IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 76 OF 2018 (IKJ)

BETWEEN

DISCOVER INVESTMENT COMPANY

Applicant

-and-

(1) VIETNAM HOLDING ASSET MANAGEMENT LIMITED

First Respondent

(2) SAIGON ASSET MANAGEMENT CORPORATION

Second Respondent

IN CHAMBERS

Appearances:	Mr. Ardil Salem of Carey Olsen on behalf of the Applicant ("Discover") Ms. Farrah Sbaiti of Collas Crill on behalf of the 1st Respondent ("VNHAM") Mr. David Lee of Appleby (Cayman) Limited on behalf of the 2nd Respondent ("SAMC")
Before:	**The Hon. Justice Kawaley**
Heard:	16 October 2018
Draft Judgment Circulated:	31 October, 2018
Judgment Delivered:	5 November 2018

HEADNOTE

Application for Norwich Pharmacal Order - governing principles - whether relief "necessary"- relevance of purpose for seeking relief - whether scope of discovery proportionate - Confidential Information Disclosure Law, 2016 - whether requirement to apply for directions under section 4 mandatory or directory.

JUDGMENT

Introductory

1. Discover applies by an Originating Summons for Orders that:

> "*1. By a date to be fixed by the Court (or by a later date agreed in writing with the Applicant), the Respondents shall each provide the Applicant with copies of the documents and an affidavit containing the information sought in the draft Order exhibited to the Affidavit of Hiroshi Funaki dated 10 May 2018.*
>
> *2. The Respondents' reasonable costs, including his costs and expenses of complying with this order, be paid by the Applicant.*
>
> *3. The Respondents may each apply to the Court at any time to vary or discharge this Order.*"

2. The application is grounded in the following central facts. Discover is an open-ended investment fund domiciled in the Cayman Islands. It is a "fund of funds" that invests in the Asian and European markets in securities and funds managed by third parties. Discover holds investments in Vietnam Holding Limited ("VHL"), of which VNHAM was the Investment Manager from 2006 until June 2018. It also holds investments in Vietnam Equity Holding Limited ("VEH"), of which SAMC is Investment Manager. Both VNHAM and SAMC are domiciled in the Cayman Islands.

3. Discover believes that Mr. Marcus Winkler ("MW"), one of its directors between June 1, 1994 and September 8, 2017 earned "Secret Profits" through "Secret Agreements" he indirectly entered into with, *inter alia*, VNHAM and VHL, in breach of his fiduciary duties to Discover. Discover further believes that VNHAM and SAMC have in their possession information about these suspected Secret Agreements and Secret Profits which would potentially be crucial to Discover's ability to plead a case of wrongdoing against MW and any other parties implicated in the suspected wrongdoing. Although MW has not sought to join the present proceedings, the Court has seen statements purportedly sworn by several former directors suggesting that they believe MW is innocent of the alleged wrongdoing towards Discover. This 'evidence' was not

conclusive, because Discover acknowledged that it was aware of certain 'outside' earnings made by MW while he was a director which were duly disclosed. The present application relates to arrangements which were not, according to Discover's records, disclosed.

4. The application was made on the explicit basis that although Discover had a good arguable case that wrongdoing had occurred it was not at this point known whether or not the information sought would in fact justify the commencement of proceedings against MW. Although there was no basis for believing that the Respondents were themselves guilty of any wrongdoing, Discover expressly reserved the right to deploy the information in proceedings against the Respondents if required.

5. The Respondents' position was not to positively oppose the application but rather to raise such principled objections as they could identify with a view to ensuring that they did not in substance consent to the making of an Order which ought not properly to be made. VNHAM, it appeared to me, had received some encouragement to adopt this stance as MW had apparently threatened legal action for breach of the confidentiality obligations in one or more of the contracts which Discover was seeking to obtain copies of. The contract sought from SAMC is also believed to be subject to similar confidentiality obligations governed by Swiss law. The principles governing the grant of *Norwich Pharmacal* relief being essentially common ground, issue was joined as to whether or not:

   (a) Discover had demonstrated that the Order sought was necessary in the requisite legal and factual sense;

   (b) assuming this Court possessed general jurisdictional competence to make the Order, the scope of the Order sought was sufficiently proportionate to justify exercising the jurisdiction on the facts of the present case; and

   (c) if an Order was granted, it should be on Discover's undertaking not to use the information obtained in proceedings against the Respondents without further leave of the Court.

6. Issue was also joined on a fourth, important ancillary matter. VNHAM contended that it could not properly be required to produce the information sought without directions being given under the ***Confidential Information Disclosure Law*** 2016 ("***CIDL***").

Discover and SAMC contended that ***CIDL*** did not apply. This was a difficult point not directly addressed by previous authority which was dealt with by counsel in an economical way. Counsel understandably focused their effort on a detailed analysis of the *Norwich Pharmacal* jurisdiction, and their submissions greatly assisted the Court.

The Norwich Pharmacal Jurisdiction

Conditions justifying the exercise of the jurisdiction to grant relief

7. This Court's jurisdiction to administer and grant relief derived from common law and/or equity legal principles is derived from section 11 of the ***Grand Court Law***, which provides:

> *"11. (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by-*
>
> *(a) Her Majesty's High Court of Justice; and*
>
> *(b) the Divisional Courts of that Court,*
>
> *as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of the Parliament of the United Kingdom amending or replacing that Act.*
>
> *(2) Without prejudice to subsection (1), the Court shall have and shall be deemed always to have had power to make binding declarations of right in any matter whether any consequential relief is or could be claimed or not."*

8. Although English law decisions on this jurisdiction are accordingly highly persuasive, the starting point of any articulation of the governing principles ought logically to be to consider their application under Cayman Islands law. In short, it is uncontroversial that the English law approach to this jurisdiction is well recognised under local law. In

Braga-v-Equity Trust Company (Cayman) Limited [2011(1) CILR 402], Smellie CJ (at 419-420) concisely opined as follows:

> "*42. The equitable principle by which the courts make orders for discovery against persons who are not themselves to be sued as parties to the action, and who are not mere witnesses to events which give rise to an action, has been settled ever since Norwich Pharmacal Co. v. Customs and Excise Commrs. was decided by the House of Lords some 37 years ago. Indeed, the equitable principle itself has existed for at least 150 years as appears from the following definitive passage from the leading speech of Lord Reid in the Norwich Pharmacal case itself ([1974] A.C. at 175):*
>
> > *'I am particularly impressed by the views expressed by Lord Romilly, M.R. and Lord Hatherly, L.C. in Upmann v. Elkan (1871), L.R. 12 Eq. 140; 7 Ch. App. 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.'"*

9. Chief Justice Smellie proceeded to elaborate upon those foundational principles and to consider in more detail how those principles applied to the facts of the *Braga* case. He made two supplementary legal findings which are of pertinence to the present case:

> "*55. Nor is there an absolute requirement that a plaintiff must show that the Norwich Pharmacal relief is needed so that an action can be instituted...*
>
> *58. Nor is the relief limited - as the applicants argued, citing Lonrho (18) - to cases where the identity of the wrongdoer needs to be ascertained.*

The relief can be granted where the identity of the alleged wrongdoer is well-known to a plaintiff but what is needed is disclosure of information to prove the wrongdoing. A clear illustration of this appears in Gianne v. Miller[1]*. This was a case in which the Cayman Court of Appeal upheld Ms. Gianne's entitlement to Norwich Pharmacal disclosure by Condoco Grand Cayman Resort ("Condoco"). This was information that revealed that her estranged husband, Mr. Miller, had acquired very valuable interests in a condominium development built by Condoco. These were interests which Mr. Miller had improperly failed to disclose in the context of divorce proceedings in California.*

59 *In Mitsui & Co. Ltd. v. Nexen Petroleum UK Ltd. (20), Lightman, J., even while refusing Norwich Pharmacal relief on the basis that an application for pre-action discovery would have been available in that case from an innocent mere witness, helpfully summarized the recent development of the jurisdiction as revealed in the case law in these terms ([2005] 3 All E.R. 511, at para. [19]):*

> *'In subsequent cases, the courts have extended the application of the basic principle. The jurisdiction is not confined to circumstances where there has been tortious wrongdoing and is now available where there has been contractual wrongdoing: P v. T Ltd. [1997] 4 All E.R. 200, [1997] 1 W.L.R. 1309; Carlton Film Distributors Ltd. v. VCI Plc [2003] EWHC 616, [2003] F.S.R. 876 (Carlton Films); and is not limited to cases where the identity of the wrongdoer is unknown. 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: see AXA Equity & Law Life Assurance Society plc v. National Westminster Bank plc [1998] C.L.C. 1177 (Axa Equity); Aoot Kalmneft v. Denton Wilde Sapte (a firm) [2002] 1 Lloyd's Rep. 417; see also Carlton Films. Further the third party*

[1] 2006 CILR N [26] (Grand Court); 2007 CILR N [10] (Court of Appeal).

from whom information is sought need not be an innocent third party: he may be a wrongdoer himself: see CHC Software Care Ltd. v. Hopkins and Wood [1993] F.S.R. 241 and Hollander, Documentary Evidence (8th ed., 2003) p.78, footnote 11.'" [Emphasis added]

10. The above extracts from this Court's decision in ***Braga*** help to demonstrate how the *Norwich Pharmacal* principles have developed incrementally on a case by case basis. How the guiding principles are expressed are frequently coloured by the facts of a particular case, and so care must be taken when considering the authorities to distinguish statements of pure principle from statements of what are effectively statements of mixed fact and law. Subject to this important *caveat*, the following statement of the law by Flaux J in ***Ramilos Trading Limited-v-Buyanovsky*** [2016] EWHC 3175 helpfully identifies what are widely accepted to be the three pre-conditions for the grant of *Norwich Pharmacal* 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.'"

11. After this initial distillation of the governing principles, Flaux J proceeds to expound upon them more fully with a view to applying them to the facts of the case before him. For present purposes, no elaboration is required as regards condition (i) and (iii) because the Respondents were unable to cast any doubt on whether those conditions had been made out. However, the quoted formulation by *Hollander* of conditions (ii) and (iii) (b), which may well be accurate in appropriate factual contexts, do not accurately reflect the strict legal position. As the findings of Chief Justice Smellie in ***Braga*** demonstrate, the purposes for which relief may be sought are not limited to obtaining evidence for the purposes of bringing proceedings. It follows that the respondent to an application need not in all cases be in possession of information "*necessary to enable the ultimate wrongdoer to be sued*". This distinction was acknowledged by Flaux J in ***Ramilos*** when he stated:

> "*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...*" [Emphasis added]

12. While I accept that it is legally possible for factually unusual circumstances to give rise to additional discretionary factors which courts may have to consider, I summarily reject SAMC's submission that the mere fact that the information sought was confidential created a freestanding discretionary basis for refusing relief in the present case. I would accordingly summarise the legal conditions for the granting of *Norwich Pharmacal* relief as follows, for the purposes of this case:

(1) the Applicant must make out an arguable case of wrongdoing;

(2) the Applicant must demonstrate that the disclosure sought is "*necessary*" in the requisite sense to enable it to seek legitimate redress for the wrongdoing; and

(3) the Applicant must demonstrate that the Respondents are likely to have relevant information acquired by them in circumstances where their involvement in the suspected wrongdoing make them more than mere witnesses.

Legal test: necessity for relief

13. Mr Salem for the Applicant Discover was keen to refer the Court to *dicta* in decided cases speaking of the breadth and flexibility of the *Norwich Pharmacal* jurisdiction. The Respondents' counsel sought to emphasise *dicta* speaking to the exceptional nature of the jurisdiction and the need to exercise it with restraint. In my judgment it is possible to draw a distinction between:

    (a) the need to adopt a flexible and non-technical approach when considering whether a particular set of circumstances in general terms potentially qualifies for relief (conditions (1) and (3)); and

    (b) the need to exercise caution when deciding whether, assuming the more generic first and third conditions have been met, it is in practical terms necessary to:

        (i) grant any relief in the particular circumstances of the case at all, and, if so

        (ii) to what extent.

14. This distinction may be demonstrated by reference to this Court's decision in ***Braga-v-Equity Trust Company (Cayman) Limited*** [2011(1) CILR 402], where Smellie CJ (at paragraph 50) cited with approval the following observations of Lord Woolf in ***Ashworth Hospital-v- MGN Ltd.*** [2002] 1 W.L.R. 2033 upon which Mr Salem relied:

> "57. *The Norwich Pharmacal jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised. New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy."*

15. Another helpfully illustrative judicial statement was cited by Ms Sbaiti, and is found in the judgment of Hoffman LJ (as he then was) in ***Mercantile Group (Europe) A.G.-v-Aiyela*** [1994] Q.B. 366 at 377E:

> *"The jurisdiction is of course one to be exercised with caution, restraint and appropriate respect for the legitimate interests of third parties. But that the*

jurisdiction exists, both in relation to the disclosure order and the Mareva injunction, I do not doubt."

16. That the necessity requirement is a legal requirement for establishing the jurisdictional competence to grant relief which also incorporates considerations of practical necessity and proportionality is perhaps most clearly demonstrated by *dicta* to which Mr Lee referred. In ***Orb A.R.I. and Others-v- Fiddler and Anor*** [2016] EWHC 361 (Comm), Popplewell J held:

> "*87. The test is one of necessity as a threshold condition; the desirability of the disclosure is not simply a matter for consideration in the exercise of discretion: see Ashworth per Lord Woolf CJ at paragraph [57] and R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2014] QB 112 per Maurice Kay LJ at paragraph [30]. The need to order disclosure will be found to exist only if it is a necessary and proportionate response in all the circumstances, although the necessity test does not require the remedy to be one of last resort (see Ashworth at paragraphs [36], [57]; R (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs (No.1) [2009] 1WLR 2579 at paragraph [94]; and RFU v Consolidated Information at paragraph [16].*" [Emphasis added]

17. In summary, whether an applicant has satisfied the necessity condition for obtaining *Norwich Pharmacal* relief is a fact-sensitive inquiry which requires consideration of both (a) whether any relief at all is required and, if so, (b) what scope of relief is proportionate in all the circumstances of each case.

Findings: has the Applicant established an arguable case of wrongdoing and that the Respondents have relevant information in circumstances where they are more than mere witnesses?

18. The Respondents sensibly conceded that conditions (1) and (3) for obtaining Norwich Pharmacal relief had been established by Discover's evidence. The investigations carried out by Discover to date are set out in some detail in the First Affidavits of Clemens Zankel and Hiroshi Funaki. Preliminary information was gleaned at meetings

which took place at, *inter alia*, the '*Restaurant L'Oiseau Blanc*' in Paris and the '*Pasteur Street Brewery*' in Ho Chi Min City.

19. Having also satisfied myself of the sufficiency of the evidence in this regard, I find that:

(a) Discover has established an arguable case that MW breached his fiduciary duty while he was a director of the company; and

(b) Discover has established that the Respondents have in their possession or under their power (either directly or indirectly) relevant information which they acquired through their involvement in impugned arrangements entered into by MW.

Findings: has the Applicant established that relief is necessary?

20. The necessity requirement for obtaining *Norwich Pharmacal* relief requires firstly identifying the purpose for which the relief is sought, secondly determining whether the form of relief sought is necessary in a general sense, and thirdly establishing that the scope of relief sought is necessary in terms of its scope and/or proportionality.

What is the purpose for which relief is sought and is it "legitimate"?

21. Discover has invested in entities that are under the management of the Respondents, who it believes have in turn entered into agreements with entities controlled by MW and to which monies have been paid while MW was a director of Discover. The Applicant contends that these earnings have not been properly disclosed. According to the First Affidavit of Clemens Zankel, a director and Board Chairman since September 8, 2017, "*the Board of Directors is investigating whether claims may exist against Mr Winkler to hold him to account for his breaches of duty to Discover*" (paragraph 7).

22. As far as both Respondents are concerned, Mr Zankel (who also has a significant beneficial interest in the Applicant company) further deposes:

> "*13. The Respondents to this application are two of the investment managers to investment funds in which Discover was invested and with whom the Board of Directors believes Mr Winkler has entered into Secret Agreements. Both of the Respondents are Cayman Islands companies. It is not, at this stage, alleged that the Respondents have committed any actionable wrong against Discover in their own right;*

rather the Board of Directors considers that the Respondents have become mixed up in the wrongdoing committed by Mr Winkler in entering into the Secret Agreements and receiving the Secret Profits without proper disclosure to Discover.

14. *If the allegations against Mr Winkler prove to be correct, the Board of Directors considers that Mr Winkler would be liable to account for the Secret Profits to Discover, having been obtained by him in breach of his fiduciary duties to Discover.*

15. *In bringing this application, Discover accordingly is seeking the assistance of the Grand Court to allow it to obtain information on the Secret Agreements, and the counterparties to them, as part of its investigation into the potential claims which may exist against Mr Winkler in respect of the Secret Profits.*"

23. The evidence clearly supports a finding that the main purpose of the application is to enable Discover to ascertain whether its suspicions of wrongdoing on MW's part are justified, and, if so, to plead a sustainable case against him. If they are not, no proceedings will presumably be issued. Mr Salem's submissions to some extent appeared to pitch the Applicant's case on wrongdoing higher than the cautiously crafted Affidavits merited. The Applicant's Skeleton Argument began by accurately summarising the case supported by the evidence:

> "*14. The Applicant is currently considering claims that could be brought against Mr Winkler and/or related persons (whose identity is presently unknown)...and believes that the Respondents have evidence, in terms of documents and information, in their possession in relation to claims the applicant believes exist...*"

24. In addressing the legal requirements for disclosure, the Skeleton proceeded to accurately refer to the "*potential claims*" (paragraph 27) which formed the basis of the Order. The following submission, therefore, must be viewed against that background and in light of the evidence:

> "*29. The above information will be necessary to permit the Applicant to both properly plead the particulars of the breach alleged against Mr*

Winkler in respect of his non-disclosures to the Applicant, and also to quantify the extent of the account of profits sought from Mr Winkler…"

25. The Respondents' counsel seized on the reference to properly pleading a case to argue that the Order sought was not necessary because the Applicant already had sufficient evidence to plead a case. In my judgment the predominant purpose of the application is not, based on the evidence, to enable Discover to properly plead a case it has already decided to bring. It is primarily to enable Discover to decide whether or not there is a valid basis for bringing proceedings at all.

26. It is admittedly an important aspect of this decision for the Applicant to consider whether it has sufficient information to properly plead a case against the alleged wrongdoer. It is also true, as Mr Salem pointed out in oral argument, that any pleading will indeed have to be particularised because Discover's Articles indemnify directors against all liability save for "*wilful neglect or default*" (Article 143(1)). However, in my judgment the question of whether or not the Order is "necessary" in general terms must properly be considered by reference to the predominant purpose for which it is sought. And that is to enable Discover to determine whether or not its strong suspicions of wrongdoing are supported by documentary evidence to such an extent as to justify commencing remedial proceedings.

27. It is of course essential that the purpose is a legally legitimate purpose. One of the most important statements of principle articulated by the Chief Justice in *Braga* was that there is no limit to the purposes for which information can be sought:

> "*55. Nor is there an absolute requirement that a plaintiff must show that the Norwich Pharmacal relief is needed so that an action can be instituted. This is plain from the passage quoted above from Lord Slynn's speech and is further explained in Ashworth in which Lord Woolf, having reviewed the history of the jurisdiction, including Norwich Pharmacal itself, stated as follows ([2002] 1 W.L.R. 2033, at para. 44):*
>
> > *'It is clear that in the Norwich Pharmacal case itself, Lord Reid was contemplating situations where the intention of the claimant, once the source had been identified, was to bring*

proceedings against the source. The language used by Lord Reid can be explained by the fact that in that case, it was the intention of Norwich Pharmacal to bring proceedings. It is also to be noted that in the final paragraph already cited from his speech, Lord Reid was taking a common sense non-technical approach when justifying the jurisdiction. Furthermore, the other speeches do not link the jurisdiction to any requirement that the information should be available to the individual who had been wronged only for the purpose of enabling him to vindicate that wrong by bringing proceedings... " [Emphasis added]

28. The importance of demonstrating that the information is needed for a legitimate purpose will probably usually be self-evident; it will only explicitly need to be addressed in cases where the legitimacy of the applicant's purpose is in dispute. For instance in ***Orb A.R.I. and Others -v- Fiddler and Anor*** [2016] EWHC 361 (Comm), Popplewell J held:

> "*91. The Claimants have not established that the information which is sought... is necessary for a legitimate purpose, namely seeking redress in respect of the wrongdoing which is alleged...*"

29. Mr Salem identified cogent support for the proposition that *Norwich Pharmacal* relief is available where the applicant seeks information which will assist him to decide whether or not to bring a claim. In ***Various Claimants -v- News Group Newspapers Limited and Ors*** [2013] EWHC 2119 (Ch) (a case concerning phone–hacking), Mann J held:

> "*66 ...It would be a pity to require a claimant to litigate partially blind... without being able to decide whether the whole exercise is worthwhile in the first place.*"

30. Ms Sbaiti urged me to find that the facts of that case were "*a far cry from our case*". I am unable to accept this submission. The detail may be different but the broad picture is essentially the same. The 'phone-hacking' case is a useful illustration of the fact that the jurisdiction which the Applicant invokes can be deployed to assist a potential victim of wrongdoing decide whether or not there is a sound basis for bringing proceedings.

Is relief necessary in a general practical sense?

31. It is helpful at this juncture to firstly consider how this limb of the necessity requirement has been applied in previous decided cases. Mr Lee acknowledged that the test applied by Lightman J in ***Mitsui & Co Ltd.-v- Nexen Petroleum UK Limited*** [2005] EWHC 65 (Ch) (at paragraph [19]) had been described as too narrow by the Divisional Court in ***R (Mohamed) -v- Secretary of State for Foreign and Commonwealth Affairs (No 1)*** [2008] EWHC 2048 (Admin) (at [94]). Lightman J's approach had been followed in ***Braga*** by this Court in a hearing in which ***Mohamed*** had not been cited. In my judgment there is no material difference of principle between these two cases.

32. In ***Mitsui***, Lightman J, near the end of his review of previous case law, observed that:

> *"19 ...Relief can be ordered... 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..."*

33. ***Mohamed*** was a case, it must be remembered, where the applicant was being tried at Guantanamo Bay for terrorist offences and was seeking information from the British Government to support his defence that confessions had been procured by torture. This factual background may well have justified a more flexible approach than might be warranted in more standard civil litigation contexts. However, in my judgment there is no proper basis for concluding that a more flexible test was actually applied. In ***Mohamed***, Thomas LJ (as he then was) admittedly held:

> *"94. It seems to us that the observations of Lightman J in the Mitsui & Co. Ltd case and Langley J in Nikitin's case put an undue constraint on what is intended to be an exceptional though flexible remedy....in our view there is nothing in any authority which justifies a more stringent requirement than necessity by elevating the test to the information being a missing piece of the jigsaw or to its being a remedy of last resort..."*

34. This passage in the judgment appears to be in response to a submission that a narrower test should apply. I accept the submission that based on Thomas LJ's just cited statement of the law in ***Mohamed*** the legal test is nothing more or less than "necessity". However I reject Mr Lee's consequential suggestion that the Divisional Court was in

actuality formulating a more liberal necessity test than that applied in ***Mitsui***. From a passage underlined in the Skeleton Argument of the 2nd Respondent it is clear that this was essentially the self-same test that Lightman J actually applied in ***Mitsui*** when he came on to consider the necessity requirement, having summarised the previous case law:

> "24 *....The necessity required to justify exercise of this jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information.*"

35. I accordingly find no material inconsistency between the approach to necessity applied in ***Mitsui*** and ***Mohamed*** respectively, if by necessity one means whether it is necessary to order the production of information for a purpose which is legitimate. The Judicial Committee of the Privy Council had, before either of these two supposedly conflicting decisions, adopted a broadly similar and perhaps, in some respects, a more clearly articulated approach to the necessity requirement. In ***The President of the State of Equatorial Guinea and Anor-v- The Royal Bank of Scotland International and Others*** [2006] UKPC 7, Lord Bingham and Lord Hoffman opined as follows:

> "16. *It is true that in some of the cases the word "necessary" has been used, echoing or employing the language of Order 24, rule 13 of the Rules of the Supreme Court. But, as Templeman LJ observed in* **British Steel Corporation v Granada Television Limited** *[1981] AC 1096, 1132, "The remedy of discovery is intended in the final analysis to enable justice to be done". Norwich Pharmacal relief exists to assist those who have been wronged but do not know by whom. If they have straightforward and available means of finding out, it will not be reasonable to achieve that end by overriding a duty of confidentiality such as that owed by banker to customer. If, on the other hand, they have no straightforward or available, or any, means of finding out, Norwich Pharmacal relief is in principle available if the other conditions of obtaining relief are met. Whether it is said that it must be just and convenient in the interests of justice to grant relief, or that relief should only be granted if it is necessary in the interests*

of justice to grant it, makes little or no difference of substance..."
[Emphasis added]

36. Although the term "necessity" has now become so widely used that modern courts are obliged to now adopt it, the fundamental principle as to what necessity means in this context remains the same. There must be no other "*straightforward or available, or any, means of finding out*" information that is central to the applicant's ability to obtain relief for proven or suspected wrongdoing. It is clear from this Privy Council decision, that this formulation of what is necessary or just and convenient involves no consideration of the legitimacy of the purpose for which the information is sought.

37. How the information sought is characterised, from case to case, is entirely distinct from the conceptual parameters of the necessity test. The fact that in some cases the information sought may happen to be "*the missing piece of the jigsaw*" does not mean that only information of such a character can legally be sought. It will likely reflect in large part the purpose for which the information is sought. It is accordingly impossible to infer that Smellie CJ had any such restriction in mind when he observed, having cited Lightman J's summary of the cases (at paragraph 19 of ***Mitsui***) in ***Braga-v-Equity Trust Company (Cayman) Limited*** [2011(1) CILR 402]:

> "*60. In the present case, it may be said that the 'missing piece of the jigsaw' is the evidence as to the true relationship between Securinvest, Banco rural/the Rural group on one side and the Petroforte Group on the other.*"

38. That observation was, in my respectful view, merely a characterisation of the significance of the information sought in the particular circumstances of that case, having regard to how it was proposed to deploy the material once it was obtained.

39. The narrower statement of principle in ***State of Equatorial Guinea and Anor-v- The Royal Bank of Scotland International and Others*** [2006] UKPC 7 focusses on whether there are alternative more convenient remedies, assuming that the purpose for which the information is sought is a legitimate one. It is possible to satisfy this dimension of the necessity test in all of the following most obvious ways (and with ascending degrees of difficulty, or descending degrees of ease):

(a) where no other means of obtaining the information exist;

(b) where no other means of obtaining the information are available;

(c) where no other straightforward means of obtaining the information exist.

40. Where it is possible to demonstrate that no other means of obtaining the information exist at all, the necessity bar will be easily met. Where it is possible to demonstrate that, although other means theoretically exist, the relevant means is not in reality available to the applicant, the bar will be set marginally higher. Where other means of accessing the information both exist and are available but are said to be not straightforward the necessity bar will likely be set marginally higher still. And it is in this third category that the present case mainly falls.

41. It was essentially argued by the Applicant in the present case that issuing the present proceedings in the Cayman Islands was the most straightforward means of obtaining the best available evidence of the alleged wrongdoing, copies of the 'Secret Agreements' and documents evidencing the payments made thereunder. The Respondents had no cogent answer to this submission. I find that Discover has established that in general terms relief is necessary because:

(a) I accept the Applicant's evidence that its Board of Directors is still at the investigative stage;

(b) I accept the Applicant's submission it is in any event legally impossible to plead a case which would survive strike-out. Any such case at this stage would depend upon partially disputed oral disclosures allegedly made by parties to confidential agreements;

(c) the information sought is clearly crucial to the Applicant's ability to conclude its investigations into the suspected wrongdoing, one way or another;

(d) it was the 1st Respondent's case that under Cayman Islands law an Order under ***CIDL*** was required to permit disclosure of the confidential information sought by the Applicant;

(e) it was the 2nd Respondent's case that the information sought was subject to Swiss law confidentiality protections;

(f) the Respondents were unwilling to disclose the information sought without a Court Order, it being self-evident that MW was unwilling to voluntarily disclose the information sought;

(g) the present application was the most straightforward remedy for the Applicant to pursue in circumstances where the other conditions for *Norwich Pharmacal* relief have been met.

Is the scope of relief sought necessary and/or proportionate?

42. The authorities make it clear beyond serious argument that *Norwich Pharmacal* Orders must be limited to compelling the production of essential information and should not be used as a means of obtaining broad discovery. A helpful illustration of these limiting principles is found in ***R (Mohamed)-v- Secretary of State for Foreign and Commonwealth Affairs (No.1)*** [2009] *1 WLR* 2579 where the Divisional Court (Thomas LJ) held:

> "*133. It seems to us, therefore, that although the action cannot be one used for wide-ranging discovery and 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....*"

43. This passage was approved, albeit in passing, by Lord Mance in ***Singularis Holdings Limited –v- Pricewaterhouse Coopers*** [2014] UKPC 36 (at paragraph 140). These principles imposing limits on the scope of the relief which can be obtained were not in dispute in the present case.

44. The Respondents rightly complained that the Order initially sought was too broad. On its face it looked like an Order for specific discovery rather than an Order compelling the production of necessary information, save that it correctly provided for the Applicant to pay the Respondents' reasonable costs in any event. The following relief was sought:

> "*1. By...(or by later date agreed in writing with the Applicant), the Respondents shall each:*
>
> *(a) Serve an affidavit on the Applicant's attorneys sworn by a responsible officer, providing details of:*

(i) *any written or oral agreements ('**Agreements**') which the Respondent, or entities it controls has, directly or indirectly, with Mr Marcus Winkler ('**MW**'), or persons the Respondent knows or believes to be associated with MW, and/or entities owned or controlled by him;*

(ii) *any written correspondence sent or received by the Respondent, or entities it controls in respect of any of the Agreements;*

(iii) *an accounting of all amounts paid by the Respondent, or entities it controls pursuant to the Agreements to MW, as directed by MW and/or to persons the Respondent knows or believes to be associated with MW and/or entities owned or controlled by him.*

(b) provide copies of :

(i) *any Agreements which the Respondent, or entities it controls has, directly or indirectly, with MW or persons the Respondent knows or believes to be associated with MW, and/or entities owned or controlled by him; and*

(ii) *any written correspondence (including emails, text messaging, online chat, or other written communications) sent or received by the Respondent, or entities it controls in respect of Agreements with MW, persons the Respondent knows or believes to be associated with MW and/or entities owned or controlled by him; and*

(iii) *all payment instructions and bank records evidencing payments made pursuant to the Agreements; and*

(iv) *all other records created by the Respondent, or entities it controls in respect of the Agreements.*

2. *The Respondents' reasonable costs, including costs and expenses of complying with this Order, be paid by the Applicant.*

3. *The Respondents may each apply to the Court at any time to vary or discharge this Order.*"

45. In the First Affidavit of Ezra Vontobel filed on behalf of VNHAM, it was deposed that the draft Order "*would involve burdensome searches to be carried out...since the inception of its dealings with Mr Winkler; and...would unnecessarily divert a substantial amount of senior management time*" (paragraph 28.3-28.4). VNHAM has dealt with MW for over 10 years. In the First Affirmation of Louis Nguyen filed on behalf of SAMC, complaint was also made about the lack of any temporal limits on the production sought with the result that "*SAMC would need to conduct a search spanning the period from its first contact with Mr Winkler in 2007 until the present date*" (paragraph 34). The deponent also complained that this "*would be a very significant exercise which would be a significant burden for SAMC*" (paragraph 36), further indicating an imminent restructuring would impair its staff capacity materially.

46. The Applicant acknowledged and offered to accommodate these complaints. In Mr Zankel's Second Affidavit, he deposed that "*Discover has no objection to a reasonable process being agreed whereby disclosure of responsive materials is made in tranches on a rolling basis, or further parameters are agreed to ensure that the scope of production is not unduly burdensome...*" (paragraph 6). This concession was in my judgment insufficient.

47. Having regard to the legal prohibition on *Norwich Pharmacal* applications being used to obtain wide-ranging discovery, I find that the Applicant has not established that the following aspects of its draft Order are necessary to enable it to determine whether or not it has a viable claim in respect of MW's suspected wrongdoing:

(a) the request for particulars of the Agreements to be set out in an affidavit;

(b) the request for particulars of "*any written correspondence ...in respect of the Agreements*" to be set out in an affidavit;

(c) the request for an accounting of all amounts paid to MW or entities linked to him to be set out in an affidavit;

(d) the request for copies of documents without any temporal limitation;

(e) the requests for copies of "any written correspondence" with MW or entities linked to him;

(f) the request for copies of "*all other records... in respect of any of the Agreements*".

Findings: form of Order

48. I find that, subject to my ruling on the ***CIDL*** issue below, the Applicant is entitled to an Order with draft paragraph 1 modified so as to include substantially the following terms:

> "*(a) provide copies of:*
>
> *(i) any agreements in or evidenced in writing ("**Agreements**") which the Respondent, or entities it controls has, directly or indirectly, with Mr Marcus Winkler ('**MW**'), or persons the Respondent knows or believes to be associated with MW, and/or entities owned or controlled by him;*
>
> *(ii) all payment instructions and requests for payment evidencing payments made pursuant to the Agreements.*
>
> *(b) sub-paragraph (a) of paragraph 1 of this Order shall only apply to documents created during the five year period ending on:*
>
> *(i) June 30, 2017 in the case of the 1st Respondent; and*
>
> *(ii) December 31, 2017 in the case of the 2nd Respondent.*
>
> *(c) serve an affidavit on the Applicant's attorneys sworn by a responsible officer, verifying that the documents supplied are true copies of the originals and setting out the extent to which the documents produced constitute a complete record of each of the two categories of documents required to be produced.*"

49. In my judgment an obligation to produce copies of agreements and documents evidencing payments and requests for payment over a 5 year period ending with the month in which each Respondent brought their relationship with MW to an end, is a proportionate range of documents to be produced. I accept Ms. Sbaiti's submission that the request for any correspondence relating to the Agreements amounted to "fishing", in the present context.

50. I further find that paragraph 3 of the Order, following an *inter partes* hearing in which the Respondents have had an opportunity to address the Court on the merits and scope of the Order, should not simply confer a right on the Respondents to apply to set aside or vary the Order. It should be broadened along the following lines:

> "3. *The parties shall have liberty to apply with respect to the implementation of this Order.*"

51. As far as the undertakings are concerned, the Respondents' counsel orally confirmed that their clients were willing to preserve all potentially relevant documents. Such an undertaking should be embodied in the formal Order. Mr. Salem proposed a minor amendment to undertaking "B" so that the Applicant would have permission to use the documents produced for any related criminal as well as civil proceedings. Without reference to authority, in the absence of any principled objections, and subject to hearing counsel further if required, I would approve that modification.

52. The 1st Respondent's counsel advanced a more beguiling set of proposed modifications. Firstly she sought, innocuously, to improve the wording of the reference to the use to which the information could be put without further leave of the Court. In my judgment the words "*proceedings for the same or related subject matter to these proceedings*" would merit some refinement, especially if the preceding words are to be "*except for the purposes of commencing civil* or criminal *proceedings*". However, subject again to hearing counsel if required, I find that it should suffice to simply change "*proceedings for the same*" to "*proceedings* in relation to *the same*".

53. Secondly, at first blush reasonably, Ms. Sbaiti proposed making it explicit that further leave of the Court would be required to commence proceedings against the 1st Respondent. This was justified by reference to the fact that Discover did not presently allege that either of the Respondents was guilty of the suspected wrongdoing. However, Discover's counsel responded that no such restraint was justified as his client's position

on the presumed innocence of the Respondents was merely a provisional one. I feel bound to accept Mr. Salem's submission. Properly understood, the Applicant's case justifies relief in respect of the identified wrongdoing on terms that contemplate the information obtained being deployed in proceedings against MW and such other parties as Discover may deem it fit to pursue. As long as the proceedings are connected with MW making a secret profit as a director of Discover, the information is being deployed for the purposes for which the Applicant has been granted relief.

Findings: are directions required under the *Confidential Information Disclosure Law*, 2016 (*CIDL*)?

The respective submissions

54. The parties' respective positions as to whether or not directions were required under ***CIDL*** were as follows:

(a) Discover contended that ***CIDL*** did not apply to the present case because:

(i) the definition of "confidential information" did not embrace the information sought, alternatively

(ii) disclosure of wrongdoing was permitted by section 3(2) of the Law;

(b) VNHAM contended that the information sought was caught by ***CIDL*** and that if *Norwich Pharmacal* relief was granted, directions should be given pursuant to section 4 of ***CIDL*** before the 1st Respondent was required to comply with the discovery Order;

(c) SAMC submitted that ***CIDL*** was not engaged because the information sought in the present proceedings was not being produced "*during or for the purposes of any proceeding*" for the purposes of section 4 of ***CIDL***.

55. To the extent that the engagement of ***CIDL*** introduces an additional procedural hurdle in the way of the Applicant obtaining relief to which I have found it is entitled, any argument that ***CIDL*** does not apply has obvious appeal. However, while at the end of the hearing I felt inclined to the view that ***CIDL*** clearly applied, finding the proper construction of the scope of the Law is a less than straightforward endeavour.

The key *CIDL* provisions

56. The crucial provision in the Law is section 4(2) which provides as follows:

> "*(2) If a person intends to or is required to give evidence in or in connection with any proceeding being tried, inquired into or determined by any court, tribunal or other authority, whether within or without the Islands and the evidence consists of or contains any confidential information within the meaning of the Law, the person shall apply for directions in accordance with this section before giving that evidence, unless the person has been provided with the express consent of the principal.*" [Emphasis added]

57. At first blush, section 4(2) requires an application for directions to be made in any case when confidential information is proposed to be deployed in legal proceedings except where express consent of the principal has been obtained. Such a result would be surprising and would lead to absurd results.

58. Section 4(1) defines "*give in evidence*" very broadly as meaning "*make a statement, produce a document by way of discovery, answer an interrogatory or testify during or for the purposes of any proceeding*". Oddly, the defined term does not appear elsewhere in section 4 nor indeed does it appear elsewhere in the Law[2]. The definition can, however, be easily applied to the term which does appear in subsection (2), "*give evidence*". Equally broad is the definition in the same subsection (1) of "*proceeding*" which "*means any court proceeding, civil or criminal, and includes a preliminary or interlocutory matter leading to or arising out of a proceeding*". Section 2 provides that "*confidential information*" "*includes information, arising in or brought into the Islands, concerning any property of a principal, to whom a duty of confidence is owed by the recipient of the information*", while "*property*" is even more broadly defined to include every interest in money and "*all documents and things evidencing or relating thereto*".

59. On the face of it, the ambit of section 4(2) is quite wide. The remaining subsections of section 4 set out the framework for dealing with directions applications, requiring that applications be made to a Judge of the Grand Court, that notice be given to the Attorney-General, conferring a right on the Attorney-General to appear as *amicus curiae*, empowering the Court to safeguard the confidentiality of any information permitted to be disclosed, binding recipients of information with corresponding

[2] The term "*give in evidence*" was used in section 4(1) of the 2015 version of the Law, a provision which was the precursor to the current section 4(2).

confidentiality obligations, and specifying matters which this Court must take into account when deciding what order to make under section 4 of ***CIDL***. The provisions read as follows:

> "*(3) An application for directions under subsection (2) shall be made to and be heard and determined by, a Judge of the Grand Court.*
>
> *(4) Notice of an application under subsection (3) shall be served on the Attorney-General and if the Judge so orders,* [on] *any person who is a party to the proceedings relating to the application being made.*
>
> *(5) The Attorney-General may appear as amicus curiae at the hearing of an application under this section and any party on whom notice has been served under subsection (4) is entitled to be heard with respect to the application, either in person or by an attorney-at-law representing the person.*
>
> *(6) Upon hearing an application under subsection (3), a Judge shall direct-*
>
> *(a) that the evidence be given;*
>
> *(b) that some or all of the evidence shall not be given; or*
>
> *(c) that the evidence be given subject to conditions which the Judge may specify whereby the confidentiality of the information is safeguarded.*
>
> *(7) In order to safeguard the confidentiality of a document, statement, answer or testimony ordered to be given under subsection (6)(c), a Judge may order-*
>
> *(a) that the divulgence of the document, statement, answer or testimony be restricted to certain persons named by the Judge in the order;*
>
> *(b) that evidence be taken in private in a manner specified by the Judge to ensure privacy; and*

(c) that the reference to the name, address and description of any person be made by the assignment of alphabetical letters, numbers or symbols representing the name, address and description of the person, the key to which reference shall be provided to restricted persons named by the judge.

(8) A person receiving confidential information by operation of subsection (3) is as fully bound by the duty of confidence, as if the information had been disclosed to the person in confidence by the principal.

(9) In considering what order to make under this section, a Judge shall have regard to –

(a) whether the order would operate as a denial of the rights of any person in the enforcement of a claim;

(b) any offer of compensation or indemnity made to any person having an interest in the preservation of confidentiality;

(c) in any criminal case, the requirements of the interests of justice."

60. Not only is section 4(2) potentially quite wide in its sphere of operation but, when it applies, it triggers the operation of a somewhat elaborate mechanism for obtaining court approval for giving evidence in relation to confidential matters. Section 3 of the Act sets out the circumstances in which disclosures that would otherwise entail a breach of confidence are not actionable. For present purposes, the following provisions are germane to the present case:

"(1) Where a person owes a duty of confidence, the disclosure by that person of confidential information-

(a) In compliance with the directions of a court pursuant to section 4;

(b) In the normal course of business or with the consent, express or implied, of a principal;

...

(j) in accordance with, or pursuant to, a right or duty created by any other Law or Regulation,

shall not constitute a breach of the duty of confidence and shall not be actionable at the suit of any person.

(2) A person who discloses confidential information on wrongdoing, or in relation to a serious threat to the life, health, safety of a person or in relation to a serious threat to the environment, shall have a defence to an action for breach of the duty of confidence, as long as the person acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing, of a serious threat to the life, health, safety of a person or of a serious threat to the environment."

61. At first blush, apart from section 3(1) (a) which actually refers to directions under section 4, the purpose of section 3 appears to be to indicate circumstances in which disclosure can be made without having to apply for directions under section 4. Disclosures in the context of criminal and regulatory investigations or proceedings are exempted by section 3(1) (c)-(i). If directions under section 4 had to be sought in all instances where information subject to confidential duties was proposed to be disclosed, section 3 would simply say so.

62. Finally, it is worthy of note that the definition of "*wrongdoing*" in ***CIDL*** derives from the ***Freedom of Information Law*** (2018 Revision), which provides in section 50 as follows:

"*(2) For the purposes of subsection (1), 'wrong-doing' includes but is not limited to:*

(a) the commission of a criminal offence;

(b) failure to comply with a legal obligation;

(c) miscarriage of justice;

(d) corruption, dishonesty, or serious maladministration."

Decided cases

63. Counsel identified three reported cases which were relevant, dealing with the Confidential Relationships (Preservation) law (2009 Revision). First, ***In the matter of the Confidential Relationships (Preservation) Law*** *(2009 Revision);* ***In the Matter of a Norwich Pharmacal Application in Respect of the State of Argentina*** [2017 (1) CILR 219]. The unusual facts were that the applicant sought directions under the Law to use in, *inter alia*, future *Norwich Pharmacal* proceedings evidence (in the form of bank account records) it had already apparently illicitly obtained through private investigators. The case involved a version of the Law which had criminal sanctions for breaching confidentiality and involved a foreign State. The Crown appeared to address the public policy implications of the application. Unsurprisingly, Smellie CJ robustly refused the application. A key finding was:

> *"48. NML seeks to benefit from the apparent breach of the* **CR(P)L** *by its investigators and of the duty of confidentiality owed to others. If granted, the directions NML seeks could therefore readily be regarded as a charter to all who seek to gain from the commission of such breaches of the lawful duty of confidentiality which the* **CR(P)L** *seeks to preserve and protect."*

64. It is apparent from the report of that case that the version of the Law under consideration, like the 2015 version of ***CIDL*** which was placed before me for the purposes of the present proceedings, required directions to be sought where a person "*intends or is required to give in evidence*" confidential material[3]. That is substantially the same as the current section 4(2) which requires directions to be sought where "*a person intends to or is required to give evidence in or in connection with any proceeding*" utilising confidential material. It was accepted without any apparent argument in that case that the party seeking to deploy the confidential material was entitled to apply for directions. It was not only the person who was being required to give evidence about the confidential material had standing to do.

[3] [2017 (1) CILR 221].

65. This view is confirmed by what happened in the second case, ***Braga-v- Equity Trust Company (Cayman) Limited*** [2011(1) CILR 402], the context of which was explained by Smellie CJ at the beginning of his judgment:

> "4. *The Confidential Relationships (Preservation) Law order was made in furtherance of the Norwich Pharmacal orders on the basis of the requirement under s.4 of the Confidential Relationships (Preservation) Law that confidential information obtained during the course of a professional relationship may be disclosed without the consent of the beneficiaries for the purpose of being given in evidence in judicial proceedings only after the seeking and obtaining of directions from this court for those purposes. The Confidential Relationships (Preservation) Law order thus came to contain provisions by which Dr. Braga was required to give certain undertakings for the protection of the confidential information before it was released to him for evidential purposes in Brazil. It is on the basis of his alleged breach of those undertakings that the applicants seek the setting aside of the Confidential Relationships (Preservation) Law order and the making now of consequential orders. For the further reason also of Dr Braga's alleged misrepresentations and non-disclosures upon his applications for the Norwich Pharmacal orders, the applicants also* seek the setting aside of those orders."

66. The party seeking *Norwich Pharmacal* relief also sought directions under section 4 of ***the Confidential relationships (Preservation) Law*** (1995 Revision) in ***Gianne-v-Miller and Condoco Grand Cayman Resorts Limited*** [2007 CILR Note 10], the third relevant decided case. These authorities most clearly demonstrate that an applicant for *Norwich Pharmacal* relief may seek directions under section 4 of ***CIDL***, which has not materially changed since those cases were decided. They do not in my judgment support the proposition that a section 4 application is invariably required today, because section 3 (which effectively sets out cases to which section 4 does not automatically apply) is now materially different.

67. I was not referred to any of these decisions in ***Banco de Costa Rica-v- Banana Corporation and Others***, FSD 222 of 2017, Judgment delivered on August 6, 2018

(unreported), where I gave reasons for an ex parte decision and the issue was not fully considered. In the course of that judgment (in the context of postponing the ***CIDL*** issue for later determination), I expressed what I now consider to be the mistaken view that only the person being compelled to produce the confidential material had standing to apply under section 4 of ***CIDL*** for directions. In fact the one reported case to which I was referred in ***Banco de Costa de Rica***, properly understood, did not support that conclusion and was entirely consistent with the later decisions placed before me in the present case. In ***Ferrostaal AG-v-Jones and others*** [1984-85 CILR 143], Hull J actually held (at 151-152):

> "*Only two classes of person have standing to apply for directions under section 3A, namely persons who intend to give confidential information in evidence in legal proceedings, and those who are being required to do so.*"

68. The ***Banco de Costa Rica*** judgment was made available to counsel in advance of the hearing even though it was only of indirect relevance to the present application.

69. Ms Sbaiti for the 1st Respondent also referred the Court to ***In the Matter of Ansbacher (Cayman) Limited*** [2001 CILR 214]. In this case a local bank sought directions under section 4 of the Law (1995 Revision) as to whether it could disclose client information in response to an order of the Irish Court authorising the investigation of a fraud. In that case Smellie CJ, despite finding that the Law was a penal statute to be strictly construed, held that the definition of "*proceeding*" was sufficiently broad to embrace a foreign administrative investigation made under authority of an order of court. This was a case where certain of the bank's customers objected to the disclosure the bank sought to make and the bank relied upon on the ground that the proposed disclosure was authorised by the following provisions of section 3(2)(b) of the Law as it was then in force:

> "*(v) a bank in any proceedings, cause or matter when and to the extent to which it is reasonably necessary for the protection of the bank's interest, either as against its customers or as against third parties in respect of transactions with the bank for, or with, its customers...*"

70. This Court agreed that the local bank could give disclosure in reliance upon this statutory provision and gave directions under section 4. The need for such directions

was self-evident, because the bank had elected to apply for such relief in the face of a vigorous challenge by some of its clients under a legal framework carrying the risk of criminal sanctions if the bank's own judgment was wrong. Nonetheless, Smellie CJ did make one important statement of principle which still has resonance today:

> "66. *One principle has, however, always remained constant here, as it has in all countries which share our common law heritage: The law is not premised on any presumption of wrongdoing. There must at least be specific and provable allegations of civil liability or criminal wrongdoing against a person before confidential information about his affairs may be divulged without his consent by someone owing him a duty of confidentiality. This is the minimum standard which applies even when matters are at the investigatory stage.*"

71. While the decided cases discussed above help to elucidate who can apply for directions under the current version of the Law, they shed less light on the question raised by the Applicant in this case of when an application is obligatorily required. What was helpfully placed before me in the ***Banco de Costa Rica*** hearing referred to above was a compilation of earlier versions of the Confidentiality Law. These included the 2009 Revision (considered in ***Braga*** and ***In the matter of the Confidential Relationships (Preservation) Law*** (2009 Revision); ***In the Matter of a Norwich Pharmacal Application in Respect of the State of Argentina)*** and the 1976 Law (applied in ***Ferrostaal)***. The previous Laws did however contain the following exemptions:

(1) **1976 Law**: section 3(2) stated that the Law did not apply, unless otherwise stated) to:

(a) professional persons acting with the express or implied consent of their principals,

(b) the Police investigating offences within the jurisdiction,

(c) the Police (authorised by the Governor) investigating offences outside the jurisdiction,

(d) the Financial Secretary or the Inspector;

(2) **2009 Law**: section 3(2) provided that the Law did not apply to divulging confidential information in a wider array of new contexts including:

(a) any persons authorised by the Governor;

(b) banks in proceedings against, *inter alia*, their customers;

(c) "*in accordance with this or any other law*".

72. The 2015 Law exemptions were essentially the same as in 2009 and criminal penalties for breach of confidentiality were retained. ***CIDL*** in its 2016 emanation introduced the following new exemptions into section 3, apparently for the first time:

(1) "*in accordance with, or pursuant to a right or duty created by any other Law or Regulation*" (section 3(1)(j));

(2) the wrongdoing exemption (section 3(2)).

73. Although these statutory antecedents were not addressed by counsel in the present case, it was common ground that no previous authority had considered the wrongdoing defence created by section 3(2) of ***CIDL***. And it is within this modern statutory framework that the following pivotal question raised by the Applicant in the present case falls to be determined: in light of section 3(2) of ***CIDL***, is an application for directions under section 4 of ***CIDL*** required at all if the Court finds that an arguable case of wrongdoing has been made out? In my judgment the Court must also have regard to the implications of section 3(1)(j), another new provision not previously considered in earlier cases, as well.

Conclusion: no application under section 4 of *CIDL* is required where the Court determines that the party seeking to deploy confidential information in legal proceedings has a legal right to do so because it is arguably the victim of wrongdoing

74. I find that no application for directions under section 4(2) of ***CIDL*** is obligatorily required in all the circumstances of the present case because:

(a) Discover is entitled to compel the Respondents to produce the confidential information "*in accordance with, or pursuant to a right or duty created by any other Law or Regulation*" (section 3(1)(j)); and/or

(b) this Court having ruled that the Respondents are obliged to produce the information sought by way of granting relief for suspected wrongdoing, they are entitled to produce the information "*in good faith and in the reasonable*

belief that the information [is] *substantially true and disclosed evidence of wrongdoing*" (section 3(2)). In these circumstances they would have a statutory defence to any breach of confidence claim brought by their "principal"; and

(c) the mandatory language of section 4(2) which suggests that directions must be sought in all cases where confidential information is to be deployed or obtained in legal proceedings must in the wider context of the Act be given merely directory effect.

75. One of the three parties before the Court contended that directions under section 4 were required. VNHAM did not seek directions on the grounds that its entitlement to comply with both a *Norwich Pharmacal* Order and comply with ***CIDL*** was in doubt. Rather the submission appeared to me to be that such directions were required in any event to avoid a contravention of the law. It was submitted that the pre-2016 *Norwich Pharmacal* cases established that "*permission of the Court pursuant to section 4 of CRPL (a requirement that has been retained by CIDL) is a prerequisite to the use of confidential information in legal proceedings*" (Skeleton argument, paragraph 8.9). Accordingly, it was further argued:

> "*Alternatively, if the Court does not consider CIDL to be triggered as a result of this Application, the First Respondent respectfully requests that the Court gives written reasons for its finding, so that the First Respondent can be satisfied that it has taken all necessary steps so as to limit its liability, in the event that an action is commenced against VNHAM for breach of confidentiality and/or breach of contract.*" [Emphasis added]

76. The submission that section 4(2) was triggered seemed to me at first blush to be an irresistible one. It was clearly proposed to adduce evidence in qualifying legal proceedings, SAMC's contrary argument notwithstanding. Accordingly, section 4(2) crucially provided that "*the person shall apply for directions...unless the person has been provided with the express consent of the principal.*" If "shall" still, in the post-2016 Revision context is to be given obligatory effect (if it ever had to be), this would lead to the following absurd results and almost nullify the practical effect of the corresponding provisions of section 3(1) of ***CIDL***. An application would be mandatory even where the disclosure of confidential information (without express consent) occurs:

"*(a)* ....;

(b) in the normal course of business, or with the consent...implied, of the principal;

(c) to a constable of the rank of inspector or above investigating a criminal offence committed or alleged to have been committed within the Islands;

(d) in compliance with a search warrant made by the Central Authority pursuant to the Criminal Justice (International Cooperation) Law (2015 Revision);

(e) in compliance with an order made by the Cayman Authority pursuant to the Mutual Legal Assistance (United States of America) Law (2015 Revision);

(f) in compliance with an order for evidence made by the Grand Court pursuant to the Evidence (Proceedings in Other Jurisdictions)(Cayman Islands) Order, 1978...;

(g) to the Monetary Authority, where the disclosure is made pursuant to a duty imposed by the Monetary Authority Law (2013 Revision) or regulatory laws;

(h) to the Financial Reporting Authority pursuant to a duty imposed by the Proceeds of Crime Law (2014 Revision) or Terrorism Law (2015 Revision);

(i) to the Anti-Corruption Commission pursuant to a duty imposed by the Anti-Corruption Law (2014 Revision); and

(j) in accordance with, or pursuant to, a right or duty created by any other Law or Regulation."

77. It would be an absurd result if every seizure of confidential information in the course of a Police or other regulatory investigation could only be lawfully made after obtaining directions from the Grand Court under section 4(2), or obtaining the express consent of the target of the investigation. It would be an absurd result if in every civil or criminal proceeding confidential material could not be deployed without either the express

consent of the person to whom the duty a confidence is owed or with the blessing of directions under section 4(2) of ***CIDL***. It would be an absurd result if confidential documents could not be disclosed in civil and commercial litigation without applying for directions under section 4 (2) of ***CIDL***, or obtaining the express consent of the "principals" concerned. An entire Division of the Grand Court would have to be created to deal with the avalanche of applications which would flood the Court as a result.

78. The object and purpose of section 4(2), in ***CIDL***'s non-penal statute iteration, is to support freestanding applications for disclosure in circumstances where either (a) section 3 provides no exculpation or defence, or (b) the applicant in circumstances of doubt wishes the protection of a court order declaring that the proposed disclosure is indeed protected by section 3. The mandatory language and the requirement to afford the Attorney-General an opportunity to appear as *amicus curiae* are perhaps a legacy of the penal era. When breach of the Law had criminal consequences, it was only reasonable to afford the Crown the opportunity to be heard. Today it is possible to imagine various legal contexts in which some public interest would be engaged and the need for a freestanding application for directions under ***CIDL*** would logically arise. But the suggestion that Parliament (having granted so many exemptions from liability under section 3) intended that applications should be made under section 4(2) as a matter of course in every case involving the production of confidential documents in both court and investigative proceedings is, with respect, a nonsensical one.

79. The canon of construction that presumes that Parliament does not intend legislation it enacts to lead to absurd results is in my judgment so well settled that it need not be supported by reference to authority. However, the following observations of Lord Millett are illustrative rather than being dispositive of this uncontroversial legal issue:

> "*116 ... The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.*
>
> *117. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it:*

see (in a contractual context) Wickman Machine Tool Sales Ltd v L Schuler AG [1974] AC 235 at p 251 per Lord Reid...."

80. Reading sections 3 and 4 in a purposive way designed to give consistency to the provisions read as a whole and applying a meaning which does not lead to absurd results, I find as follows. Section 4(2) of ***CIDL*** properly construed does not require in a mandatory sense that a party seeking to adduce confidential material, or a party being compelled to produce confidential material, seek directions from this Court whenever this situation arises. The obligation to seek directions is only triggered in circumstances where such parties harbour doubts about their ability to adduce or produce the confidential evidence without breaching confidentiality obligations which appear to apply.

81. The purpose of section 3 of the Law, developed in an incremental way over the years, is to avoid the absurd consequences which would flow from having to make a section 4 application whenever the need to deploy confidential information without the consent of the person to whom confidence is owed arises. The exemption categories have expanded over the years, reflecting a public policy shift towards greater transparency, moving from criminal and regulatory investigations to most recently embrace the exemptions found in section 3(1)(j) and 3(2). These are, of course, not blanket exemptions. Where the availability of the 'defences' created by section 3 is in doubt, it may be desirable and indeed necessary for the parties at risk of being sued for breach of confidence to seek directions under section 4(2), which will usually involve declaratory relief in some form or the other.

82. The Applicant's counsel advanced, very concisely four grounds for contending that ***CIDL*** did not apply. I do not accept that the information sought falls outside the broad definition of "confidential information". The fact that the confidentiality obligations are said to be governed by Swiss law and may under Swiss law fall away as a result of any court order for disclosure cannot be dispositive of the position under Cayman Islands law. I am attracted by the following submission (Skeleton Argument of the Applicant, paragraph 35), but decline to base my interpretation of ***CIDL*** upon it:

> *"(d) Finally, by reference to the Overriding Objective, the contrary suggestion that a separate application for a direction pursuant to section 4 of CIDL should be sought by the Respondents prior or in*

parallel to this Application being disposed of makes no sense, and would lead to the parties incurring unnecessary costs and delay."

83. The "*makes no sense*" submission is fundamentally sound, but not at the mere level of case management under Rules of Court. At a higher legal level, the "*makes no sense*" submission supports the conclusion that ***CIDL*** properly construed does not require an application under section 4(2) to obtain evidence of wrongdoing under a *Norwich Pharmacal* Order. I accept as being dispositive on this issue the following submission:

> "*35. The Applicant's position is that the framework within section 4 of CIDL is inapplicable to either of the respondents' disclosure pursuant to the Norwich Pharmacal relief sought in this matter, for the following reasons:*
>
> ...
>
> *(b) As the information sought concerns wrongdoing, it is in any event exempt from the section 4 regime by virtue of the provisions of section 3(2) of CIDL, which permits disclosure of 'wrongdoing'. This is defined at section 50(2) of the Freedom of Information Law (2018 Revision) to include a 'failure to comply with a legal obligation', which encompasses the allegations against Mr Winkler for breach of fiduciary duty...*"

84. Section 3(2) explicitly creates a defence to a breach of confidence claim where the recipient of confidential information discloses the information acting in good faith in the belief that the information constitutes evidence of, *inter alia*, wrongdoing. It follows that section 3(1)(j) should be construed as conferring a corresponding right on persons who are not in possession of the confidential information or subject to an express duty of confidentiality seeking to obtain it with a view to obtaining relief for, *inter alia*, wrongdoing. The provisions of section 3(2) merit revisiting again:

> "*(2) A person who discloses confidential information on wrongdoing, or in relation to a serious threat to the life, health, safety of a person or in relation to a serious threat to the environment, shall have a defence to an action for breach of the duty of confidence, as long as the person acted in good faith and in the reasonable belief that the information*

was substantially true and disclosed evidence of wrongdoing, of a serious threat to the life, health, safety of a person or of a serious threat to the environment."

85. The defence is not only available if the disclosure is made in the context of legal proceedings. However, the defence envisages disclosure being made to a third party for the purposes of proving the existence of "*wrongdoing, of a serious threat to the life, health, safety of a person or of a serious threat to the environment*". That third party would potentially either be, for example, a claimant/victim, a health worker or an environmental protection officer and would presumably need legal protections of their own for receiving and deploying the confidential information. Such recipients would be subject to implied duties of confidentiality.

86. In my judgment section 3(1)(j) provides that protection by stating that no actionable breach of confidence occurs where disclosure is made "*in accordance with, or pursuant to , a right or duty created by any other Law or Regulation*". It must be possible for persons acting under statutory authority in the interests of preventing serious threats to life, health, safety and the environment to obtain confidential information without applying to Court for directions under section 4(2) of ***CIDL***. The same applies to persons seeking relief in respect of wrongdoing.

87. In granting the substantive relief sought by the Applicant herein, I accepted (above) Mr Salem's submission that the jurisdictional basis for so doing is derived from section 11(1) of the ***Grand Court Law***. I further find that Discover's entitlement to *Norwich Pharmacal* relief justifies the further finding that, by virtue of section 3(1)(j) of ***CIDL***, the Applicant's receipt and deployment of the confidential information for the permitted purposes shall not be actionable. For these further reasons, no need for a separate application under section 4(2) of ***CIDL*** arises.

Were further submissions required?

88. I should add that it is self-evident that in reaching these conclusions on the terms and effect of ***CIDL***, I have strayed somewhat beyond the narrow confines of very concise arguments from counsel on what amount to a new point which is not illumined by previous decided authority. I have considered whether I should have invited counsel to address me further, but on balance decided that I should give deference to Mr Salem's

plea to keep the Overriding Objective in mind, even if the quality of the analysis above is impoverished as a result. The ***CIDL*** point was not, moreover, a hotly contested point, but rather an issue where all parties in my judgment were in substance seeking guidance from the Court with a view to achieving a cost-effective and timely outcome.

89. For similar reasons I have considered but rejected the notion of inviting the Attorney-General to address the Court on the question of whether section 4(2) of ***CIDL*** today requires a mandatory application for directions in all cases involving the proposed deployment of confidential information in legal proceedings. The present application raises not obvious public policy concerns and, from the Applicant's perspective, justice delayed would be, to some extent at least, justice denied. Nonetheless, the present case does illustrate that there is room for doubt about precisely when directions under ***CIDL*** should be sought. In these circumstances I would hope that the Honourable Attorney-General might, in light this decision (which will hopefully be brought to his attention), consider whether the language of section 4(2) might be refined, one way or another, to clarify the provision's true legislative intent.

Summary

90. The Applicant is entitled to a *Norwich Pharmacal* Order substantially in the terms set out above at paragraphs 48-53. It and the Respondents are protected from liability for breach of confidence by section 3(1) (j), (2) of ***CIDL***. In the result no need for directions under section 4(2) of ***CIDL*** arises. I shall hear counsel, if required, on the terms of the Order.

HON IAN RC KAWALEY
JUDGE OF THE GRAND COURT