all completely at odds with the impression which the defendant seeks to create that the heating pipe systems are much less technologically advanced that the Polyplastic Group's products, a bicycle rather than a rocket.

180. The Book then goes through the history of the development of the Polyplastic Group and identifies that, in 2002, it started its third *"trend of its development"* , district heating pipe systems. There is then reference to the R & D Center of the Group providing all the projects of the Group with engineering and scientific support. The chronological development of the Group shows district heating pipe systems as one of the products and sources of revenue of the Group, culminating in the statement: *"By the end of 2011 Polyplastic Group plans to sell nearly 170,000 tonnes of PE pipe, 60,000 tonnes of composites and more than 900 km of district heating pipe."*

181. A table at the beginning of the section headed: *"Polyplastic Group today"* shows key figures for *"Composite Division"* , *"Plastic Pipe Division"* and *"Polymerteplo Group"* with the figure for the latter incorporated within the overall Group activity. In the same section of the Book is a passage about the Cheboksary Pipe Plant which describes it as: *"Cheboksary pipe plant is the only Polyplastic Group's enterprise producing district heating pipes in bars with PUR insulation."* Still in the same section, there is clear evidence of the shared use of the R & D Center: *"R&D Center draws up the relevant regulatory documents for all articles manufactured by the pipe production plants at Polyplastic and Polymerteplo Groups."*

182. Finally the Book describes shared office facilities:

> "Since January 2010 we have settled down in the new business centre. In this spacious, modern three-floor building can be found the group management company, which coordinates activity for all of the group subsidiaries, as well as two trade houses … and Polymerteplo Group.

> Every day more than 500 employees keep well coordinated with all of the units and companies of Polyplastic Group in Russia and adjacent countries."

183. As Mr Akkouh says, none of this is expressed in terms of an intention to integrate the groups in the future, it is all expressed in terms of what is already happening, which makes the defendant's position that they are run entirely separately all the more difficult to fathom.

184. The fifth point relied upon by the claimant, in support of its case that costs properly attributable to the Polymerteplo Group have been shunted onto the Polyplastic Group, is that the accounts of the Polyplastic Group show the two groups dealing with one another. For example, (i) the Polyplastic Group's accounts for the 2012 accounting year record that Polyplastic sold RUR329 million worth of goods and services to the Polymerteplo Group and that it purchased RUR658 million worth of goods and services from the Polymerteplo Group; and (ii) the Polyplastic Group's accounts for the 2014 accounting year record that the group owed RUR1.49 billion (c. $25.5 million) to the Polymerteplo Group.

185. In my judgment, all this material relied upon by the claimant clearly demonstrates a good arguable case, that there was integration between the groups, with shared facilities, such as plants, back office and research and development. In effect the groups were run together and the defendant's attempts to deny this are frankly unsustainable. What is more difficult for the claimant is whether it has a good arguable case that this cost shifting was illicit and improper and therefore amounts to "wrongdoing" for the purposes of the Norwich Pharmacal jurisdiction.

186. The best point which the claimant has is that, if this were not illicit and improper, why has the defendant gone to such lengths in his evidence to maintain the position that the groups are separate? Nevertheless, I agree with Mr Chapman QC that there is an air of unreality about the claimant's case that this was all illicit and improper costs shifting. Not only was the integration of the two groups openly and publicly publicised in the Book and openly discussed by the defendant in the two 2013 presentations, with no attempt to hide it, but the two groups used the same auditors who audited the accounts in accordance with International Financial Reporting Standards ("IFRS"). If some sort of illicit costs sharing was going on, it seems to me inconceivable that the auditors would not have picked this up. As the fifth point made by the claimant demonstrates, the inter-group sales and purchases and inter-group loans are related party transactions identified as such in the accounts. If any of this was improper, the auditors would surely have said so.

187. The principal answer which the claimant seeks to give to that compelling point is that there have been high profile failures by auditors to identify fraud, such as Enron and that there are inherent limits on uncovering management fraud as part of the audit process. The claimant also contended that the auditors in the present case were not paid very much for their audit, the equivalent of about U.S. $180,000. However, the claimant puts forward no evidence of the appropriate level of remuneration and, in any event, there is no basis whatsoever for any suggestion that the auditors were negligent, let alone that they were in collusion with the Polyplastic Group or Strongfield, in turning a blind eye to improper costs shifting. Any such suggestion is no more than fanciful speculation.

188. Although the claimant relied upon evidence that one document had been prepared to mislead the auditors and that other documents were deliberately kept from the auditors, none of that related to a fundamental issue such as this one of cost shifting in relation to which, given the publicly available Book and presentations, there was no attempt to hide the position. In my judgment, even making every allowance for Mr Akkouh's perfectly valid point that there are inherent limits in uncovering management fraud as part of the audit fraud, it seems to me improbable in the extreme that, if there was fraud or improper costs shifting, this would not have been uncovered by the auditors.

189. In the circumstances, it does not seem to me that the claimant can show a good arguable case that the integration between the two groups which was undoubtedly occurring was in any sense improper and, accordingly, the first threshold condition to Norwich Pharmacal relief is not satisfied.

190. Even if the claimant could show an arguable case of wrongdoing, there are a number of other reasons why Norwich Pharmacal relief should not be granted in relation to the so-called Cost Shifting Ground. First, if there was wrongdoing, then it must have implicated both the Polyplastic Group and the Polymerteplo Group, Russian entities, and, on the face of it, any claim against them should be brought in the Russian courts pursuant to Russian law. Equally, if there was wrongdoing by Strongfield, the questions in the schedule to the draft order which concern this Ground (Section D, questions 33 to 37) all relate to the period since 2013. It must follow that what is being sought is evidence to support a claim against Strongfield

in respect of that period of time, which is a claim which would have to be brought under the 2012 shareholders agreement, which is subject to Cyprus law and arbitration. Either way, any claim which the claimant may have in respect of this Cost Shifting Ground is one which will be brought in foreign court or arbitration proceedings. For the reasons set out earlier in this judgment, this court has no jurisdiction to grant Norwich Pharmacal relief to assist in obtaining evidence in support of any claim the claimant may bring in Russia or Cyprus.

191. Second, the material on which the claimant relies, specifically the Book, the 2013 presentations and the audited accounts of the two groups is not material which has recently come to light. Nearly all of it is material to which the claimant will have had access at the time of the merger discussions in 2013. The 2012 accounts of the Polyplastic Group were approved on 31 May 2013 and the 2014 accounts on 31 May 2015. If, contrary to the conclusions I have reached above, this material demonstrates a sufficiently arguable case of wrongdoing and this court has jurisdiction to grant Norwich Pharmacal relief, this application is one which should have been made in mid-2015 at the latest. On any view, there has been considerable delay in making the present application, which militates against granting the relief sought. It may be that if the application was otherwise well-founded, that would not be fatal, but in the present circumstances, it is clearly another reason for not granting the relief sought.

192. Finally, no amount of seeking to categorise what is sought as information can disguise the fact that questions 33 to 37 in the schedule to the draft order are in truth precisely the sort of wide-ranging request for disclosure and evidence for which the Norwich Pharmacal jurisdiction cannot be used. I accept that Mr Akkouh was alive to that point and sought to narrow the scope of the relief sought, but, even then, this was not the sort of narrow, focused request for information for which alone the jurisdiction can be used.

The Dividends Ground

193. The claimant's case is that the failure of the Polyplastic Group to pay any dividend since 2010 is a breach of clause 3.3 of the 2012 shareholders agreement set out at [148] above. The defendant's contrary argument is that clause 3 is only dealing with “objectives” not “obligations”. Furthermore, Mr Chapman QC relies upon the fact that, as set out in the section of the judgment dealing with the history of the dispute, non-payment of dividends can be justified on the basis that it was always contingent on the dividends distributed to the claimant being used to repay the loan pursuant to the credit agreement or on the basis of lack of funds. Notwithstanding all those arguments, it seems to me that the claimant does have a good arguable case that Strongfield was in breach of clause 3.3, in so far as its appointed directors of the Polyplastic Group failed to procure the payment of dividends by the Group. However, merely because the first threshold condition for the grant of Norwich Pharmacal relief is satisfied, it by no means follows that the claimant is entitled to such relief.

194. The first and fundamental obstacle to the application on this Ground is that any proceedings in which a claim is made for breach of clause 3.3 of the 2012 shareholders agreement will be arbitration proceedings in Cyprus. For the reasons set out earlier in the judgment, this court has no jurisdiction to grant Norwich Pharmacal relief to assist in obtaining evidence in support of any claim the claimant may bring in Cyprus.

195. Second, although the claimant indicated shortly before the hearing that the application was no longer pursued in respect of questions 1 to 7 in the schedule to the draft order, ostensibly on the basis that the claimant had obtained the information it needed from the defendant's first witness statement, I agree with Mr Chapman QC that the claimant already had sufficient information to bring a claim in Cyprus for alleged breach of clause 3.3, long before that statement was served in July 2016. As the earlier section of the judgment dealing with the history of the dispute demonstrates, the claimant was well aware that dividends had not been paid for the 2011 year and the reasons which Strongfield was giving for that non-payment since it was already demanding their payment when it served the notice of 15 November 2012 referred to at [149] above.

196. So far as non-payment of dividends for the 2012 year is concerned, the claimant was well aware that the dividends were not going to be paid and of the reasons which the Strongfield appointed directors were giving for such non-payment, at the time of the board meeting on 28 June 2013 referred to at [153] above. By then or soon thereafter as I see it, the dispute between the parties about the terms of the credit agreement and the non-payment of dividends had crystallised and the parties' positions in relation to those issues remained the same so far as dividends in subsequent years are concerned. The claimant simply did not need the answers to questions 1 to 7 in order to commence proceedings against Strongfield in Cyprus and plead its case or, putting it another way, I do not consider that, in relation to this Ground, the defendant's first witness statement told the claimant anything it did not know already in terms of what it needed to plead a case in Cyprus. I reject any suggestion that the statement provided some otherwise missing piece of the jigsaw.

197. The application is still pursued by the claimant in relation to questions 8 and 9. In my judgment, these questions are classic examples of a fishing expedition. They are questions about the Polymerteplo Group dividends which are essentially predicated upon the suggestion that that Group was able to pay out dividends of the size it did because of improper cost shifting from the Polyplastic Group. I have already held in relation to the Cost Shifting Ground that the claimant does not have a sufficiently arguable case that there was improper cost shifting to satisfy the first threshold condition of Norwich Pharmacal relief. It seems to me that questions 8 and 9 suffer from the same defect and the claimant simply does not have a good arguable case that the payment of dividends by the Polymerteplo Group involved any wrongdoing.

198. However, even if I were wrong about that, these questions can only be relevant to claims that the claimant might seek to bring against the two groups or Strongfield in Russia or Cyprus respectively and the court has no jurisdiction to grant Norwich Pharmacal relief for that purpose. Finally in relation to those questions, the claimant does not require an answer to them in order to pursue its claim against Strongfield for breach of clause 3.3 of the 2012 shareholders agreement. The relief sought is neither necessary nor proportionate.

The Transfer Pricing Ground

199. The principal allegation advanced by the claimant is that, in 2012 and 2013, the Polyplastic Group purchased hundreds of millions of dollars of unspecified goods and services from ETPHL which Strongfield controlled because, although the claimant was a 50% shareholder, it was on the same silent partner basis as with APG. The claimant submits that these transactions give rise to serious grounds for suspecting that profits have been diverted away from the Polyplastic Group by schemes involving the imposition of ETPHL in the Group's supply chain, what is characterised as “Transfer Pricing”. The claimant says that it has sought financial and other records relating to these transactions to be met by the response from both the defendant and Mr Oleynikov, the corporate secretary of Strongfield and the Polyplastic Group that ETPHL kept no such records. Mr Akkouh submitted that this assertion that ETPHL kept no records at all of these transactions was incredible.

200. Mr Chapman QC pointed out that these transactions are expressly recognised in the audited accounts of the Polyplastic Group for 2012 and 2013 as related party transactions. The defendant makes the point in his first witness statement that: *“As a related entity…all of its transactions with [the Polyplastic Group] were of course scrutinised by [the] auditors. This scrutiny would include checking the nature of ETPHL's dealings with third parties to source the goods it would provide to [the Group] and the appropriateness of the margin applied by ETPHL. There was no reason to generate further accounts detailing these.”*

201. Mr Akkouh was critical of this evidence on the basis that it was inconsistent with the earlier assertion that ETPHL did not produce financial accounts. However, it seems to me that, as with the related party transactions between the Polyplastic Group and the Polymerteplo Group, to which I referred above in relation to the Cost Shifting Ground, there is simply no basis for concluding that the auditors did not do their job properly. Related party transactions inevitably attract attention from auditors and, in my judgment, it is inconceivable that the auditors of the Polyplastic Group did not at least carry out a sufficient sample of the transactions to satisfy themselves of precisely the matters which the defendant identifies: that these were genuine contracts for the purchase of goods and services, the basis upon which ETPHL had purchased from third parties and the appropriateness of the margin which ETPHL was getting. Checking those matters would inevitably have required examination of contracts, invoices and other documents including at ETPHL.

202. It seems to me that the explanation for the apparent inconsistency in what the defendant is saying is that, whilst it was almost certainly the case that ETPHL, as a company incorporated in St Vincent and the Grenadines, did not have to file accounts with the authorities or have an audit of its financial affairs, it does not follow that it did not have any records at all of the transactions it had entered into with third parties to purchase raw materials or with the Polyplastic Group to sell goods or services. On the basis that the auditors must have carried out some sort of sampling exercise, if there had been no supporting documentation at all for the transactions they were sampling, that would have been a significant “red flag” so far as any auditor was concerned, suggesting these were not genuine transactions or were otherwise suspicious. The auditors would inevitably have flagged that up and would not have given an unqualified opinion of the financial statements.

203. Equally, if the margins obtained by ETPHL had been excessive, that is something that would have inevitably given rise to another “red flag” for the auditors, as it would have suggested that some sort of transfer pricing of the kind which the claimant says it suspects, was going on. The reality is however that the auditors, who, in the case of both the 2012 and the 2013 accounts were Deloitte, did not raise any issue about these transactions and gave an unqualified opinion in these terms:

> "In our opinion, the accompanying consolidated financial statements present fairly, in all material respects, the consolidated financial position of the Group as at [31 December 2012 or 2013 respectively] and its consolidated financial performance and its consolidated cash flows for the year ended [31 December 2012 or 2013 respectively] in accordance with International Financial Reporting Standards."

204. Mr Akkouh relied upon the terms of a Management Report from Deloitte to the defendant as Chief Financial Officer of the Polyplastic Group dated 24 September 2008 in relation to the 2006 and 2007 accounts, section 28 of which was headed: *"Issues relating to transfer pricing in respect of intra-corporate transactions"*. However, as I pointed out during the course of argument, that is a false point. The auditors were not talking about the price at which the Group was purchasing in raw materials, but the on-sale price of finished products where discounts were given. What the auditors were saying was that, if the discount given was more than 20%, then the Group might be in trouble with the Russian tax authorities who could say that it was artificially deflating its profits. This has nothing whatsoever to do with the sort of improper transfer pricing with ETPHL to which Mr Akkouh was referring.

205. Far from assisting the claimant, it seems to me that that Management Report is extremely damaging to any suggestion that the claimant has a good arguable case that there was wrongdoing in relation to ETPHL. It demonstrates that Deloitte were thorough and, where they picked up matters of concern, these were drawn to the attention of the management of the Polyplastic Group. It is inconceivable that, if there were anything untoward about the millions of dollars of related party transactions with ETPHL, the auditors would not have picked that up and, at the very least, informed management in a similar Management Report, if not qualified the accounts. In my judgment, the claimant does not have a good arguable case under this Transfer Pricing Ground in relation to ETPHL.

206. Mr Akkouh submitted that similar transfer pricing had occurred with Stavrochem and Violett Polymer which had been interposed in the supply chain in succession to ETPHL in 2014. Stavrochem was a company acquired by APG in 2008 and carried on the business of buying and selling raw materials for the Polyplastic Group. In August 2014 it was sold to an *"unrelated entity"* Violett Polymer, with whose business it was merged. The new business of Violett Polymer then supplied raw materials to the Polyplastic Group. The claimant relies upon the corporate records which show that at least from October 2015, Violett Polymer has been in the ultimate ownership of Strongfield. Mr Akkouh submitted that the defendant gave a complicated and unconvincing account in his evidence as to why the merged entity was brought back into Strongfield's control, citing unspecified supply chain problems. Although Mr Akkouh criticises the account given by the defendant, Mr Chapman QC correctly points out that the claimant's evidence in reply does not seek to challenge this account. Furthermore, as already noted in [156] above, the defendant says that the claimant knew that Violett Polymer was going to be interposed instead of ETPHL and agreed to this, which does seem to me to be likely. There is no contrary evidence adduced by the claimant from Messrs Rappoport and Smirnov. In my judgment, the claimant has not shown a sufficient good arguable case of wrongdoing in relation to Violett Polymer.

207. It follows that, both in relation to ETPHL and Violett Polymer, that the claimant cannot satisfy the first threshold condition for the grant of Norwich Pharmacal relief. However, even if it could, there are other reasons why such relief should not be granted, similar to the reasons in relation to the other two Grounds with which I have already dealt. First, whilst it is not clear precisely what claim the claimant would wish to bring, it is clear that any claim would be made in foreign proceedings. In so far as any claim is said to arise against Strongfield, given that the questions in section B of the schedule to the draft order (questions 10 to 24) all relate to the period since 1 January 2013, it must follow that what is being sought is evidence to support a claim against Strongfield in respect of that period of time, which is a claim which would have to be brought under the 2012 shareholders agreement in Cyprus. Likewise if what is contemplated is a claim against the Polyplastic Group that is a claim which would have to be brought before the Russian courts.

208. As Mr Chapman QC said, paragraph 80 (c) of Mr Akkouh's skeleton, which I quoted at [112] above, refers to a series of vague potential claims against recipients of allegedly misappropriated funds, including ETPHL and Violett Polymer. In so far as there is any scope for such claims, it is difficult to see where else they would be brought other than in proceedings in St Vincent and Hungary respectively. There is certainly no basis shown by the claimant for founding jurisdiction against them in England. In that respect, the analogy which Mr Akkouh sought to draw with Shlaimoun is not apt. As I held at [79]

above, that was a case in which there had clearly been wrongdoing within the jurisdiction, the respondent company genuinely did not know what proceedings to take where, until it obtained the Norwich Pharmacal orders and, on analysis, it is not a case about proceedings being contemplated in a foreign jurisdiction at the time those orders were made. In contrast here, any proceedings against ETPHL and Violett Polymer can only be contemplated as taking place in a foreign jurisdiction.

209. Accordingly, questions 10 to 24 in the schedule to the draft order are clearly seeking evidence to support a claim or claims against a series of alleged wrongdoers in foreign proceedings and, for the reasons set out above, this court has no jurisdiction to make a Norwich Pharmacal order for that purpose.

210. Second, as with the Cost Shifting Ground, the material on which the claimant relies in relation to the Transfer Pricing Ground is material which has been known to the claimant for some considerable time. The 2012 accounts of the Polyplastic Group were approved on 31 May 2013 and the 2013 accounts on 30 May 2014 and the claimant would have been able to obtain copies of those accounts at those times, which would have identified the extent of related party transactions with ETPHL, although I consider that Messrs Rappoport and Smirnov must have already been well aware of those transactions, given that the claimant was a 50% shareholder in ETPHL. The fact that it was a sleeping partner without control seems to me to be neither here nor there: it is inconceivable that a 50% shareholder was not aware of the business of that company.

211. The claimant has also known for a considerable period of time that ETPHL did not produce accounts or keep accounting records or that, at least, that is what Strongfield was asserting. In a letter to the claimant dated 10 December 2013 asking it to return the shares in ETPHL Strongfield stated: *"ETPH is an offshore company which keeps no accounting records, prepares or presents no statements to either shareholders or regulatory authorities."* As noted at [157] above, the same point was made by Mr Oleynikov, the corporate secretary of Strongfield and the Polyplastic Group in October 2014.

212. Thus, if contrary to the conclusions I have reached above, this material demonstrates a sufficiently arguable case of wrongdoing and this court has jurisdiction to grant Norwich Pharmacal relief, this application is one which should have been made in October 2014 at the latest, at least as regards ETPHL, and there has been considerable delay in making the application. For the same reasons as set out at [190] in relation to the Cost Shifting Ground, that is an additional reason for refusing the relief sought.

213. Finally, as with the questions relating to the Costs Shifting Ground, questions 10 to 24 cannot conceivably be characterised as anything but a wide-ranging request for disclosure and evidence which goes beyond anything permissible under the Norwich Pharmacal jurisdiction. Although Mr Akkouh sought to narrow the request and limit it, at least in the first instance, to the documentation which the accountants saw when preparing the 2012 and 2013 accounts, that still does not overcome the fundamental objection that this is a request for evidence to support a claim, which goes beyond the narrow scope of the Norwich Pharmacal jurisdiction.

The Loans Ground

214. The claimant alleges that loans were made to the Polyplastic Group on uncommercial terms by Dameka Finance Limited ("Dameka") a company with multiple connections to Strongfield and its partners. In 2011, short-term and long-term lending was in an aggregate amount of about U.S. $16 million at an average rate of interest of 10–11%. The claimant relies on three points: (i) that the lending was above market rates; (ii) that given the Group's record revenues in 2011, it is difficult to see why it was so heavily reliant on debt-financing; and (iii) Dameka was an undisclosed third party lender.

215. In relation to the first point, the claimant contends that statistics from the Central Bank of Russia show that in 2011, prevailing market rates for loans to non-financial organisations fluctuated between 3.8% and 6.5% for short-term lending and 6 to 9.7% for long-term lending. Although the defendant contended that the Central Bank's figures did not represent the rates at which loans were available in the market, Mr Armstrong stated that the statistics relied upon represented the results of a survey of interest rates charged by Russian banks to non-financial institutions.

216. Mr Chapman QC relied upon the audited accounts of the Polyplastic Group for the year to 31 December 2011, which set out all the long-term and short term loans of the Group, from which it was clear that the interest rates under the loans from Dameka were in line with the interest rates under loans obtained from other financial institutions. Thus, there was a short-term secured loan from Dameka at 11% but other short-term secured loans from JSC Priorbank at 13.5%. So far as unsecured short-term loans from Dameka are concerned, there was one in the previous financial year at 6%, appreciably less than rates from other financial institutions which ranged from 10% to 12%.

217. There were long-term secured loans from Dameka in both financial years at 11 or 11.5% but these were lower than the rates from JSC Prior Bank in the year to 31 December 2010 at 13.5%. There were long-term unsecured loans from Dameka in the year to 31 December 2010 at 9%, 11% and 12% (a Euro loan) compared with loans from Tekhnopol-Marketing LLC and inter-group loans from the Polymerteplo Group in that year all at 10%. In the year to 31 December 2011, the Dameka loans were at 10% and 11% compared with the loans from Tekhnopol-Marketing LLC and inter-group loans from the Polymerteplo Group in that year all at 10%. It is noteworthy that the rates being charged by Dameka do not appear to have attracted any comment from the auditors, which one might have expected if, as the claimant alleges, they were at rates of interest which were in excess of market rates.

218. In my judgment, the accounts provide compelling confirmation that Dameka's rates were not out of line with those of other lenders to the Group and also bears out the defendant's evidence as to the rates which could be obtained by the Group. In my judgment, the allegation that the rates were above market rates and were on uncommercial terms is simply not made out by the claimant and, on that basis alone, the claimant fails to show a good arguable case of any wrongdoing in relation to the Dameka loans.

219. In the circumstances, it is not necessary to deal with the claimant's other allegations about the loans. Even if Dameka was a related party, the loans were at rates which were in line with other rates obtained by the Group, so that in itself cannot even begin to demonstrate wrongdoing. Whilst the claimant may dispute that the loans taken out by the Group were necessary, the accounts show that there were such loans, and not just from Dameka, so that, again, there is no evidence of wrongdoing. The suggestion that these loans were all part of some illicit scheme to extract monies from the Polyplastic Group is fanciful speculation. Accordingly, the claimant fails to satisfy the first threshold condition for the grant of Norwich Pharmacal relief in relation to this Ground.

220. Even if that were wrong and the claimant could show a good arguable case, it would still not be entitled to Norwich Pharmacal relief for a number of other reasons. In so far as it is possible to discern what claims might be brought, they would presumably be claims against the Polyplastic Group and Dameka which would have to be pursued in the Russian courts and the English court has no jurisdiction by way of Norwich Pharmacal relief to assist in obtaining evidence in support of claims to be brought in foreign proceedings.

221. Furthermore, I agree with Mr Chapman QC that this is the stalest of stale allegations. It derives from the claimant's reading of the 2011 accounts which were approved on 31 May 2012 and to which the claimant would have had access at the time. If there were anything in the point, the claimant could and should have made it long ago and it is not an appropriate use of the Norwich Pharmacal jurisdiction to seek evidence now in relation to such a stale allegation. The delay in bringing the application on this Ground is yet another reason for refusing relief.

222. Finally questions 25 to 32 in the schedule to the draft order amount in relation to this Ground, as with the others, to an impermissibly wide-ranging request for disclosure and evidence, for which the Norwich Pharmacal jurisdiction cannot be used.

Conclusion

223. For all the reasons set out in this judgment, the claimant's application for a Norwich Pharmacal order is dismissed.

Appendix

The Schedule to the Draft Order setting out the relief sought

Schedule 1

Introduction and interpretation

i. All requirements to provide information about the situation " **at present** " mean the date at which you swear the affidavit required by paragraph 1 of the Order.

ii. You are required to provide information within your knowledge and information that you can acquire by making reasonable enquiries in view of the timeframe within which you must swear the affidavit required by paragraph 1 of the Order.
iii. Where you do not know particular information that you are asked to provide, you are required to identify the persons who you believe would know this information.
iv. Where you are asked to give a date, time or amount as part of your answer, you are required to provide approximations (indicating this is the case) if you are unable to provide the specific date, time or amount in question.
v. Where you are asked to " **produce** " a document, this means by:

(a) (if the document is within your control) exhibiting a copy of that document to the affidavit required by paragraph 1 of the Order; or
(b) (if the document is not within your control) by identifying the document and identifying the persons in whose control it may be found.

vi. Where you are asked to " **identify** " a document, this means providing a description of the document including:

(a) its title, date, signatories and subject matter;
(b) (if an agreement) the parties to the agreement and the consideration to be provided by each party; and
(c) (if a loan) the amount of the loan and applicable interest rate.

vii. Where you are required to produce or identify a document, and it is not reasonable for you to do either within the time permitted by paragraph 1 of the Order, you may instead explain the circumstances that make it unreasonable for you to comply and provide an estimate of how much additional time is required.
viii. Where you are asked to " **identify** " a person, this means providing their full name, all alternative names by which they are known, their jurisdiction of incorporation or registration (for a legal entity) and all known addresses and means of contacting them.
ix. Giving " **full particulars** " in relation to a legal entity means providing the following information in respect of the period 1 January 2013 to the present (or such other period as is specified), identifying any changes during that period:

(a) identifying the persons who own the entity, including the identity of each direct and indirect owner, the size and nature of his ownership interest and the structure through which that interest is held;
(b) identifying the persons who manage the entity's affairs, including the identity of its directors and company secretary (as applicable) and the identity of any individuals authorised formally or informally to give instructions to such directors or company secretary;
(c) describing the nature of the entity's business, identifying (approximately) how many employees it has, and identifying the jurisdictions in which it carries on business; and
(d) identifying any financial institution at which the entity holds an account and the associated account number(s).

x. To the extent the answer to a question requires you to repeat information provided in an earlier response, the question may be answered by cross-referring to your earlier answer.
xi. " **Armstrong 1** " means the first witness statement of Daniel Vinh Wade Armstrong dated 12 April 2016.
xii. The company abbreviations " **APG** ", " **BNPC** ", " **Dameka** ", " **ETP Holding** ", " **PG LLC** ", " **Strongfield** " and " **Violett Polymer** ", have the meaning given to them in Armstrong 1.
xiii. " **Calendar year** " means 1 January to 31 December of the indicated year.
xiv. " **Control** ", in relation to documents, has the meaning ascribed by Rule 31.8(2) of the Civil Procedure Rules , *i.e.* the document is in your physical possession, you have a right to possession of it, or you have a right to inspect or take a copy of it.
xv. " **Persons** " means both natural persons and companies, trusts or other legal entities.
xvi. " **Polyplastic Group** " means APG and its direct and indirect subsidiaries.
xvii. " **Polymerteplo Group** " means Polymerteplo Group Limited, Polymerteplo Group LLC, Radius Systems Holdings Limited, Radius Systems Limited and their direct and indirect subsidiaries.
xviii. " **Strongfield Party** " means Strongfield, any shareholder of Strongfield, or any known relative of such shareholder.

Section A: Questions regarding the non-payment of dividends by the Polyplastic Group

The following questions relate to the non-payment of the dividend declared in respect of the Polyplastic Group's profits for calendar year 2011.

1. Explain why the dividend payment of RUR 526,893,500 in respect of calendar year 2011 that was authorised to be made to APG by the shareholders of PG LLC on 12 September 2012 was not made.

2. Describe how the decision not to pay this dividend was documented and produce any documents that record or refer to that decision and/or the reasons for it.

3. Explain what happened to the amount that was authorised to be paid as a dividend, including identifying any persons to whom some or all of this amount was transferred.

4. Give full particulars of any legal entity identified in response to the previous question.

The following questions relate to the non-payment of any dividend in respect of the Polyplastic Group's profits for each of calendar years 2012 to 2014.

5. Explain why no dividend was declared by PG LLC in respect of its consolidated net profit for each of calendar years 2012, 2013 and 2014.

6. Describe how the decision not to declare a dividend for each such year was documented and produce any documents that record or refer to that decision and/or the reasons for it.

The following questions relate to the dividend of RUR 4,813,172,000 (approximately US$157 million) paid by the Polymerteplo Group in 2012.

7. Out of which year's or years' profit(s) was this dividend paid?

8. Explain (a) how the Polymerteplo Group was able to pay a dividend of this size given the revenue and profits which it generated, and (b) the source(s) of the monies used to pay the dividend.

9. Identify (a) all persons to whom all or part of this dividend was paid or subsequently transferred, and (b) the current whereabouts of the monies (and the traceable proceeds of the monies) used to pay the dividend.

Section B: Questions regarding suspected schemes involving the insertion of intermediary companies into the Polyplastic Group's supply chains

The following questions relate to the suspected schemes described in Armstrong 1 involving the apparent insertion of (i) ETP Holding, (ii) Violett Polymer, and (iii) BNPC, in the supply chains by which the Polyplastic Group acquires raw materials.

Please answer each of the following questions in respect of each of these three companies. For each question, please provide the requested information in respect of the situation at present and state how the requested information has changed (if at all) since 1 January 2013 to the present.

10. Provide full particulars for each company.

11. Produce any of the company's account statements or other account documentation.

12. Confirm whether you, Strongfield and/or PG LLC create, receive or maintain any record of the company's cash-flow and, if so, produce those records.

13. Describe the nature and volume of the goods or services which the company has supplied to the Polyplastic Group and the amount paid by the Polyplastic Group for each category of goods or services received.

14. In relation to each agreement pursuant to which those goods and/or services have been supplied by the company to the Polyplastic Group, produce the agreement.

15. In relation to any goods which the company has supplied to the Polyplastic Group, identify:

(a) the person that manufactured or produced those goods and;

(b) all other persons (if any) involved in the supply chain between that manufacturer/producer and the company, including all persons that buy and sell those goods or that take possession of them as consignee.

16. Provide full particulars for each legal entity identified in response to question 15(b).

17. In relation to each agreement pursuant to which each person identified in response to question 15 (including the manufacturer/producer) has bought, sold or taken consignment of the relevant goods, produce the agreement.

The following questions relate to the suspected insertion of intermediaries in the supply of raw materials to the Polyplastic Group generally:

18. Identify, in respect of each of the last three full calendar years (2013 to 2015) the five largest suppliers of raw materials to the Polyplastic Group (whether directly or indirectly), other than ETP Holding, Violett Polymer and BNPC, as measured by the amount spent by the Polyplastic Group in that year, indicating the amount spent in relation to each such supplier.

19. For each supplier identified in answer to the previous question, identify all other persons involved in the supply chain between (a) that supplier and the Polyplastic Group, and/or (b) that supplier and the manufacturer(s)/producer(s) of the relevant raw materials, including all persons that buy and sell those goods or that take possession of them as consignee.

20. Provide full particulars for each legal entity identified in response to the previous question.

21. In relation to each agreement pursuant to which each person in the supply chains identified in response to question 19 (including any manufacturer/producer) has bought, sold or taken consignment of the relevant goods, produce the agreement.

The following questions relate to payments made from intermediaries in the Polyplastic Group's supply chains:

22. Identify any payment over, or series of payments with an aggregate value of over, US$1 million (or its equivalent in other currency) made by (i) ETP Holding (ii) Violett Polymer, (iii) BNPC, or (iv) any other person identified in response to question 15(b) or 19 above, during the period 1 January 2013 to the present, to any of the following persons:

(a) any Strongfield Party;
(b) any company within the Polymerteplo Group; or
(c) any person outside the Polyplastic and Polymerteplo Groups that acts in accordance with the direct or indirect instructions of any Strongfield Party and/or in which any Strongfield Party has a direct or indirect beneficial interest.

23. Provide full particulars for each legal entity identified in response to question 22(c).

24. For each payment identified in answer to question 22:

(a) explain the purpose of the payment and the consideration received in return; and
(b) in relation to any agreement pursuant to which payment was made, produce the agreement.

Section C: Questions regarding suspected schemes involving the making of loans to the Polyplastic Group

The following questions relate to the suspected scheme described in Armstrong 1 involving the making of loans by Dameka to the Polyplastic Group.

25. Provide full particulars for Dameka for the period 1 January 2011 to the present.

26. In relation to each agreement pursuant to which Dameka has loaned money to the Polyplastic Group from 1 January 2011 to the present, produce the agreement.

27. Describe the process by which the interest rate for these loans has been negotiated and agreed by the Polyplastic Group, either in the case of each loan or generally, including any process intended to ensure that the Polyplastic Group does not borrow money from Dameka at above-market rates, and identify the persons involved in this process.

28. Describe in general terms, or identify specifically if known, the source of the funds that Dameka has loaned to the Polyplastic Group for the period 1 January 2011 to the present.

29. Describe in general terms, or identify specifically if known, how the Polyplastic Group used the funds that Dameka loaned to it for the period 1 January 2011 to the present.

30. Identify any payment over, or series of payments with an aggregate value of over, US$1 million (or its equivalent in other currency) made by Dameka during the period 1 January 2011 to the present to any of the following persons:

(a) any Strongfield Party;
(b) any company within the Polymerteplo Group;
(c) any person outside the Polyplastic and Polymerteplo Groups that acts in accordance with the direct or indirect instructions of any Strongfield Party and/or in which any Strongfield Party has a direct or indirect beneficial interest.

31. Provide full particulars for each legal entity identified in response to question 30(c).

32. For each payment identified in answer to question 30:

(a) explain the purpose of the payments and the consideration received in return; and
(b) in relation to any agreement pursuant to which that payment was made, produce the agreement.

Section D: Information about the Polyplastic Group's dealings with the Polymerteplo Group

The following questions relate to agreements by which funds have been transferred between the Polyplastic and Polymerteplo Groups (the latter is defined to include the Radius Group).

33. Identify, in respect of each of the last three full calendar years (2013 to 2015):

(a) the five persons within the Polymerteplo Group to which the Polyplastic Group paid the largest amount of money in that year, indicating the amount paid; and
(b) the five persons within the Polymerteplo Group that paid to the Polyplastic Group the largest amount of money in that year, indicating the amount paid.

34. For each person identified in answer to the previous question:

(a) explain the purpose of the payments to/from the Polyplastic Group and the consideration received in return; and
(b) in relation to any agreement pursuant to which payment was made, produce the agreement.

35. In relation to the agreements produced or identified in relation to the previous question, describe (in respect of the situation at present and stating how the requested information has changed over the period 1 January 2013 to the present):

(a) the process by which such agreements are approved by the Polyplastic Group, including identifying the persons involved in this process and any relevant monetary thresholds applying to a particular approval process; and
(b) the process by which the consideration to be paid under the agreements is negotiated and agreed by the Polyplastic Group, either in each case or generally, including any process which is intended to ensure that the consideration paid is fair and at market rate, and identify the persons involved in this process.

The following questions relate to the sharing of costs between the Polyplastic and Polymerteplo Groups as referred to in the 2013 Synergies Presentation referred to in Armstrong 1. For each question, please provide the requested information in respect of the situation at present and state how the requested information has changed over the period 1 January 2013 to the present.

36. Explain how costs are shared between the Polyplastic and Polymerteplo Groups, including (but not limited to), identifying the different areas of the Groups' business in relation to which their costs are shared, how costs are shared in relation to each of those areas of business, how the division of costs between the two Groups is decided, which persons are involved in making such decisions and how those decisions and the reasons for them are documented. In addition, produce any such documents.

37. Explain what processes are in place, if any, to ensure that:

(a) costs originally incurred by the Polymerteplo Group are not allocated to or borne by the Polyplastic Group; and/or

(b) where goods or services are sourced centrally for the benefit of both Groups, that the cost allocated to or borne by the Polyplastic Group is proportionate to the goods or services that it (rather than the Polymerteplo Group) actually receives.

Section E: General

38. Confirm if you know of any other agreement, or series of related agreements, having a value over US$1 million (or its equivalent in other currency), entered into by the Polyplastic Group between 1 January 2013 and the present, for which the Polyplastic Group did not receive fair, market value. If so, produce any such agreement.

39. Describe the banking arrangements used by each of the Polyplastic and Polymerteplo Groups from the period 1 January 2013 to the present, including identifying the principal financial institutions at which each Group holds accounts.