IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 42

CAUSE NO. FSD 308 OF 2024 (IKJ

IN THE MATTER OF NORWICH PHARMACAL RELIEF

AND IN THE MATTER OF CERTAIN PROCEEDINGS IN THE GRAND COURT OF THE CAYMAN ISLANDS

AA and ors

v

UU and ors

IN COURT

Before:	The Hon. Justice Kawaley
Appearances:	Mr Paul Lowenstein KC with Mr Adam Crane, Ms Shula Sbarro and Ms Nicosia Lawson of Baker & Partners for the Applicants
	Mr Thomas Grant KC with Mr Christopher Easdon, Mr Paul Kennedy and Ms. Yuan Wen of Campbells, for the Respondents ("R1" to "R11", respectively)
Heard:	11, 14 April 2025

250529 In the matter of AA v UU – FSD 308 of 2024 (IKJ) - Judgment

Draft Judgment Circulated: 15 May 2025

Judgment Delivered: 29 May 2025

Released for publication: 13 June 2025

Inter partes hearing on terms of Norwich Pharmacal Order - status of order made at ex parte on notice hearing - whether cross-undertaking as to damages should have be included in initial order and/or final order - whether leave to appeal exclusion of undertaking should be granted or whether review permissible under liberty to apply provision in order - whether interim payment on account of respondents' costs and/or security for costs should be ordered-appropriate respondents to order - effect of acceptance of jurisdiction by some respondents on ability of others to contest jurisdiction - application of "mixed up" requirement to successor in title of party innocently involved in wrongdoing - need for limits on innocent party's entitlement to recover full costs of compliance - Grand Court Rules (2023 Revision), Preamble paragraph 4, Order 62 r.4(7)(h)

INDEX

JUDGMENT

Background

1. In my experience, applications for a *Norwich Pharmacal* Order ("NPO") typically fall into two categories. Firstly, cases where the jurisdiction to make an order is in dispute

and, secondly, cases where there are comparatively minor disputes about what information should be produced. In the present case, the Respondents agreed that the Applicants were entitled to obtain a NPO at the initial *ex parte* on notice hearing on 21 October 2024 (and with effect from that date), subject to the terms of the order being finalised. The 21 October 2024 Order was perfected on 25 October 2024 (the "21 October Order"). Nearly six months later, not a single document having been produced and a 1 ½ day hearing took place with controversy focussing primarily on:

(a) whether a cross-undertaking as to damages ought to have been included in the 21 October 2024 Order (leave to appeal against my refusal to include a cross-undertaking was sought and an application to vary the Order was made under the liberty to apply provision therein);

(b) whether any cross-undertaking as to damages should be fortified;

(c) whether the Applicants should be ordered to make a payment on account of the Respondents' incurred costs of compliance with the Order and/or provide security for future costs of compliance; and

(d) whether some of the Respondents should not be made subject to the final form of Order, the terms of which were not otherwise subject to any significant dispute.

2. The application was originally filed with a view to ensuring that the Applicants' ability to obtain the information they sought was not prejudiced by a pending sale of R7 (the "Transaction"). The Order had the foreseeable effect of preventing the completion of the Transaction, and the Respondents contended that they suffered financial damage as a result. This unusual part of the factual matrix may well in part explain why the present application has been contested in what appears to me to be an unusual way. However, another unusual factor is the fact that the Respondents are regulated professional service providers, who were "mixed up" in the fraud in an undeniably atypical way. They were appointed as trustees of the trusts alleged to be a vehicle for the fraud (the "Trusts")

after it had been perpetrated. This added an additional layer of complexity to the dynamics of the application. The Applicants seemingly proceeded on the basis that this was a standard NPO application while the Respondents appear to have believed that the usual process ought fairly to be adjusted to meet the exigencies of this particular case.

3. Finally, the present matter came before the Court on a full *inter partes* basis on the terms of the Order on the Summons issued by the Respondents dated 17 January 2025. The Applicants, despite criticising the Respondents for delay, themselves failed to take the lead to bring their own Originating Summons back before the Court.

4. This Judgment addresses the following matters:

(a) the 21 October Order;

(b) the Respondents' Leave to Appeal application (in relation to the 24 October 2024 Ruling on the cross-undertaking issue);

(c) the cross-undertaking issue (in relation to the 21 October Order and as condition for compliance with the Disclosure Order);

(d) the fortification issue;

(e) the payment on account of costs issue;

(f) the security for costs issue;

(g) the application to dismiss the case against R7-R10;

(h) the application to dismiss the case against R11;

(i) the privilege review issue; and

(j) miscellaneous issues relating to the form of the Order.

The 21 October Order

5. The proceedings were commenced by an *Ex Parte* Originating Summons filed on 27 September 2024 and sealed on 30 September 2024. A 27 September 2024 letter sought a 'Sealing and Gagging Order', which was granted on 4 October 2024 and which in summary:

(a) sealed the file and anonymised the proceedings;

(b) restrained the Respondents from disclosing the existence of the proceedings.

6. Also on 27 September 2024, an *Ex Parte* Summons was filed seeking leave to serve R6 out of the jurisdiction. Leave was granted by Order dated 11 October 2024. According to paragraph 5 of attorney Nia Statham's 1st Affidavit, the NPO application papers were served on the Respondents at 3.27 pm on Thursday 17 October 2024 in advance of the Monday 21 October 2024 initial hearing of the Originating Summons. The Respondents have now filed unchallenged evidence that they anticipated a cross-undertaking in damages would be offered because this was foreshadowed in the Applicants' supporting evidence, the draft Consent Order and the Applicants' Skeleton Argument. On this basis, the Respondents agreed in principle that a NPO should be granted when their respective former attorneys appeared in Court on 21 October 2024.

7. After the hearing, I dealt with what appeared to be a minor dispute on the terms of the Order on the papers:

(a) on Wednesday 23 October 2024 at 4.13 pm, Appleby (the Respondents' then attorneys) emailed the Court advising that they would shortly be filing a draft Order and wondered whether I would be available to consider it that afternoon on grounds of urgency. At 4.17 pm (three minutes later), my

Personal Assistant responded that I was travelling and would not return to the Office until Friday morning but indicated any documents filed would be forwarded to me;

(b) at 5.42 pm, Appleby emailed a letter and draft Order to the Court and asked if it could be forwarded to me. The letter stated most pertinently:

> "*…The Applicants have deleted the cross undertaking included in the recital of the Order. The Court will be aware that a cross undertaking is part of the standard order for an ex parte Norwich Pharmacal application. The matter proceeded ex parte and the Applicants have obtained the benefit of an order and advanced no (let alone no proper) basis for the departure from the usual order. Given the importance of this matter, if the Court is inclined to deny the Respondents the benefit of a cross undertaking under the circumstances, the Respondents respectfully request that the matter return to court for an urgent hearing on this issue, with provision for the filing of skeleton arguments and (if required) evidence in advance…*";

(c) at 9.09 pm on 23 October 2024, Baker & Partners (the Applicants' attorneys) emailed the Court indicating the inclusion of the cross-undertaking was the only issue in dispute and, "*in the interests of time*", referred the Court to their email to Appleby early that evening (at 5.46 pm) in which they stated:

> "*…1. There is no basis for the court to make an order with the cross-undertaking at this time, especially one which contemplates loss to an unknown third party. This Order, at present, creates no disclosure obligations. What damages are foreseeable in the circumstances where the terms of the disclosure are yet to be agreed or ordered by the Court?*

> *2. This order is not an ex parte Order as you have sought to frame it. The Order results from the application by the Respondents for an adjournment of the Norwich Pharmacal Application at a hearing where all of the Respondents were represented by counsel. Given the adjournment and the length of time the parties will have to negotiate the terms of the order or seek a determination by the Court, this application cannot and should not be treated as the parties having no notice or short notice. The Respondents have sufficient time to raise and ventilate their points of concern…*";

(d) the above 23 October 2024 emails and letters were forwarded to me at some point on 24 October 2024 when I had a morning speaking engagement, coincidentally, at the ACI Fraud, Asset Tracing & Recovery Conference in Miami. At 4.09 pm that afternoon, the following Ruling on the form of the draft Order was communicated to counsel:

> "*The Judge has considered the respective emails concerning the disputed aspects of the Draft Order. His ruling on those issues is as follows:*
>
> *(1) a cross-undertaking in damages is only a standard provision in NPOs at the ex parte stage. Having regard to the fact that the present NPO, granted ex parte on notice, is granted in substance as if it was confirmed at an inter partes hearing, there is no principled basis for its inclusion. The Respondents are at liberty to apply for the Court to include a cross-undertaking on special grounds if so advised;*
>
> *(2) … He accordingly approves the draft Order submitted by Appleby, subject to deleting the 5th recital, for sealing as soon as possible, dated as of 21 October 2024 as indicated at the hearing.*"

8. One can infer from the fact that the Respondents' attorneys took the initiative of submitting the draft Order on the Applicants' application and pressed to have it settled as soon as possible, that the Respondents were at that juncture unusually eager (presumably with a view to completing the Transaction) to put the matter to bed. The Ruling was as brief and prosaic as the competing submissions. The Respondents' then attorneys did not at that juncture contend that the agreement in principle that a NPO should be granted had been reached based on the assumption that a cross-undertaking would be included in the Order. Nor was the right of some Respondents to contend that they ought not to be bound by the Order expressly reserved. However, the importance of the cross-undertaking issue was emphasised and a hearing on the issue was requested "*if the Court is inclined to deny the Respondents the benefit of a cross undertaking under the circumstances*".

9. The 21 October Order was sealed on 25 October 2024 and the recitals did not contain the cross-undertaking sought by the Respondents but which the Applicants contended was not needed. The Order pivotally provided as follows:

> "*1. The Applicants are entitled to an Order on the Norwich Pharmacal Application which will have an effective date of 21 October 2024, the detail and scope of which is hereby adjourned to allow the detail and scope of which is hereby adjourned to allow the terms of the Order either (1) to be agreed between the parties and presented to the Court for consideration and approval, or (2) in the circumstances where the parties have sought and are unable to agree the terms of the Order, the remaining issues in dispute are to be later determined by the Court, either (a) on the papers (if agreed by the parties), not before 18 November 2024; or (b) at a hearing, to be listed on the first available date after 18 November 2024 on the understanding that there shall be no undue delay for the parties to be heard after 18 November 2024.*" [Emphasis added]

10. On its face, this wording proposed by the Respondents was clearly not a standard interim *ex parte* order because:

    (a) it confirmed that the Applicants were entitled to an Order as of the initial hearing date; and

    (b) the adjournment of the "*detail and scope*" of the Order for future determination does not immediately suggest that the question of whether the Applicants are entitled to relief against only some (as opposed to all) of the Respondents had been adjourned.

11. However, the 21 October Order did contain the following provision which on one view did qualify paragraph 1 as regards R11:

> "*3. The Eleventh Respondent shall have leave, if so advised, to adduce expert evidence of Swiss law in relation to the Norwich Pharmacal application…*"

12. R11 was separately represented at the 21 October 2024 hearing and Mr Grant KC (who did not appear at that hearing) reminded me that her counsel at that hearing told me that she would file an Affidavit confirming that she had no documents to produce. She subsequently filed just such an Affidavit. This was, it seems to me even in hindsight, entirely consistent with a concession that a NPO could be made against her but that her response to it would be that she had no information to produce.

13. Whether or not the jurisdictional preconditions for the Court considering whether or not to exercise its discretion to grant a NPO have been established by an applicant is a hard-edged issue, which has never in my experience been fudged. Respondents wishing to contest the Court's jurisdiction to make an order ordinarily do so in unequivocal terms. My apprehension on 21 October 2024 of the concession made by all Respondents was that the jurisdiction to make an order was not being disputed and that the only issue left to be resolved was precisely what the scope and timing of production should be.

14. By the time I came to consider the form of the Order, the only matter which I considered to be potentially subject to further review (based on the Respondents' request for a hearing on the issue if I was inclined to exclude it) was the cross-undertaking issue. I accordingly directed in the 24 October 2024 Ruling that it could be addressed under the liberty to apply provision in the Order. Essentially, I decided to finalise the Order on the basis that a cross-undertaking had not been shown to be required but retained the jurisdiction to revisit the issue later if grounds for departing from this initial position could be made out.

The Respondents' leave to appeal application against the 24 October 2024 "Ruling"

The Notice of Motion for Leave to Appeal

15. By a Summons dated 8 November 2024, the Respondents (now represented by Campbells) applied for leave to appeal against the 21 October Order. The Memorandum on Grounds of Appeal set out the following grounds of appeal:

> "*16. The learned Judge's decisions, namely: (a) to make the Order in the absence of any cross undertaking in damages; and/or (and without prejudice to (a)); (b) to accede to the Applicants' submission that the cross-undertaking be deleted or excluded from the Order were wrong for the following reasons:*
>
> *16.1 The learned Judge ought to have found that the hearing on 21 October 2024 was ex parte. The judge was wrong to proceed otherwise. The fact that the Respondents had received 1 clear day's notice of the Summons did not mean that the hearing on 21 October 2024 was properly to be treated as inter partes. Hence it was wrong to decide, as the Judge did, that the order was 'granted in substance as if it was confirmed at an inter partes hearing.'*

16.2 In any event, even if that were right, it did not justify the non-inclusion of the cross undertaking. Contrary to the Judge's ruling, there was a principled basis for its inclusion, whether at the ex parte or the inter partes stage. A Norwich Pharmacal order involves a substantial imposition on an innocent party and the jurisdiction is recognised as an exceptional one.

16.3 The Judge failed to take into account that the Applicants had themselves voluntarily tendered the cross-undertaking as part of the overall order sought, and no doubt recognising that it was the necessary quid pro quo of any order. That offer of a cross undertaking was not formally resiled from at the hearing on 21 October 2024. Had it been the Respondents' position at the hearing would have been different.

16.4 So far as relevant (and so far as they were adopted by the Judge, which is not clear), none of the reasons put forward by the Applicants via their counsel as set out at para 9 above were supportable, as will be expanded upon in the skeleton argument to be served hereafter in support of this appeal. In brief:

16.4.1 There was no principled basis for the suggestion that the cross-undertaking should only be included in any final order.

16.4.2 The objection that the cross-undertaking was one 'which contemplates loss to an unknown third party' is not understood. The wording proposed by the 86 5 Respondents was drawn from the Applicants' own draft order and Ms [X's] own affidavit.

16.4.3 The Applicants were wrong to assert that the order was not ex parte. In any event this point was entirely contradictory of the earlier argument deployed by the Applicants that the cross-undertaking should only be included in the final order.

16.4.4 Loss was foreseeable but in any event whether it was or not was irrelevant.

16.4.5 Whether or not there was an arguable case of wrongdoing against third parties was entirely irrelevant. The existence of such an arguable case was the premise (and a necessary premise) of the Summons which itself tendered the cross undertaking in the accompanying draft order as elaborated in the skeleton argument and the affidavit of Ms [X].

16.5 As will be explained in evidence to be served hereafter, the Order made on 21 October 2024 not only risked causing, but in fact has caused, loss to the Respondents. There is no reason why the Respondents, as innocent parties being proceeded against under the Norwich Pharmacal jurisdiction, should bear the risk (and as it turned out, the fact) of financial loss as a result of any order made under that jurisdiction. The policy of the law is to protect such respondents. Hence the costs rules that have developed in relation to the Norwich Pharmacal jurisdiction.

16.6 If the Judge entertained any doubt on the matter (as he evidently did) he should have acceded to the Respondent's request and allowed the Respondents' counsel to address him further on the question. It was unfair not to.

16.7 The Judge was wrong to provide simply for a liberty to apply 'on special grounds'. It is not clear what that phrase means and in any event it is too vague and narrowly cast to provide a fair protection to the Respondents.

15.8 Further or alternatively the Judge should have refused to make any order absent the cross undertaking in damages, which should have been the price of any order, as the Applicants rightly recognised."

16. Having regard to the basis on which I declined to include a cross-undertaking in the 21 October Order, the first of two pivotal grounds of appeal was the averment that: "*There was no principled basis for the suggestion that the cross-undertaking should only be included in any* [interlocutory] *order*" (paragraph 16.4.1, which infelicitously uses the word "final" instead of "interlocutory"). My central finding was that a cross-undertaking was not appropriate for inclusion in a final order because its function was to protect a respondent from damage incurred between the making and discharge of an *ex parte* injunctive type order as a result of an interlocutory order which was wrongly made. I also found that the Order was in substance a final one.

17. Accordingly, the second pivotal ground of appeal was the complaint that I "*ought to have found that the hearing on 21 October 2024 was ex parte*" (paragraph 16.1). In fact my finding was based on the character of the Order, not the hearing. Clearly, the mere fact that an order is made at an *ex parte* hearing does not mean that, regardless of its terms, it is interlocutory in all respects.

18. However, as regards the other grounds:

(a) generally, the remaining grounds are either parasitic on the correctness of the two main complaints or are supportive of them;

(b) it is unclear on what basis it is asserted I had doubts about the correctness of my decision. But the complaint that a further hearing ought to have been convened on the cross-undertaking issue ignores the liberty to apply provisions of the Ruling and Order;

(c) it is unclear why complaint is made about the provision in the Ruling "*simply for a liberty to apply 'on special grounds'*" on the cross-undertaking issue when the 21 October Order as perfected actually provided: "*4. The parties, and each of them, have liberty to apply.*" However, it is fair to construe the language of the Ruling as implying that good grounds for departing from the usual approach to final orders was required; and

(d) the existence of the liberty to apply provision, even when read in conjunction with the Ruling, raised three important questions: (1) whether an appeal was the appropriate remedy for challenging the omission of the cross-undertaking, (2) why the Respondents had not invoked the liberty to apply jurisdiction, and (3) why (as I queried during the present hearing) I could not simply reconsider the issue in the present Judgment?

19. The Respondents in addition relied on evidence that actual loss had been suffered by virtue of the making of the 21 October Order. I will assume for present purposes that loss was suffered as a result of the Transaction's completion being delayed without considering at this juncture the controversial question of whether or not the requisite legal causation test would be met if a cross-undertaking were to have been in place (or were to be retrospectively put in place).

The Respondents' legal submissions

20. In the Respondents' Skeleton, the following main submissions on leave to appeal were set out:

" *45. In circumstances where the hearing was ex parte (even if on informal notice), the relief granted (which was necessarily interim in nature – hence why the parties are back before the Court today) should have been subject to the usual cross-undertaking in damages.* [*Gee on Commercial Injunctions* (7th edn) at para. 23-067, was cited]

46. Second, the Judge failed to give proper weight to the fact that the Respondents only consented to the NPO in reliance upon the Applicants' express offer of a cross-undertaking in damages. To the extent that the initial 'in principle' NPO can be said to have been made with the consent of the Respondents, that consent was conditional upon a cross-undertaking in damages being provided. If the Respondents had known that no cross-undertaking would be provided, they would not have consented to the initial 'in principle' NPO, and the order would have had to include the customary cross-undertaking in damages."

47. Third, one of the purposes of a cross-undertaking in damages is to enable the respondents (and third parties) to an order to be compensated in the event that it turns out to have been wrongly made. While the initial 'in principle' NPO provided that the Applicants were entitled to Norwich Pharmacal disclosure, it did not specify which Respondents would be required to give it—the ambit of the disclosure was expressly adjourned by para. 1. Insofar as the Court accepts the Respondents' submission that no disclosure should be given by (inter alios) R7-10, it will follow that, as against them, the initial 'in principle' NPO was wrongly made and that they should therefore be compensated in respect of losses caused to them by the grant of the order in the usual way. In any event, the Court should ensure that any loss caused to wholly innocent respondents by an order under the Norwich Pharmacal jurisdiction (which is not an order made in normal adversarial litigation), whether rightly or wrongly made, should be compensated by the applicant. Why should those respondents bear that loss themselves?

> *48. For these reasons, and those in their Draft Memorandum of Grounds to Appeal, the Respondents have a real prospect of success on appeal, and they respectfully ask that leave to appeal be granted.*"

21. In oral argument, Mr Grant KC referred the Court to his Skeleton Argument on leave to appeal and also submitted (addressing the merits of the cross-undertaking issue):

(a) the 21 October Order was not a final order;

(b) the price of the Applicants obtaining a final order should be the inclusion of a cross-undertaking back-dated to 21 October 2024;

(c) the Order was agreed on the basis of there being a cross-undertaking;

(d) the Order was not final as against R2 and R7-10 because no relief was sought against them and loss was suffered.

22. In his oral reply, Mr Grant KC submitted:

(a) *Rowe & Ors -v- Ingenious Media Holdings plc & Ors* [2021] EWCA Civ 29; [2021] 1 WLR 3189 (upon which Mr Lowenstein KC heavily relied) was decided in a different context;

(b) it was wrong to seek substantive NPO relief against R7-R11: reference was made to *Collier-v-Bennett* [2020] EWHC 1884 (QB) approved in *Stanford Asset Holdings Ltd -v- AfrAsia Bank Ltd* [2023] UKPC 35 (at paragraph 36);

(c) the 21 October Order was according to the terms of paragraph 1 expressed to be an *ex parte* order; and

(d) counsel understood that Mr Kennedy who appeared on behalf of R11 indicated that a "nil return" Affidavit would be filed on her behalf.

The Applicants' submissions

23. The Applicants in their Skeleton submitted that the grounds of appeal disclosed no realistic prospects of success. On the main question of whether a cross-undertaking was required, it was submitted:

"*31. It is well established that a cross-undertaking in damages is, normally, a condition for the grant of relief on an interim basis to guard against the potential injustice to a defendant if, ultimately, the right in support of which interim relief was granted does not exist: see Rowe & Ors v Ingenious Media Holdings plc & Ors [2021] EWCA Civ 29; [2021] 1 WLR 3189, [60] to [66] per Popplewell LJ.*

32. For that reason, and "[b]y contrast, final injunctions are not subject to cross-undertakings (except sometimes pending appeal)": Twentieth Century Fox Film Corporation & Ors v British Telecommunications plc [2011] EWHC 1981 (Ch); [2012] Bus LR 1461, [35] per Arnold J.

33. Thus, while there may be a justification for including a cross-undertaking in damages when Norwich Pharmacal relief is granted ex parte, there can be no such justification for including it where it has been decided that the applicant is entitled to final relief; at that stage, there is no risk of injustice: see Cathay Capital Holdings III LP v Osiris International Cayman Limited [2021 2 CILR 391], [15] per Doyle J (a case of Norwich Pharmacal relief where an undertaking was given at the ex parte stage).

34. Disclosure of Information: Norwich Pharmacal and Related Principles (3rd Ed., 2022) states at §11.15:

> *'There is no general requirement that the applicant will offer a cross-undertaking in damages, as is commonly encountered in the context of*

interlocutory injunctions. […] That said, a cross undertaking appears to have been required in the Bankers Trust case itself. It has been observed that this must have been attributable to the interim nature of the relief granted. However, as have been explained above, Norwich Pharmacal relief is typically final and thus any parallel to interim injunctions must be treated with caution'.

35. *While the Court may, obviously, decline to exercise a discretion to grant relief because a cross-undertaking has not been provided the Court cannot require a cross-undertaking to be given because it is something which is given voluntarily. As explained by Popplewell LJ at [36] and [37] of Ingenious Media:*

> *'[36] When the court requires a cross-undertaking, it does not order it to be given. An undertaking is something which can only be given voluntarily to the court. However, in determining whether to order security for costs the court is exercising a discretion. The Rules determine the circumstances in which the court may order security and provide that it may only do so if satisfied that in all the circumstances it is in the interests of justice (CPR rr 25.13(1)(a) and 25.14(1)(a)). The court may determine that in the absence of a cross-undertaking it is not just to exercise the discretion to order security, but that if a cross-undertaking is given a security order is just…*
>
> *[37] That is also the nature of the jurisdiction which the court exercises in requiring a cross undertaking, whether fortified or not, when asked to grant an interim injunction or freezing order. It is part of the inherent jurisdiction of the court when deciding whether or not to grant such discretionary relief…"*

36. *The requirement of a cross-undertaking as to damages outside the ordinary circumstances in which they are found would be 'in a rare and exceptional case', as it is in the case where the court orders a cross-*

undertaking to be given in the context of an order for security for costs (as in Ingenious Media: esp. [82]".

24. In oral argument, Mr Lowenstein KC referred to paragraph 34 in *Ingenious* in addition to paragraph 36 which was set out in his Skeleton Argument. That paragraph referenced the requirement of a cross-undertaking in the context of a security for costs order. It was submitted that this was also being required in an interim context. As regards the Order in issue in the present case, he noted that no one had applied to set it aside and that it was either interim or final. He submitted that the fact that the Applicants had initially offered to provide a cross-undertaking was irrelevant.

Findings: when is a cross-undertaking required as a matter of law or practice when applying for a NPO?

25. *Gee* at paragraph 23-067 does suggest that a NPO applicant is ordinarily required to provide a cross-undertaking in damages:

> "*If an order is to be made against a bank or other third party, the claimant is required to furnish an undertaking in damages*…"

26. However this terse statement is unsupported by any authority and sheds no light on whether or not the status of the order, interlocutory or final, is a relevant consideration. Popplewell LJ's observations in *Ingenious* have pertinence beyond the context of the security for costs application he was directly considering in that case:

> "*37. That is also the nature of the jurisdiction which the court exercises in requiring a cross-undertaking, whether fortified or not, when asked to grant an interim injunction or freezing order. It is part of the inherent jurisdiction of the court when deciding whether or not to grant such discretionary relief. Although CPR PD 25A, paras 5.1—5.3 refer specifically to cross undertakings in damages in such cases, that is not the source of the jurisdiction. Section 37(1) of the Senior Courts Act*

> *1981 provides that a court may grant an injunction, interlocutory or final, in all cases in which it appears to the court to be just and convenient to do so. Cross-undertakings in damages are by no means the only conditions which a court may require in return for the grant of an injunction There are many cases in which relief has only been granted by the court on condition that the applicant has undertaken to do something or refrain from doing something in terms which the court could not itself have ordered, for example when considering anti suit injunctions or in the context of arbitration proceedings: see Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb [2020] Bus LR 1668, para 120 for a recent example.*"

27. This passage clearly demonstrates a distinction between the stark positions contended for by the protagonists in the present case. It suggests that it is common practice to require a cross-undertaking in the interlocutory context but also that a cross-undertaking can potentially be required as the "price for" obtaining any order, interim or final.

28. In my judgment the only well-established category of case where, as a matter of practice, cross-undertakings are routinely required is in the interim injunction type case where the undertaking is designed to compensate the respondent for damage sustained if the interim order is set aside. A similar approach arguably applies in relation to a NPO but, as in the injunction context, a distinction is to be made between what is standard practice and how broad the jurisdiction to require cross-undertakings actually is, having regard to the exigencies of each individual case.

29. Mr Lowenstein KC relied on Simon Bushell and Gary Milner-Moore's '*Disclosure of Information: Norwich Pharmacal and Related Principles*', 3rd edition. While *Gee* focusses on injunctions and mentions NPOs in passing, the NPO is the focus of this text. The learned authors state (at paragraph 11.15):

> "*There is no general requirement that the applicant will offer a cross-undertaking in damages, as is commonly encountered in the context of*

interlocutory injunctions… However, as has been explained above, Norwich Pharmacal relief is typically final and thus any parallel to interim injunctions must be treated with caution."

30. This implies that NPOs are typically made on a final basis and that, in that predominantly final context, there is "*no general requirement that the applicant will offer a cross-undertaking in damages*". The Cayman Islands practice is in my judgment clearly aligned with the proposition that a cross-undertaking is only generally offered in the interim NPO or injunctive context. Otherwise why would the cross-undertaking have been offered at the *ex parte* stage in the present case and withdrawn once the Applicants' attorneys formed the view that a final order had been obtained? The draft Order attached to the *Ex Parte* Originating Summons in the present case contained the following form of proposed undertaking:

"*AND UPON the Applicants undertaking that:*

1. If the Court later finds that this Order or carrying it out has caused loss to the Respondents and decides that the Respondents should be compensated for that loss, the Applicants will comply with any order the Court may make."

31. That language mirrors the usual cross-undertakings offered when applying for interim injunctive relief without being explicitly limited to that context. *Cathay Capital Holdings III L.P. v. Osiris International Cayman Limited* [2021 (2) CILR 391] (Doyle J) illustrates a cross-undertaking being accepted in the context of an *ex parte* application for a NPO where only a preservation order was granted at the *ex parte* stage. Doyle J placed the cross-undertaking in damages clearly in the domain of protecting the respondent from the risk of being prejudiced by an order made without notice which was subsequently shown to have been improperly made:

"*5. It is a basic general principle of justice and fairness that an order should not normally be made against a party without giving such party an*

> *opportunity to be heard. As with all general principles there are exceptions, including (1) where the genuine and exceptional urgency of the situation requires the matter to proceed immediately and without notice (these are very rare cases), and (2) where it appears likely that if notice is given the defendant or others would take action which would defeat the purpose of the application before any order*."

32. My recollection is that before delivering the 24 October 2024 Ruling, I confirmed that the *ex parte* NPO I granted and declined to set aside in *Arcelormittal-v-Essar Global Limited* [2019 1 CILR 297] included a cross-undertaking and the final NPO did not. That decision was appealed to the Court of Appeal, but no point was taken on the absence of a cross-undertaking in the final order: *Essar Global Limited-v-Arcelormittal* [2021 1 CILR 788]. Neither Judgment refers to that aspect of the order.

33. There appears to be no local authority supporting the proposition that the Cayman Court ordinarily requires a cross-undertaking in damages when granting either an *ex parte* or final NPO. However, what transpired in the present case adequately supports a finding that there is a general practice of *ex parte* applicants offering cross-undertakings in damages at the *ex parte* stage. No persuasive judicial authority was cited on this point either, but despite the lack of clarity as to the English position based on the two cited texts, my own research suggests that the Caymanian practice may well be aligned with the English practice in this regard. For example, Timothy Killen and William Clerk opined in '*A Practical guide to Norwich Pharmacal Orders*' at page 6:

> "*where an application is made without notice (or on short notice) an applicant will be expected to provide a cross undertaking in damages to the respondent, and to any innocent third parties who might foreseeably suffer loss as a result of the order.*"[1]

34. The Fraud Advisory Panel in '*Norwich Pharmacal Orders: an Introduction to UK Legislation*' opine:

[1] https://www.2tg.co.uk/wp-content/uploads/2020/10/2TG-Practical-Guide-to-Norwich-Pharmacal-Orders-Summer-2018.pdf.

> "*The applicant is generally required to give a cross-undertaking in damages. This means that if it is later determined that the NPO should not have been made, the applicant will compensate the respondent and any innocent third parties who suffer loss (such as an individual whose confidential information becomes public).*"[2]

35. Finally, it is noteworthy that Appleby stated in their 23 October 2024 letter on the form of the 21 October Order:

> "*1. Recital in relation to the cross-undertaking: this must remain as it is the standard position in ex parte proceedings. The Applicants have failed to establish why the Court should deviate from the standard position…*"

36. For these reasons, I find that an applicant for a NPO is as a matter of Cayman Islands law and practice normally expected to offer a cross-undertaking in damages when obtaining relief in circumstances where damage might be caused by granting an order which might subsequently be set aside. The cross-undertaking in this context is designed to ensure that an ultimately invalid legal order does not cause damage to the respondent or third parties that they cannot seek summary compensation for.

37. A cross-undertaking would not ordinarily be expected when the entitlement of the applicant to a NPO has been established. In this context, the law generally assumes that collateral damage flowing from a lawful order should not give rise to a summary entitlement to compensation. Were this not the usual assumption, a legal cottage industry would by now have grown up based upon claims for incidental damage flowing from the huge volume of final Court orders.

38. However, this Court possesses the jurisdiction to "require" a cross-undertaking in relation to final as well as interlocutory orders where justice requires it, but not to

[2] https://www.fraudadvisorypanel.org/wp-content/uploads/2022/03/Norwich-Pharmacal-Orders-1st-ed-Mar21.pdf.

compel the giving of an undertaking. Of course, it is ultimately for the applicant in either context to decide whether they wish to actually provide the undertaking in every case. Justice does not in my judgment require a cross-undertaking to be given by the Applicants as a condition for the Respondents' compliance with the Disclosure Order in all the circumstances of the present case.

Findings: merits of application for leave to appeal

39. Being required to consider in April 2025 an application for leave to appeal against the form of order as perfected on 25 October 2024 pursuant to a Ruling which expressly granted the Respondents liberty to apply on the controversial issue transports one into an '*Alice Through the Looking Glass*' world.

40. I dismiss the application for leave to appeal on the primary grounds that the pursuit of an appeal in circumstances when the Respondents have been afforded the opportunity extended to them by the 24 October 2024 Ruling to invite this Court to revisit its cross-undertaking decision, would be a gross abuse of the appellate procedure. I appreciate that the Court's jurisdiction to revisit its own decision is limited because of the legal policy in favour of finality and against undermining the proper use of the remedy of appeal (a matter which I return to briefly below). However, this Court's case management powers must be sufficiently flexible to allow it to make a summary decision on the papers in essentially provisional terms which allows the prejudiced party to apply to vary it without being required to pursue an appeal. The Ruling, it bears repeating, was communicated on my behalf via email in the following terms:

> "*The Judge has considered the respective emails concerning the disputed aspects of the Draft Order. His ruling on those issues is as follows:*
>
> *(1) a cross-undertaking in damages is only a standard provision in NPOs at the ex parte stage. Having regard to the fact that the present NPO, granted ex parte on notice, is granted in substance as if it was confirmed at an inter partes hearing, there is no principled basis for its inclusion.*

The Respondents are at liberty to apply for the Court to include a cross-undertaking on special grounds if so advised;

(2) ...He accordingly approves the draft Order submitted by Appleby, subject to deleting the 5th recital, for sealing as soon as possible, dated as of 21 October 2024 as indicated at the hearing." [Emphasis added]

41. Leave should be refused in any event for reasons which to some extent overlap:

(a) the Respondents identified no authority supporting the proposition that a NPO applicant will ordinarily be required to offer a cross-undertaking in damages irrespective of whether the order is final or interlocutory. The complaint that this Court ought to have made a finding to this effect has no realistic prospect of success;

(b) the complaint that this Court ought to have found that the 21 October 2024 Order was interlocutory rather than final has no realistic prospect of success to the extent that it is based on the character of the hearing rather than the character of the Order. The standard function of the cross-undertaking to protect respondents or third parties from damage which might unjustly be caused by an *ex parte* order which the respondent has not had an opportunity to set aside. If a respondent agrees in principle at an *ex parte* hearing that an order can be made, the order made is to that extent final;

(c) the complaint that the Court ought to have found that the Order was *ex parte* and should have had the usual cross-undertaking (because of the circumstances in which the Order was made) is, in and of itself, strongly arguable. However this ground of appeal, which is closely related to the complaint that this Court ought to have afforded the Respondents a further oral hearing before omitting the cross-undertaking, has no realistic prospects of success. This is because no arguable grounds are advanced for impugning my case management decision to omit the cross-undertaking subject to the following *caveat*: "*The Respondents*

are at liberty to apply for the Court to include a cross-undertaking on special grounds if so advised". (The "special grounds" liberty to apply on this issue was inadvertently not included in the actual Order);

(d) Appleby had submitted the day before the 24 October 2024 Ruling: "*Given the importance of this matter, if the Court is inclined to deny the Respondents the benefit of a cross undertaking under the circumstances, the Respondents respectfully request that the matter return to court for an urgent hearing on this issue.*" The purpose of the liberty to apply provision was precisely to afford the Respondents the hearing on the issue if they wished to contend that a cross-undertaking was required for reasons they had not yet been able to fully articulate. Admittedly in hindsight it appears unrealistic for me to believe that finalisation of the scope and terms of compliance with the Order would be expedited by potentially postponing final decision of the cross-undertaking issue. However, no arguable grounds for concluding that this decision was without the ambit of my judicial discretion at the time have been advanced by the Respondents; and

(e) the Respondents did not pursue their leave to appeal application with the diligence to be expected in relation to an interlocutory appeal in relation to the form of a NPO. Instead, in their 17 January 2025 Summons, they sought a cross-undertaking as a condition of providing disclosure and in their Skeleton Argument for the present hearing they also sought cross-undertakings pursuant to the liberty to apply provisions in the 24 October 2024 Order.

42. The merits of the application for a cross-undertaking being included in the 21 October Order with retrospective effect, which was fully argued, will be considered instead below.

The cross-undertaking issue

Preliminary

43. The Respondents' Summons provided as follows:

> "*2. The Applicants shall give the following cross-undertaking (or such other cross-undertaking as the Court thinks fit) as a condition for the making of the Disclosure Order or any other order made pursuant to paragraph 1 of the Order dated 21 October 2024:*
>
> > *If the Court later finds that the order dated 21 October 2024, this Order or the carrying out of the aforesaid orders has caused loss to the Respondents or any other persons (alternatively the Respondents only) and decides that the Respondents or any other person (alternatively the Respondents only) should be compensated for that loss, the Applicants will comply with any order the Court may make.*"

44. The Respondents ultimately sought a cross-undertaking on two alternative bases:

(a) "*as a condition of disclosure under the NPO, together with fortification for that undertaking*" (Skeleton Argument, paragraph 5.3);

(b) "*While the initial 'in principle' NPO provided that the Applicants were entitled to Norwich Pharmacal disclosure, it did not specify which Respondents would be required to give it—the ambit of the disclosure was expressly adjourned by para.1. Insofar as the Court accepts the Respondents' submission that no disclosure should be given by (inter alios) R7-10, it will follow that, as against them, the initial 'in principle' NPO was wrongly made and that they should therefore be compensated*

in respect of losses caused to them by the grant of the order in the usual way" (Skeleton Argument, paragraph 47).

45. As far as the temporal scope of cross-undertaking under limb (a) is concerned, it was submitted:

> "*67. ...The Respondents are content that this cross-undertaking should be limited to losses sustained by the Respondents between (1) the making of the initial 'in principle' NPO and (2) the Court's final order following this hearing*…"

46. The same paragraph of the Respondents' Skeleton relies on the liberty to apply provisions in the 24 October 2024 Ruling referred to above in relation to the Notice of Motion for Leave to Appeal. The second limb of the cross-undertaking application also seemingly invoked the same jurisdiction (Skeleton Argument, paragraph 68 (2)):

> *"(e) If the Court agrees with the Respondents that no disclosure should be given by (inter alios) R7-10, it will follow that, as against them, the initial 'in principle' NPO was wrongly made and that they should therefore be compensated in respect of losses caused to them by the grant of that order in the usual way. The fact that this is now apparent provides a strong justification for revisiting the question of whether a cross-undertaking should be provided*…"

47. The first basis on which a cross-undertaking is sought, beguilingly limited in temporal scope to losses incurred between the date of the 21 October Order and the date of the final Order, is different in character to the second basis. As I have found above, it is not customary for a cross-undertaking to be given as a condition of production of the information sought, albeit that the Court can in its discretion require a cross-undertaking if justice so requires. It is an expanded version of the cross-undertaking which the Applicants originally offered and the Respondents' former attorneys originally sought. This limb of the application requires clarification of what principles govern the exercise

of this general discretion and whether the circumstances of the present case fall within the ambit of those principles or not. Most fundamentally, is it even properly open to the Respondents under the liberty to apply provisions of the 21 October Order (as read with the 24 October 2024 Ruling) to invite the Court to require an entirely different form of cross-undertaking at all?

48. The second basis is more prosaic. Its determination requires consideration of whether R7-R10 should be permitted to contend that, in effect, the 21 October Order was always *ex parte* in substance against them because they are entitled to apply now to have it set aside. As a matter of preliminary analysis, it seems clear that the Respondents' then attorneys Appleby regarded the Order as *ex parte* in character and that the "*standard position*" was that a cross-undertaking in damages should be given by the Applicants. This was the position adopted in their letter of 23 October 2024 on the terms of the Order, and this would logically explain why the Order was consented to in Court on 21 October without any distinction being made between those Respondents who were agreeing to be finally bound by the Order and those who might wish to challenge the validity of making a final Order against them.

49. The Respondents' Summons however:

(a) proposed that a Disclosure Order should only be made against R1, R3, R4 and R5: and

(b) only formally sought a dismissal against R2, R6 and R11.

50. The suggestion that no order should be made against R7-R10 is a somewhat belated one, but this illustrates why it is important for parties to know where they stand as regards to the final or interim character of an order when it is made. Having found above that the general rule is that a cross-undertaking as to damages is required for *ex parte* NPOs, the simple question to be answered on this limb of the application is whether the 21 October Order should properly be characterised as interim or final?

Merits of application for a cross-undertaking as the price of obtaining disclosure

51. The Respondents' Skeleton Argument advanced the following submissions in support of the application for a cross-undertaking in damages being offered as a condition for compliance with the Order:

> "*67. The Respondents seek an order requiring the Applicants to give a cross-undertaking in damages as a condition of the Court ordering disclosure under the NPO. The Respondents are content that this cross-undertaking should be limited to losses sustained by the Respondents between (1) the making of the initial 'in principle' NPO and (2) the Court's final order following this hearing. While the Court has already ruled on this issue in the form of the Cross-Undertaking Ruling, that ruling specifically provided that 'The Respondents are at liberty to apply for the Court to include a cross-undertaking on special grounds if so advised'. The Respondents are therefore entitled to raise this point now (in addition to their application for leave to appeal against the Cross Undertaking Ruling).*
>
> *68. The Court should require a cross-undertaking as a condition of disclosure under the NPO, for the following reasons:*
>
> *68.1. Where a Norwich Pharmacal order is made on an ex parte basis, the applicant will generally be required to furnish a cross-undertaking in damages.*
>
> *68.2 As set out in paragraphs 44 to 47 above:*
>
> *(a) Properly analysed, the 21 October 2024 hearing was an ex parte hearing, at which the Court was granting relief to hold the ring. The scope of the disclosure to be ordered (and against which Respondents) was not determined*

and it was possible that the order may have been wrongly made against certain Respondents (as has turned out to be the case in relation to, among others, R7-10).

(b) Further, the Respondents only consented to that relief in reliance on the Applicants' representations as to the furnishing of a cross-undertaking in damages. As analysed above those representations were made in three separate places and were not in any way resiled from at the hearing.

(c) To the extent that the initial 'in principle' NPO can be said to have been entered with the consent of the Respondents, that consent was conditional upon the cross undertaking in damages being provided.

(d) If the Respondents had known no cross-undertaking would be provided, they would not have consented to the 'in principle' NPO, and the order would had to have included the customary cross-undertaking in damages.

(e) If the Court agrees with the Respondents that no disclosure should be given by (inter alios) R7-10, it will follow that, as against them, the initial 'in principle' NPO was wrongly made and that they should therefore be compensated in respect of losses caused to them by the grant of that order in the usual way. The fact that this is now apparent provides a strong justification for revisiting the question of whether a cross-undertaking should be provided.

(f) In any event, as discussed earlier, the Court should ensure that any loss caused by an order made against innocent respondents should be compensated by the applying party.

(g) For all these reasons, NPO ought to have included the customary cross-undertaking in damages, alternatively

> *such cross-undertaking is justified by the facts as they stand now. The Court can, and should, remedy the situation by making the inclusion of a cross-undertaking a condition of the final relief granted under the NPO.*
>
> *69. While the cross-undertaking sought is, in a sense, retrospective, it is not the type of retrospectivity that prejudices the Applicants. The Applicants have a choice now either to (1) take the Norwich Pharmacal disclosure on the terms of the cross undertaking, or (2) not take the Norwich Pharmacal disclosure. Which course they adopt is up to them; there can be no suggestion that the cross-undertaking is being 'forced' on them.*" [Emphasis added]

52. No coherent principled freestanding basis for requiring the Applicants to offer a cross-undertaking as a condition for complying with a final NPO is advanced, as the Applicants pointed out in their Skeleton (at paragraph 39). The line between the case for the "*customary*" cross-undertaking at the *ex parte* stage and the need to independently evaluate the need for a cross-undertaking at the final stage is completely blurred. The submissions adopt the arguments advanced in support of the leave to appeal application (Skeleton, paragraphs 44-47) which start with the proposition that the 21 October 2024 Order should properly be viewed as an *ex parte* one. The retrospectivity sought strongly suggests that the real world basis for this argument is ensuring that the relevant Respondents can seek damages in respect of losses already incurred in relation to the Transaction which was delayed due to the Order.

53. Mr Lowenstein KC rightly cautioned against creating a new practice in cross-undertakings which might deter applicants from seeking NPO relief. In fairness to the Respondents' case on this discrete point, reliance was primarily placed on the unique circumstances of the present case. I accept that there may be circumstances where justice requires a NPO applicant to furnish a cross-undertaking in damages as a condition for obtaining a final order. Qualifying circumstances would logically have to

entail a tangible risk of future damage being sustained by reason of (in the requisite legal sense) the making of a final order.

54. I reject the Respondents' contention that qualifying circumstances justifying the grant of such relief exist in the present case. In the exercise of my discretion, I find that justice does not require compliance with the final Order in this case to be made conditional upon the Applicants providing a cross-undertaking in damages.

Merits of application for a cross-undertaking to be included in the 21 October Order under the liberty to apply provisions of that Order and the 24 October 2024 Ruling

55. As I stated when refusing the application for leave to appeal above (at paragraph 40 (c)), the complaint that the Respondents agreed to the Order under the mistaken assumption that it would contain a cross-undertaking was entirely arguable. The main basis for refusing leave was that the more appropriate remedy was to apply to more fully argue the point as they were given leave to do by paragraph 4 of the 21 October Order as read with the Ruling on the cross-undertaking issue.

56. The Respondents eventually explicitly pursued this straightforward remedy in paragraph 67 of their Skeleton Argument. It is possible that the changing of the Respondents' legal guard shortly after the Order was perfected and the fact that the Ruling was contained in a few lines embedded in an email explains why it was overlooked by new counsel apparently instructed to deal with the cross-undertaking issue as a matter of urgency.

57. Mr Lowenstein KC did not seek to persuade me that I had no jurisdiction to reconsider the cross-undertaking issue under the liberty to apply provisions, although the Applicants' Skeleton (presumably prepared without sight of the Respondents' Skeleton) had queried what basis existed for revisiting my initial decision. Instead he focussed on the final character of the Order and the proposition that a cross-undertaking was only generally offered in the *ex parte* NPO context. The soundness of those submissions did not undermine the Respondents' most powerful, if somewhat nuanced, point: they

would not have agreed to an Order expressed in what appeared to be final terms if they had been told no cross-undertaking in damages was being offered.

58. This point did not depend on mere argument; it was supported by incontrovertible circumstantial and unchallenged direct evidence. As for the circumstantial evidence:

(a) the Applicants' primary supporting Affidavit for the *Ex Parte* Originating Summons offered a cross-undertaking in damages;

(b) the Applicants' Skeleton Argument for the 21 October 2024 *ex parte* on notice hearing confirmed that offer;

(c) the Applicants' pre-hearing draft Order also contained a cross-undertaking; and

(d) the application was admittedly made shortly before the Transaction was due to conclude, which makes it inherently likely that the Respondents would have been actively concerned about the risk of loss flowing from the Order.

59. These strands of circumstantial evidence support the inference that (1) the Respondents agreed that the Applicants were entitled in principle to a NPO on the assumption that a cross-undertaking in damages would be included in the relevant Order and (2) this consideration was material to their agreement. In addition to this, there are the following unchallenged assertions by R10 in his First Affidavit:

> "*9.4 The NP Proceedings were brought at a time critical moment for the Seventh to Tenth Respondents during the closing stages of the sale…as a result of the NP Proceedings, the closing…was delayed, causing substantial financial loss to the Seventh to Tenth Respondents…*
>
> *9.5 The Respondents did not challenge paragraph 1 of the 21 October Order from being granted on the reasonable understanding-based on the*

> *Applicants' own representations-that the Applicants would provide a cross-undertaking as to damages…*"

60. Looking back at the hearing on 21 October 2024, it is possible to wonder, speculatively, why the Respondents' counsel did not make it clearer that the right for some Respondents to challenge the propriety of the Order was being reserved. That would be an unrealistic query because it ignores a very practical and potentially significant consideration: the need to make such a reservation would not have arisen if the Applicants were offering a cross-undertaking in any event. Looking back at the determination of the dispute about the Applicants' decision to exclude the cross-undertaking from the 21 October Order, it is also possible to wonder why the Respondents' then attorneys did not raise the fact that they only agreed to the Order in reliance on the proffered cross-undertaking. This is also an unfair query which ignores the practical and significant consideration that Appleby might reasonably have felt it was enough to (1) make the concise point that the hearing proceeded on an *ex parte* basis and a cross-undertaking was the "standard position" and (2) seek a further hearing if this primary submission was rejected. Baker and Partners had the last word before the Ruling was delivered, and responded:

> "…*This order is not an ex parte Order as you have sought to frame it. The Order results from the application by the Respondents for an adjournment of the Norwich Pharmacal Application at a hearing where all of the Respondents were represented by counsel. Given the adjournment and the length of time the parties will have to negotiate the terms of the order or seek a determination by the Court, this application cannot and should not be treated as the parties having no notice or short notice. The Respondents have sufficient time to raise and ventilate their points of concern…*"

61. Based on my interpretation of the Respondents' concession made through counsel in Court and the agreed terms of paragraph 1 of the 23 October 2024 version of the Draft Order, I concluded that the Order was final in all relevant respects and that the need for a cross-undertaking in damages to compensate the Respondents or others from damage

sustained if the Order was shown to have been wrongly granted did not arise. The issue was clearly a controversial one: Appleby's 23 October letter sought a hearing if the point was resolved against them; Baker and Partners' 23 October email had the following combative conclusion:

> "*In the interests of time, we have set out several reasons why the draft Order should not include the cross-undertaking. However, the above does not constitute the Applicants' full reasons for opposing a cross-undertaking in this draft Order, and all the Applicants rights are reserved to advance other arguments.*"

62. I found the prospect of postponing completion of a substantially agreed Order to resolve the narrow dispute at a further hearing inconsistent with the interest of expedition. It appeared to me that the Applicants were correct in their characterisation of the final status of the Order and I did not advert to the arguments ultimately advanced on the issue. However I did not consider it was fairly open to me to deprive the Respondents of the opportunity to demonstrate at a subsequent hearing, if they had further meritorious arguments to advance, that a cross-undertaking was in fact appropriate.

63. In summary, the 24 October 2024 Ruling decided the point against the Respondents without affording them the further hearing they requested, but preserved their right to have a further hearing should they wish to seek one. Having seized that opportunity, the Respondents have now satisfied me that:

(a) they reasonably assumed that they could obtain an adjournment of the NPO application by agreeing the Applicants were entitled in principle to an Order and that the relevant Order would contain a cross-undertaking in damages substantially in the terms previously offered by the Applicants;

(b) the issue of a cross-undertaking was material to their agreement, because any Order made against the Respondents on or after 21 October 2024 was likely (in a commercial sense, if not in a legal sense) to cause R7-R10 financial loss;

(c) the Respondents did not make an informed decision that each of them would be finally bound by a NPO as the Applicants understandably believed to be the case; and

(d) the 21 October Order should be varied to include the form of undertaking the Applicants initially offered with retrospective effect or otherwise set aside.

64. The Applicants for obvious reasons did not want to resile from their original position yet understandably could not effectively undermine the case for variation. They could not credibly challenge the Respondents' direct evidence that the Order was agreed on the assumption that a cross-undertaking would be given. This evidence results in a logical unravelling of the hypothesis that the 21 October 2024 Order was final to a material extent. Nor were they able to advance any convincing riposte to the proposition, only advanced by the Respondents in argument, that jurisdiction to revisit the cross-undertaking issue existed by virtue of the liberty to apply provisions of paragraph 4 of the Order (as read with the 24 October 2024 Ruling).

65. It is nonetheless necessary to at least summarise the jurisdictional basis for my decision to revisit this issue which the Applicants appeared to me to challenge in half-hearted manner but might perhaps consider they were not given sufficient notice to more fully respond to.

66. There is an alternative to the liberty to apply jurisdiction reserved in October 2024 and which is the primary basis for my revisiting the cross-undertaking issue having refused leave to appeal against my initial decision. This Court's inherent jurisdiction to vary its own orders corresponds broadly to the power to "*vary or revoke*" in England and Wales under CPR 3.1(7). Williams J had regard to the principles in relation to this rule (which has no local equivalent) in the local case of *Fleiger-v-Fleiger*, Fam 120/2015, Judgment dated 20 July 2023 (unreported), at paragraphs 80-86. A leading authority in England and Wales is *Tibbles-v- Sig* [2012] EWCA Civ 158. Rix LJ (as he then was) opined as follows on the jurisdiction under that rule (at paragraph 39):

> "*(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated*…" [Emphasis added]

67. These principles provide an alternative basis for my varying my 23 October 2024 Ruling on the cross-undertaking issue. That decision was made on a misstated version of the facts, namely the mistaken view that the Respondents had made a deliberate and informed decision to become finally subject to a NPO when the true position now appears to be that they did not.

68. However Rix LJ went on in *Tibbles* to mention the parallel jurisdiction (upon which I primarily rely) to review orders under liberty to apply provisions in orders, observing (at paragraph 40):

> "…*The revisiting of orders is commonplace where the judge includes a "Liberty to apply" in his order. That is no doubt an express recognition of the possible need to revisit an order in an ongoing situation: but the question may be raised whether it is indispensable…*"

69. This provides general jurisprudential support for my primary finding that in settling the terms of an incomplete NPO which was subject to ongoing review by this Court, it was permissible to make a provisional decision on one aspect of the terms of that Order, on the papers, giving liberty to apply to full argument on the point if required.

70. The road to that further hearing may well have been a somewhat long and winding one, but a careful review of the correspondence does not justify laying a charge of delay at

the Respondents' door. Mr Lowenstein KC properly acknowledged that his clients had a chain of authority which made obtaining instructions quickly challenging. The pivotal consideration is that all the evidence points to the conclusion that had the cross-undertaking issue been fully argued in late October 2024, I would not have concluded that paragraph 1 of the Order was final in the requisite legal sense, as superficially appeared to be the case. I can hardly criticise the Applicants' counsel for taking a view of the concession the Respondents had made at the 21 October 2024 hearing which I myself considered shortly thereafter to be the most straightforward view of what had transpired.

71. It follows that the Applicants should now provide the "standard" cross-undertaking if they wish to pursue the substantive relief they seek herein, but merely for inclusion in the 21 October Order with effect from that date. The cross-undertaking will be for the standard purpose of compensating the Respondents for any damage caused (in the requisite legal sense) by the Order having been wrongly granted against them.

Fortification: should the cross-undertaking be fortified?

72. Arguments about what the appropriate causation test is for recovering damages pursuant to a cross-undertaking were foreshadowed in argument (in relation to the case for fortification) but obviously are not ripe for substantive determination at the present stage.

73. The Respondents' key submissions were as follows:

> "*70. The Respondents also seek fortification of the cross-undertaking by the payment of USD 410,000 into Court within 14 days of the Court's order.*
>
> *71. The Court has a wide discretion as to the form of fortification that should be ordered. As noted in Brainbox Digital Ltd v Backboard Media GmbH [2017] EWHC 2465 (QB), [2018] 1 WLR 1149 at [26], the 'question of the extent of the cross-undertaking remains a matter of discretion for the*

judge … So equally in my judgment does any requirement for fortification of the applicant's cross undertaking and the extent of any such fortification that the court may require'.

72. When deciding whether to order fortification of a cross-undertaking, the Court should ask itself the following questions[3]*:*

72.1. Can the party seeking fortification show a sufficient level of risk to require fortification (which involves showing a good arguable case to that effect)?

72.2 Can the party seeking fortification show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the order?

72.3 Is there sufficient evidence to enable an intelligent estimate of the quantum of those losses?"

74. Here, it was submitted, the evidence was that loss had already been caused by the granting of the 21 October Order. The Applicants did not dispute the applicable legal principles in general terms. Instead they focussed on the legal particularities of the causation element and contended that there was on this basis no evidence of qualifying loss. Mr Lowenstein KC in oral argument and in his Skeleton Argument referred the Court to the following authorities:

(a) *Alta Trading UK Limited v Bosworth* [2021] EWHC 1126 (Comm)(at paragraph 42);

(b) *PJSC National Bank Trust & Anor v Mints & Ors* [2021] EWHC 1089 (Comm) (at paragraph 27(ii)); and

(c) *Harley Street Capital Limited v Tchigirinksi & Ors* [2005] EWHC 2471 (Ch) (at paragraph 28).

[3] *Phoenix Group Foundation v Cochrane* [2018] EWHC 2179 (Comm) at paragraph 14.

75. The most helpful articulation of the causation principles in this area of the law is found in the *PJSC National Bank Trust & Anor* case where Calver J (at paragraph 27 (ii)) opined as follows:

> "*In relation to the causation element: (a) It is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the order/injunction: Air Express v Ansett (1979) 146 CLR 249 per Mason J at [325]; Saville J in Financiera Avenida v Shiblaq, transcript, 21 October 1988 (unreported) and SCF Tankers Ltd v Privalov [2017] EWCA Civ 1877 at [43] ('Privalov'). (b) In order to show that the loss would not have been suffered 'but for' the injunction, the applicant must show that the freezing order and the undertakings were an effective cause of the third party's loss: Privalov at [42]. As Tomlinson LJ stated in Malabu Oil at [54]:*
>
> > *'[as] to causation, it is sufficient for the court to be satisfied that the making of the order is or was a cause without which the relevant loss would not be or would not have been suffered. That is the hurdle which the applicant must surmount. It is of course open to the defendant to demonstrate that it has not been surmounted, as by demonstrating that there is no causal link between the granting of the injunction or order and the loss in question. If however, disproving the asserted causal link as to which a good arguable cause is shown requires the deployment of extensive contentious evidence and argument, that is not an exercise to be attempted at the interlocutory stage.' (emphasis added).*" [Emphasis added]

76. I am unable to accept Mr Lowenstein KC's contention that compliance with the order must be the causative factor nor that there is any analogy between the facts of the present case and the facts in the *Harley Street Limited* case where Briggs J (as he then was, at paragraph 28) found the causative link to be too tenuous. Here there is a straightforward arguable case that, in a broad sense, R7-R10 suffered loss because the granting of the Order delayed the closing of the Transaction. It remains to consider

whether for present purposes that is a valid way of applying the "but for" causation test which I find applies. However, for different reasons I find that the Respondents' case on causation is a tenuous one.

77. In my judgment it is essential to remember the unique circumstances of the present case. Unusually, it is accepted that the 21 October Order was properly granted against some Respondents. In this context, the critical question is whether there is sufficient risk that the loss complained of will be compensable because (1) the fortification applicants will be found to be innocent parties against whom the Order ought not to have been made, and (2) but for the Order being made against them, the loss would not have occurred. This is the function the cross-undertaking in damages is intended to serve. As Briggs J (sitting as a Deputy Judge of the High Court) stated earlier in his judgment in *Harley Street Capital Limited*:

> "*16. In my judgment, the underlying principle is that a cross−undertaking in damages, as the quid pro quo for the court making an interim order without having determined the facts or the claimant's entitlement to it, is given not to identified respondents, but to the court to enable the court, if it thinks fit, to compensate any innocent sufferer from an interim injunction which ought not to have been granted*..." [Emphasis added]

78. Here, by happenstance, fortification is being requested in respect of loss already sustained by "*identified respondents*" so the Court can (and in my judgment must) evaluate the risk of loss in a more textured way than would be possible before the cross-undertaking is being enforced. It is also important to analyse the impact, if any, on the causation element of the complicating consideration that some Respondents accept that the Order was properly made. This matter was addressed in a somewhat summary and matter of fact manner by the Respondents, which implied that the validity of the Order overlapped neatly with the scope of Order dispute in which it was contended that there was no need for a final Order to be made against R7-R10. In the Respondents' Skeleton it was submitted (at paragraph 68, in support of the need for a cross-undertaking):

> "(e) *If the Court agrees with the Respondents that no disclosure should be given by (inter alios) R7-10, it will follow that, as against them, the initial 'in principle' NPO was wrongly made and that they should therefore be compensated in respect of losses caused to them by the grant of that order in the usual way. The fact that this is now apparent provides a strong justification for revisiting the question of whether a cross-undertaking should be provided.*" [Emphasis added]

79. However, when it came to the case on fortification, the Respondents seemed reluctant to engage in that context with the merits of the issue the Court was being asked to substantively decide under the scope of order umbrella. It was argued (paragraph 73, footnote 104): "*All R7-10 need to show today is a good arguable case on the recovery of these sums.*" I agree. But that does not obviate the need to properly evaluate how arguable it is that when seeking to enforce the cross-undertaking R7-R10 will actually be able to demonstrate both (1) that the Order was wrongly made against them at the initial hearing and (2) that the loss they have arguably suffered is attributable to the Order being wrongly made against them.

80. In fairness, the Respondents' Skeleton does address the scope of Order issue directly in relation to R7-R10 (paragraph 64.1) but then primarily in terms of whether there was any practical need for them to provide disclosure because:

(a) R7, the holding company, had no involvement with the Trusts;

(b) R8-10, had no personal involvement with the Trusts independently of their roles as directors and/or employees of Group companies so any requirement for them to be required to comply with disclosure obligations would likely be duplicative (in the course of argument I agreed it was difficult to conceive what documents they would hold which the corporate respondents were not bound to disclose).

81. Those considerations provide very light support for the proposition that those Respondents ought not to have been joined at all. The following submissions in the Skeleton (also at paragraph 64.1) do directly address the question of the propriety of the Order being made against R7-R10 at all:

> "*(c)… In any event there is simply no jurisdiction to make any order against them, and it may be noted that, in the skeleton argument for the 21 October 2024 hearing, no real attempt was made to demonstrate one: one might for instance note the submissions concerning the 'Mixed Up In' Condition at paras. 96 to 101, where in fact no case at all is made that any of the Respondents fulfil this condition. There is simply no basis for concluding that R8-11 have in any way "facilitated" wrongdoing and indeed Ms X concedes this.*
>
> *(c) Nor indeed would it be fair or just to make such an order. The factors relevant to the discretionary element of granting a Norwich Pharmacal order (what is now referred to as the 'Overall Justice' condition) are conveniently gathered in [17] of the Supreme Court decision in Rugby Football Union v Consolidated Information Services Ltd [2012] UKSC 55, [2012] 1 WLR 3333. 'The essential purpose of the remedy is to do justice.' Two considerations which it is suggested carry great weight in relation the individual Respondents are '(iv) whether the information could be obtained from another source' and '(v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing.'*"

82. Mr Grant KC's approach to these issues in oral argument did not appear to me to make it entirely clear how these jurisdictional points were being deployed against the background of the agreement in principle concession which had been made. Paragraph 1 of the 21 October Order provided, lest it be forgotten:

> "*1. The Applicants are entitled to an Order on the Norwich Pharmacal Application which will have an effective date of 21 October 2024, the detail and scope of which is hereby adjourned to allow the terms of the Order either (1) agreed between the parties and presented to the Court for consideration and approval, or (2) in the circumstances where the parties have sought and are unable to agree the terms of the order, the remaining issues in dispute are to be later determined by the Court, either (a) on the papers (if agreed by the partes), not before 18 November 2024; or (b) at a hearing, to be listed on the first available date after 18 November 2024 on the understanding that there shall be no undue delay for the parties to be heard after 18 November 2024.*"

83. This prompted Mr Lowenstein KC in reply to remark that some of his opponent's submissions had sounded like an appeal against the 21 October Order. As regards the case for dismissal against R11, he submitted that the Court was now *functus*. Having rejected the Applicants' case that paragraph 1 was final in character, it does not follow that R7-R10 have *carte blanche* in terms of the grounds they can plausibly advance in support of the contention that the Order ought not to have been made against them. Generic potential jurisdictional challenges which the Court has implicitly rejected by accepting the concessions made by other Respondents cannot credibly be advanced unless the challenging parties can fairly contend that the jurisdictional factors apply to them in a distinctive way. It is far easier to articulate a coherent case for not making a disclosure order against R7-R10 on the more flexible discretionary grounds than it is to coherently explain why one of basic jurisdictional requirements applies to them in a materially different way to the other corporate entities they controlled and/or were officers of.

84. As regards the two jurisdictional grounds relied upon for fortification purposes by the Respondents:

(a) the "*Mixed Up*" requirement appears at first blush to apply in the same way to all Respondents and it is difficult to see how R7-R10 can rely upon it;

(b) the "*Overall Justice*" requirement appears at first blush to potentially apply to each Respondent differently. However, it is difficult to view this as affording a jurisdictional basis for contending that the Order ought not to have been made (for reasons which I elaborate upon below). Rather it is a discretionary power to be exercised after the gateway jurisdictional requirements for granting a NPO have been met; and

(c) assuming that R7-R10 can rely on this ground for contending the Order was not validly made against them, it is not easy to apprehend how they can establish a causative link between the loss they complained of and the Order being made wrongly as against them. Would the loss not have been sustained as a result of the Order being (admittedly) validly made against the consenting Respondents in any event?

85. On reflection, it is difficult to completely dispel the feeling that Mr Grant KC skirted around these difficult issues, like Superman steering clear of kryptonite. Be that as it may, the fortification application must be determined applying the governing legal principles which were essentially common ground. As formulated by the Respondents in their Skeleton, the issues to be considered are the following:

> "*72.1. Can the party seeking fortification show a sufficient level of risk to require fortification (which involves showing a good arguable case to that effect)?*
>
> *72.2 Can the party seeking fortification show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the order?*
>
> *72.3 Is there sufficient evidence to enable an intelligent estimate of the quantum of those losses?*"

86. In my judgment, it is implicit in every judicial articulation of the causation limb of the fortification test, that the fortification applicant must establish a good arguable case (or serious question to be tried) that but for the improper making of an interim order against them, the loss complained of would not have been incurred (or be likely to be incurred). The fortification applicants here have not adduced evidence to the effect that the loss they complain of would not have occurred but for the fact that they had been improperly joined as Respondents. On the contrary, their evidence presently suggests that the loss would have been sustained in any event. If it is legally possible for parties such as R7-R10 to enforce a cross-undertaking as to damages in respect of loss suffered as a result of an order properly made against R1, R3 and R5, the Respondents have not demonstrated a good arguable case in this respect.

87. I find that:

(a) the Respondents have established a good arguable case that loss has been incurred;

(b) the Respondents have not made out a good arguable case that the loss was "*caused by the granting of the order*" in the requisite legal sense; and

(c) there is sufficient evidence to enable an intelligent estimate to be made of the loss, if this was required.

88. The application for fortification is refused. It is in any event academic because of my findings below, in any event, are that the Order was not improperly made against R7-R 10 at the *ex parte* stage.

Payment on account of costs

Preliminary

89. The Respondents have yet to produce a single document, six months after agreeing the Applicants were entitled in principle to *Norwich Pharmacal* relief. The central theme

of the intervening period has been the Respondents' attempts to obtain adequate protection for their costs of complying with the Order and their costs of the present proceedings. Whilst their concerns are to some extent justified, the application for a payment on account of their costs of the present proceedings prompted me to rhetorically ask in the course of argument, somewhat hyperbolically, whether a reasonable Court properly directing itself could grant this form of relief. The context in which the application was made seemed distinctly odd.

Governing principles

90. The governing principles were accurately summarised by the Respondents in their counsel's Skeleton:

> "*80. GCR O.62, r. 4(7) provides that 'The orders which the Court may make under this rule include an order that a party must pay -…(h) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily'. As this Court observed in Al Sadik v Investcorp Bank BSC [2019 2 CILR 585] at [25(e)], while the power is ultimately discretionary, GCR O.62, r. 4(7)(h) contains an implicit starting assumption that an interim payment should be made, which arises from the 'indisputable fact' that the core function of the rule is: (1) to articulate the principle that the mere fact that a taxation hearing is pending is 'not … a good reason' for depriving the receiving party of all of their costs; and (2) to empower the court to summarily assess an appropriate partial costs payment which should immediately be made.*"

91. *Al Sadik* was a case where I made an interim payment order at the same time as awarding the applicant indemnity costs in relation to its successful anti-suit summons and damages for breach of an exclusive jurisdiction clause. The offending litigation was a collateral attack on a Privy Council judgment. The relevant rule in the Grand Court Rules (2023 Revision) is Order 62, r.4(7)(h). This provides:

"*(7) The orders which the court may make under this rule include an order that a party must pay—*

…

(f) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily."

92. The case there for ensuring that the interim payment applicant was not kept out of their costs was very compelling indeed. I found in *Al Sadik* that the starting assumption should be that an interim payment should be ordered if a summary assessment of the appropriate amount could be made. However, I also observed (at paragraph 25):

"*(g) in concluding that GCR O.62, r.4(7)(h) contains an implicit starting assumption in favour of an interim payment on account of costs, I do not ignore the fact that power to make such an order is clearly discretionary and that the strength of the starting assumption may be weaker or stronger depending on the circumstances of each case…*"

93. The circumstances of the present case make it inappropriate to apply the costs follow the event rule in the same way as it applies in adversarial litigation. In the NPO context, the dominant principles are that the applicant should pay the litigation and compliance costs of a party who has assisted equity (or the public interest) by furnishing information which justice requires them to produce. As the Respondents themselves rightly submitted in relation to their substantive application for costs:

"*76.2 As Lord Sumption noted in that case*[4]*, the rationale for this practice was explained by Aldous LJ in Totalise plc The Motley Fool Ltd [2001] EWCA Civ 1897, [2002] 1 WLR 1233 at [29] [AB/25/491-492]: 'Norwich Pharmacal applications are not ordinary adversarial*

[4] *Cartier International AG v British Telecommunications plc* [2018] UKSC 28, [2018] 1 WLR 3259 at [12].

proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party. They are akin to proceedings for pre-action disclosure where costs are governed by CPR r 48.3. That rule, we believe, reflects the just outcome and is consistent with the views of Lord Reid and Lord Cross in the Norwich Pharmacal case [1974] AC 133, 176, 199. In general, the costs incurred should be recovered from the wrongdoer rather than from an innocent party … Each case will depend on its facts …In a normal case the applicant should be ordered to pay the costs of the party making the disclosure including the costs of making the disclosure.'"

94. In the present context, the starting assumption in my judgment will usually be that a respondent will not be entitled to their costs at all unless either:

(a) the proceedings against them are dismissed; or

(b) they have provided disclosure.

Merits of interim payment application

95. The Applicants submitted:

"*58. Before addressing this issue in detail, the Applicants ask the Court to, again, take a step back to consider what is being asked for here. Non-cause-of-action defendants are asking for over three quarters of a million USD on account of costs before they have produced a single document…*"

96. It is not necessary to consider the merits of this issue in detail because Mr Grant KC, in the face of the strong provisional views I expressed, indicated that he would not press this application. In the exercise of my discretion, I decline to grant the interim payment application at this stage. It is in my judgment premature rather than wholly

unmeritorious, and rather than dismissing it I would adjourn it generally with liberty to apply.

Security for costs

Preliminary

97. Whether or not there was a need for security for costs because of a "*real risk*" of non-payment, what the jurisdiction to order security was and whether compliance costs as well as legal costs could be the subject of an order was disputed.

98. The Applicants were foreign companies in liquidation and foreign public companies. While their assertions that they were obviously capable of meeting any legal and compliance costs were plausible, I considered the Respondents were justified in receiving more comfort that their likely costs could realistically be met than the Applicants had volunteered up to the date of the hearing.

99. Initially I did not consider security for costs was appropriate or necessary but invited Mr Lowenstein KC to take instructions on whether his clients could give an undertaking to meet the reasonable costs and expenses of the complying Respondents instead. This seemed to me to be an appropriate midway point between the Applicants' contentions that the Respondents had done nothing since 21 October 2024 but to seek protection for unreasonably high costs incurred without producing anything, and Mr Grant KC's contention that the Respondents had played with an entirely "straight bat". In my judgment, the principal individual Respondents were likely torn between competing emotional forces throughout the period in question. On the one hand, their instincts as professionals habitually engaged in investigating fraud must have prompted them to assist the Applicants and the Court. On the other hand, their commercial instincts were to minimise the financial impact of an application which was both financially damaging (in a collateral sense) and framed in a way which unfairly implied that they had facilitated the wrongdoing in question. The circumstances in which R8-R10 found themselves justified protective action to some extent taking account of the fact that:

(a) the issue of the reasonableness of the Respondents' costs claim was already contentious; and

(b) if enforcement of any costs order was required, having to commence proceedings abroad would be inherently prejudicial.

100. The apparently unusually large scale of the present information gathering exercise makes it ultimately unsurprising that the Respondents have been arguably overzealous in pursuit of security for their costs incurred and to be incurred of compliance with the NPO. However, with the Applicants having rained on R8-R10's Transaction parade, they can be forgiven for not following Voltaire's philosophical commendation of a light-hearted response to life's challenges: "*Life is a shipwreck, but we must not forget to sing in the lifeboats.*"

Governing principles

101. I accept that this Court must have the jurisdictional competence to order security for costs. The most straightforward legal basis, although it is only most clearly supported by provisional views, is that as part of the *Norwich Pharmacal* jurisdiction itself, the Court can in its discretion require an applicant to secure an innocent respondent's costs of compliance where the interests of justice so require: *Murphy-v-Murphy* [1999] 1 W.L.R. 282 at 295A (per Neuberger J, as he then was). Relevant considerations will generally include:

(a) the degree of risk of non-payment absent security;

(b) the ability of the respondent to fund future compliance costs; and

(c) whether and to what extent it is unfair in the relevant circumstances for the respondent to be required to rely on the applicant's good faith in meeting the incurred costs obligations at some future date on an unsecured basis.

Merits of application

102. Applying the above governing principles to the Respondents' application for security for costs and departing from the strong contrary view I expressed during the hearing, I provisionally find that a prima *facie* case for security for costs has in fact just been made out. The key considerations are:

(a) I consider the degree of risk of non-payment is small, having regard to the sovereign identity of the Applicants' ultimate overseas client. However, the Respondents would clearly have no straightforward options to enforce any payment orders;

(b) the key Respondents have consented to a NPO when they might have formally raised technical objections, not least on the "Mixed Up" requirement. They are not solely responsible for any delay since the 21 October Order was perfected on 25 October 2024;

(c) the Respondents will on any view have already incurred substantial costs. Although no documents have yet been produced, they have not been twiddling their thumbs. Or, as Mr Grant KC put it more colourfully, they did not simply "*lie doggo*"; and

(d) it would be inherently unfair, having regard to the overarching principle that innocent NPO complying parties should not be financially prejudiced for assisting the applicant and the Court, for the Respondents to be subject to any risk of having to incur further costs to recover their litigation and compliance costs.

103. The primary reason why those findings are provisional is that basic fairness requires the Applicants' counsel to be afforded a chance to respond to their opponent's oral submissions on this issue. In any event, it would in my judgment undermine the efficacy

of the NPO jurisdiction for parties who for whatever reasons have not disclosed a single document while playing hardball over their fees to be rewarded by a security for costs order. Despite acting reasonably in many respects, in my judgment the Respondents, and despite my sympathy for their predicament, marginally failed to maintain an appropriate balance between honouring their commitment to give disclosure and seeking comfort that their costs and expenses could be recovered. This is why I indicated during the hearing that I did not need to hear from Mr Lowenstein KC on this issue by way of oral argument but encouraged his clients instead to offer some form of undertaking.

104. I would accordingly adjourn the application generally with liberty to apply. Hopefully an acceptable form of undertaking can be agreed between the parties although my provisional view now is that somewhat more protection for the Respondents is required than the proposal orally proposed by Mr Lowenstein KC at the hearing. The scales of justice appear to me to have tipped in favour of the Respondents somewhat because, based on (1) the interlocutory findings I have made in this Judgment on the causation requirements for breach of cross-undertakings (see paragraph 87 (b) above), and (2) the findings I record below on R7-R10's dismissal application, the position now appears to me to be that the 21 October Order caused commercial loss which may not be legally recoverable by the affected Respondents in these proceedings.

Scope of Order: should proceedings against R7-R10 be dismissed?

Preliminary

105. This aspect of the case is somewhat difficult to unravel because the respective arguments were like ships passing in the night. The Applicants' primary submission was that the 21 October Order was final and the Respondents' case was that it was interlocutory. The Applicants contended it was not possible for the Respondents to challenge this Court's jurisdiction to grant *Norwich Pharmacal* relief. The Respondents contended it was possible for them under the rubric of determining the scope of the Order to seek a dismissal of the proceedings against some Respondents.

106. As I have already noted above (see e.g. paragraph 83), although it was open to some Respondents to challenge the propriety of seeking a NPO against them, they ought not in principle to be able to challenge generic jurisdictional points which have been conceded by other Respondents. In *Essar Global Limited-v-Arcelormittal* [2021 CILR 788], Martin JA opined as follows:

> "*16. It is now well established that the requirements for the grant of a NPO are as follows (Mitsui & Co. Ltd. v. Nexen Petroleum UK Ltd. (10) ([2005] 3 All E.R. 511, at para. 21, Lightman, J.)):*
>
> *'(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.*'"

107. Those "*requirements*" or jurisdictional conditions apply, albeit subject to nuanced contextual modifications, in every case. If they are not met, relief cannot be granted. What Mr Grant KC referred to as the "*Overall Justice*" requirement seems to me to refer to the Court's discretion, assuming the jurisdictional requirements are met, to grant or withhold relief. In *The Rugby Football Union-v- Consolidated Information Services Limited* [2012] UKSC 55, upon which reliance was placed for this principle, Lord Kerr (giving the judgment of the Court) stated:

> "*16. The need to order disclosure will be found to exist only if it is a 'necessary and proportionate response in all the circumstances': Ashworth at paras 36, 57 per Lord Woolf CJ. The test of necessity does not require the remedy to be one of last*

resort: R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2009] 1 WLR 2579*, para 94.*

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."

108. In my judgment there is a difference between dismissing proceedings against a party on the grounds that the Court lacks jurisdiction to grant relief and dismissing proceedings on the grounds that having found the Court possesses jurisdiction to grant relief, the applicant has failed to make out a case on the merits for granting relief. In the former case the proceedings can be struck out *in limine* at the interlocutory stage on the grounds that they were improperly brought. In the latter case a strike-out application would fail, and the applicant would be entitled to a hearing on the merits.

109. In the present case R7-R10 seemingly seek to contend that the proceedings were improperly brought against them at the final *inter partes* hearing because this is essential for their ability to enforce the cross-undertaking in damages which I have found in the present Judgment they are entitled to. The difficulty they face is twofold:

(a) R1 and R3-R5 accept that the Court has jurisdiction to make a final Order against them and may exercise its discretion to grant the relief the Applicants seek;

(b) R7-R10 can only plausibly raise jurisdictional challenges to the extent that they can demonstrate that the jurisdictional requirements apply to them in a materially different way to the way they apply to R1 and R3-R5.

110. R7-R10 have sought dismissal on two grounds. Firstly, the "Mixed Up" requirement was not met - this is, unarguably, a jurisdictional challenge. Secondly, the "Overall Justice" requirement was not met - this is a merits challenge. The Applicants only addressed these arguments, which I myself was only able to clearly discern having reserved judgment, with the broad traverse that it was too late for these points to be

raised. Because of the way I resolve the points, no need to afford the Applicants an opportunity to respond in the light of my findings recorded above about the *ex parte* nature of the 21 October Order properly arises.

Mixed-Up requirement

111. R1, R3, R4 and R5 (together the "Disclosing Parties") accept that an Order can finally be made against them. My primary finding is that it is not open to R7-R10 to contest the fact that the 'generic' conditions for granting *Norwich Pharmacal* relief were met in their case. The "Mixed Up" condition is generic in the present case because R7 is the holding company of the Disclosing Parties and each of R8-R10 are directors of the Disclosing Parties. No clear basis has been articulated for finding that, in effect, the Applicants ought to have known before reviewing the responsive evidence filed for the purposes of the present *inter partes* hearing, that R7-R10's involvement (as opposed to that of the Disclosing Parties) with the Trusts was akin to that of a mere bystander.

112. If a party such as R7 controls entities which admittedly were "Mixed Up", *prima facie* that jurisdictional requirement is met in relation to the holding company. An NPO was obtained in *Essar Global Limited-v-Arcelormittal* against a holding company on the central basis of corporate control. Various points were vigorously contested in that case (which was included in the Joint Authorities Bundle placed before me), but the "Mixed Up" jurisdictional requirement was not one of the points in controversy. The same point applies with even greater force to the human agents of artificial persons, because artificial persons such as companies can only act through the human agency of their directors. There can be no sensible suggestion that the relevant directors have been sued otherwise than because of their business connection with the Respondent corporate entities.

113. In case I am wrong in finding that, in effect, R7-R10 are bound by the concession made by the Disclosing Parties that jurisdiction exists to grant relief, I will consider the merits of the jurisdictional issue despite the fact that it was argued in a way which seemed to me to lack conviction and has not received the benefit of full adversarial argument.

114. In my judgment a reasonable starting assumption informed by principle and pragmatism should be that where the successor in title of a party who did facilitate the wrongdoing holds relevant information, an application for *Norwich Pharmacal* relief ought not to be liable to be defeated on the grounds that the successor in title played no direct facilitative or other role. This view of the legal position no doubt informed the Respondents' initial decision to agree that *Norwich Pharmacal* relief could in principle be obtained. After all, the function of the "Mixed Up" limb of the conditions for granting NPOs is to ensure that there is a sufficient likelihood that the respondent has information linked to the alleged wrongdoing. The "facilitation" requirement (a term only used by Lord Reid in *Norwich Pharmacal*) is really focussed on the need for a more than casual connection between the information-holder and the wrongdoing.

115. Where a party legally holds documents or other information while acting as an agent or trustee of, or service provider to, an entity which facilitated or was otherwise involved in the wrongdoing, it ought not to matter whether the party in possession of them at the date of the NPO application (the respondent) was acting in their current capacity at the time when the fraud occurred. Were this not the case, fraudsters could as a matter of standard operating practice simply change service providers (or trustees) immediately after perpetrating a fraud with a view to immunizing themselves from a *Norwich Pharmacal* attack. Because there is seemingly no authority on this specific point, it is understandable that the Applicants' counsel drafted the application in the way they did, making the standard assertions that the Respondents were both "Mixed Up" in and facilitated the alleged wrongdoing (although facilitation is not in my judgment required). It is also understandable why the Respondents' first instincts clearly were that this was not a point which could or should be taken in opposition to the present application.

116. The true legal position is that the respondent must be involved in (or connected to) the wrongdoing in a way which makes them more than a mere bystander. Judicial statements about principles of common law and/or equity must be construed in the context of the relevant cases rather than like statutory provisions. The mere fact that

past cases have only involved parties who were so involved in a contemporaneous sense, but not their successors in title, cannot alter the principle and the overarching consideration that the jurisdiction is intended to be a flexible one. As Maurice Kay LJ held in *R (Omar)-v-Secretary of State for Foreign Affairs* [2013] EWCA Civ 118:

> "*36. I propose to address this issue because the parties' submissions disclose a disagreement about an aspect of the legal test. It goes to the requisite degree of involvement on the part of a respondent to a Norwich Pharmacal application in the alleged wrongdoing. In Norwich Pharmacal, Lord Reid said (at page 175B):*
>
> > *'[The authorities] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers ... justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration.'*
>
> *37. Ms Kaufmann submits that, to the extent that Lord Reid required proof of facilitation of the alleged wrongdoing, his speech exceeded the ratio of the House of Lords. Lord Morris referred (at page 178H) only to a need for the person in possession of the information "to have become actually involved (or actively concerned)" in the wrongdoing. Viscount Dilhorne spoke (at page 188C) of "involvement". Lord Cross (at page 197D) used the language of "unwitting facilitation". Lord Kilbrandon referred (at page 203F) to the Commissioners as "not mere bystanders". Thus, submits Ms Kaufmann, the true test, on a preponderance, requires no more than "involvement". She refers to Ashworth Hospital Authority, in which Lord Woolf said (at paragraph 26):*

> *'The Norwich Pharmacal case clearly establishes that where a person, albeit innocently, and without incurring any personal liability, becomes involved in a wrongful act of another, that person thereby comes under a duty to assist the person injured by those acts ...."*

Lord Woolf's speech attracted the concurrence of Lords Browne-Wilkinson, Nolan and Hobhouse. Lord Slynn also agreed with it, adding (at paragraph 1):

> *'It is sufficient but, it is important to stress, also necessary that the person should be shown to have 'participated' or been 'involved' in the wrongdoing '*

38 *It seems to me that there will be cases where there is a real difference between, on the one hand, involvement or participation and, on the other hand, facilitation. A person present and involved may be attempting to discourage or prevent the wrongful act rather than facilitating it. He may nevertheless become aware or come into possession of the very material which the applicant seeks. I do not think that the Norwich Pharmacal remedy was intended to be put beyond his reach in such circumstances. Support for this view can be seen in another passage in the speech of Lord Woolf in Ashworth when he said (at paragraph 35):*

> *'Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement (the reference to participation can be dispensed with because it adds nothing to the requirement of involvement) is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give*

> *disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion.'*
>
> *I detect no insistence or facilitation in this passage which, it seems to me, is part of the ratio in Ashworth.*
>
> *39. However, that is not the last word on the subject. Mr Eadie draws our attention to the recent decision of the Supreme Court in Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55 *in which Lord Kerr (with the concurrence of Lord Phillips, Lady Hale, Lord Clarke and Lord Reed) founded (at paragraph 14) his exposition of the law on the speech of Lord Reid in Norwich Pharmacal, including the 'facilitation' passage. However, the issues in that case required no analysis of the difference between 'involvement' and 'facilitation' and it seems to me that Lord Kerr's judgment did not, and was not intended to, undermine the approach in Ashworth. Moreover, Lord Kerr went on (at paragraphs 15-17) to emphasise 'the need for flexibility and discretion in considering whether the remedy should be granted' and that 'the essential purpose of the remedy is to do justice'. His language was inconsistent with an intention to impose a more demanding test.*
>
> *40. In the present case, the Divisional Court rejected Ms Kaufmann's submission on this point, concluding (at paragraph 97) that an applicant must establish facilitation. In our judgment it was wrong so to conclude.*" [Emphasis added]

117. For these further reasons, I reject the application for the case against R7-R10 to be dismissed on the grounds that the "Mixed Up" requirement was not met in their case.

Discretion to grant relief

118. An entirely coherent case was advanced by Mr Grant KC as to why it was not "necessary" for a Disclosure Order to be made against R7-R10. In short, the evidence showed that R7 had no information to disclose and R8-R10 had no documents or information in their personal capacity which would not be caught by the obligations applicable to the Disclosing Parties. The obligation for parties who had nothing to produce to comply with a Disclosure Order was said to create a risk of duplicated effort. No coherent case was advanced in support of the proposition that these Respondents ought never to have been joined at all, however.

119. Unsurprisingly Mr Lowenstein KC had difficulty advancing a cogent riposte to the proposition that R8-R10 did not need to be personally bound by the Order. The possibility that R8-R10 might have personal information as well seemed speculative. In practical terms, they would be bound *qua* directors to ensure the corporate Disclosing Parties complied with the Disclosure Order. I decline to grant a Disclosure Order against R7-R10. I would adjourn the application against R8-R10 generally with liberty to apply in the event of a material change of circumstances, rather than dismissing it altogether.

Scope of Order: should proceedings against R11 be dismissed?

Preliminary

120. The application to dismiss the case against R11 was dealt with clearly and fully both in the Respondents' counsel's Skeleton Argument and in oral argument. The application had three main bases:

(a) R11 had filed a "nil return" Affidavit confirming she had no documents. It was unrealistic to contend she might be able to provide relevant oral evidence;

(b) it was not necessary for her to be subject to a NPO in light of the wide range of information the Disclosing Parties had agreed; and

(c) before she could give evidence, the Court would have to reject her contention that under Swiss banking secrecy law she could not assist the Applicants in any event.

Merits of application

121. I summarily reject the submission that the proceedings "*should never have been brought against her in the first place*". The main points advanced in support of dismissing the case against her all derive from evidence filed or concessions made after the commencement of the present proceedings which the Applicants cannot be deemed to have had foreknowledge of. The only question is whether the proceedings should now be dismissed.

122. R11 is the only Respondent who is a former employee of the former trustee of the Trusts. Mr Lowenstein KC referred to a selection of documents apparently contemporaneous with the fraud in which R11 is mentioned. This displaced my provisional view that the case against her should be dismissed. The fact that other documents are being produced by the Disclosing Parties does not eliminate the potential relevance of bespoke oral evidence R11 might be able to provide. It is not open to me at this juncture to decide the Swiss law issues. R11 has not suggested that the mere pendency of the proceedings against her is inherently prejudicial and she can reasonably expect to recover her reasonable costs of participating in the present proceedings in any event. She should be entitled to recover her reasonable costs of the proceedings forthwith, save that I would reserve the Swiss law element of those costs until it is clear whether the matter is going to be contested or not pursued.

123. Bearing in mind the unusual size of the fraud under investigation, in my judgment the Applicants can reasonably invite the Court to adjourn the application against R11 for them to consider their position in relation to what on any view presently appears to be

a borderline application. The Applicants ought to carefully assess whether the value of the information it is believed R11 might be able to provide based on her recollection of events more than six years ago makes a full inquiry into the contested Swiss secrecy law issues a proportionate exercise for the Court to adjudicate in the *Norwich Pharmacal* context.

Scope of Order: privilege review

124. Although there was some argument as to whether the Respondents should be limited to a "high-level" privilege review or a full privilege review, the Applicants focussed on the need to limit the costs of the review. In their Skeleton (at paragraph 8.1) it was submitted:

> "*(c) Given the Respondents' proposed costs of giving disclosure – and however those key issues of principle are resolved – the process of hosting, searching, reviewing (including for privilege) and production of documents should be undertaken by a third party to be agreed by the parties. The Applicants have produced cost estimates from four such providers, which come in at approximately only 7.84% - 11.5% of the…cost estimated by the Respondents themselves*…"

125. Mr Lowenstein KC had no difficulty in persuading me that the Respondents' overall estimated costs of compliance including the privilege review are remarkably high and that a third-party service provider could by agreement be engaged by the Respondents for this purpose. Mr Grant KC persuaded me that it was important for the Respondents to be able to have the privilege review carried out by their own lawyers. In these circumstances, I find merely find that:

(a) the Respondents should be able to engage their own lawyers to carry out a privilege review; however

(b) the Court is unlikely to approve as reasonable legal costs which are materially greater than the costs that would be charged by bespoke third party service-providers.

126. The scale of documents involved in the present exercise cast a fresh light on the traditional NPO principles upon which the parties relied throughout the present hearing. Mr Lowenstein KC was keen to emphasise the importance of not deterring applicants from seeking relief by placing overly onerous requirements (such as fortification) in their path. Mr Grant KC placed emphasis on the importance of the principle that respondents should not be burdened with the costs of compliance with NPOs. The sense that the disclosure exercise and related costs are on an unusual scale can be gleaned from a 14 November 2024 letter written by Campbells on behalf of the Respondents:

> "*The Respondents have no intention of incurring unreasonable costs in complying with the disclosure order once made (and it is unclear what reason the Respondents would have for doing so and why you suggest this would be in their interests). The Respondents' estimated costs of US$1 – US$2million is a conservative and reasonable estimate in light of the factors identified above. Put another way, in the event [ ]were to undertake a full review of 374,000 documents at an average cost of US$425 per hour and at a standard review rate of 50 documents per hour, then the estimated cost would be well over US$3million.*"

127. One man's sense of reasonable expenditure is another man's extravagance. Mr Grant KC sought to defuse the impact of the $3 million figure by suggesting that, today, no one was seriously suggesting costs would reach that level.

128. The present Applicants for most purposes insisted that their ability to meet any costs obligations was beyond doubt. On this basis, no access to justice concerns were engaged in the present case and the fact that they might be in other cases was beside the point. On the other hand it is obvious on proper analysis that all litigants have budgetary constraints. The principle that a NPO applicant must be willing to pay the reasonable

costs of compliance with the order has inherent safeguards in it. The "reasonableness" of compliance costs is a condition precedent to a respondent's right to reimbursement.

129. There is a public policy element to NPOs, and professional service providers ought probably to regard compliance with them, to some extent, as part of the costs of doing business. A professional service provider is not entitled (it seems to me, without reference to authority) to regard a NPO applicant as a private client obliged to pay for all professional time spent at the usual commercial rates. Insurance protection ought to be available to cover the business risk of responding to NPO-type proceedings and to bridge the gap between actual expenses and recoverable expenses. Even where such protections are available, the insured receiving parties will of course still have to maximize their costs recoveries from proceedings such as these.

130. The Court in granting *Norwich Pharmacal* relief may be said to be advancing the interests of the administration of justice, not vindicating the private interests of the applicant by enforcing some duty owed by the respondent. Lord Sumption in *Cartier International AG and others - v- British Telecommunications Plc and another* [2018] UKSC 28 opined as follows:

> "*11. I suggested in Singularis Holdings-v- PricewaterhouseCoopers [2015] AC 1675, para 22, that the duty to assist identified by Lord Reid was not a legal duty in the ordinary sense of the term. As Lord Reid himself put it in Norwich Pharmacal, the intermediary came under the duty without incurring personal liability. This is really only another way of saying that the court had an equitable jurisdiction to intervene. Lord Kilbrandon put the point very clearly in his own speech. Citing the South African decision in Colonial Government v Tatham (1902) 23 Natal LR 153, 158, he said that "the duty is said to lie 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" (p 205D-E).*"

131. In this case it is common ground that a serious fraud has occurred involving entities based in the Cayman Islands the ultimate victims of which are the taxpayers of a foreign

sovereign State. The Applicants, ultimately funded by the taxpayers of that State, are seeking information which will potentially support proceedings in relation to that wrongdoing. The present proceedings are one of several similar or related anonymised proceedings recently filed in this forum. The principle that innocent respondents should be indemnified is well established in the NPO and parallel legal contexts, as Mr Grant KC clearly demonstrated, and must be enforced.

132. This Court should not only be astute to ensure that the scales of justice are balanced equally between the legitimate legal interests of the foreign Applicants and the predominantly local Respondents. In addition the principle of indemnification must be kept within reasonable bounds and applied in a way which does not distort its intended function in this legal sphere. Mr Lowenstein KC was in a general sense right to caution the Court about an approach which would have an *in terrorem* effect on NPO applicants.

133. It is hoped that these observations will assist the parties to agree the unavoidably difficult legal and compliance costs issues as a whole in a spirit of compromise.

Form of Order: miscellaneous

134. On 1 May 2025, I was helpfully provided a version of the memorandum setting out the disputes on the form of order which was provided by the Respondents' counsel on the second day of the hearing, annotated with the Applicants' counsel's comments. I set out in summary form my conclusions on the various issues (the most substantive and/or contentious of which have been dealt with as explained above). Under paragraph 4.2 of the Preamble to the GCR, the Court's duty to manage cases includes:

> "…*(c) encouraging the parties to co-operate with each other in the conduct of the proceedings;*
>
> (d) *helping the parties to settle the whole or part of the proceeding*…"

Disclosing Parties

135. Only R1 and R3-R5 should give disclosure now. However the application as against R7-R10 and R11 is adjourned with liberty to apply rather than dismissed for the reasons set out above.

Date for Schedule 2 Disclosure

136. The Applicants sought disclosure within 6 weeks of the Order and the Respondents contended for disclosure within 12 weeks of the Order. One position assumes the Respondents must have already substantially completed their collation of documents exercise; the other takes into account the size of the task and the complexity of issues such as privilege. Both positions have some merit. I direct that the Schedule 2 disclosure should be given "within 42 and 84 days" on the understanding that the Respondents will disclose all that they can within that period on a rolling basis and can be trusted to act reasonably and in accordance with the spirit of the Order.

Liberty to apply in relation to disclosure

137. The Applicants alone propose liberty to apply in relation to disclosure. I approve this provision, considering the fact that their responsibility for meeting compliance costs will act as restraint on this jurisdiction being used as an instrument of oppression.

Schedule 1

138. I resolve the four disputed issues as follows:

(a) I approve the more "granular" description of the entities the Respondents are to list which they propose as in paragraph 1 of the Respondents' draft Order;

(b) I approve paragraph 2 of the Respondents' draft Order;

(c) I approve paragraph 2.2 of the Applicants' draft Order;

(d) I approve paragraph 3 of the Respondents' draft Order.

Schedule 2

139. One item is not disputed at all and two of the remaining four disputes reflect refinements of wording initially proposed in correspondence by the Respondents' attorneys and agreed by the Applicants' attorneys. In relation to those matters:

(a) consistently with my finding in relation to Schedule 1 above, I approve the more "granular" language in the Respondents' version of Schedule 2;

(b) I approve paragraph 2 of the Applicants' draft Order;

(c) I approve paragraph 9 of the Respondents' draft Order, which seems to reflect the product of work done to identify what accounts were caught by the generic disclosure they previously offered. This is on the assumption that the Respondents are subject to an implied obligation to disclose any other similar and relevant accounts which come to their attention;

(d) I approve paragraph 17.11 of the Respondents' draft Order on the assumption that the Respondents are subject to an implied obligation to disclose any other similar and relevant documents relating to other entities which come to their attention.

Privilege

140. The Applicants in Schedule 2 to their draft Order qualify the primary disclosure obligations with the words "*subject to redactions for privilege*". The Respondents propose a more fulsome statement of their privilege rights, and a clarification that they are not obliged to disclose documents subject to confidentiality orders or similar

obligations in the body of the Order (paragraph 1.1-1.3 of their draft Order). No dispute of the principle contended for by the Respondents is discernible. I approve the Respondents' proposed wording.

Costs

141. Some aspects of the costs orders in dispute can only fairly be addressed by the parties in light of a consideration of the present Judgment. Some aspects fall to be determined as a matter of principle. The following issues can be determined at this stage:

(a) should the Disclosing Parties be awarded merely their reasonable incurred costs of compliance with the Order, or should their future costs be included? In my judgment costs of compliance can only reasonably include costs incurred and to be incurred if further compliance action is required. The word "reasonable" should be a sufficient brake on a runaway approach to compliance costs;

(b) the Applicants agree they should pay all reasonable incurred costs of the proceedings (i.e. the *Ex Parte* Originating Summons) and compliance in relation to, in addition to the Disclosing Parties, R7-R10 as well. This is consistent with my finding that R7-R10 should not at this stage be required to comply in the future with the Order yet to be perfected;

(c) the Applicants do not treat R2, R6 and R11 as Respondents in their draft Order. I agree that R2 and R6, whom I understand it was made clear at an early stage were not being pursued ought not in principle to be awarded any costs on the basis that any costs awarded to other Respondents ought to cover any costs notionally attributable to R2-R6. Because the point has not been clearly argued, I would give them liberty to apply unless the point can be agreed;

(d) having refused to agree to the case against R11 being dismissed, the Applicants' stance that she is not a respondent is unintelligible (apart from the obvious desire to avoid liability for her costs). As recorded above, the Applicant should pay

her reasonable costs of the present proceedings to date, although any costs attributable to the Swiss law issue should be adjourned with liberty to apply together with the application against her as a whole.

142. I do not feel I can fairly deal with the costs of the following freestanding issues arising on the Respondents' Summons because my disposition of these issues has yet to be considered by counsel. I will nonetheless set out my provisional views:

(a) the costs of the cross-undertaking for the 21 October Order issue should logically be paid by the Applicants as part of the costs of the proceedings. The same applies to the security for costs issue because an undertaking has been offered instead;

(b) the cross-undertaking as a condition for compliance issue, the fortification issue, the payment on account of costs issue and the application to dismiss the case against R7-R10 involved substantial time and costs and the Respondents did not succeed on them. Even if the *Norwich Pharmacal* jurisdiction generally applies a more generous approach to respondents' costs than civil litigation generally, my provisional view is the costs otherwise payable to R7-R10 should be proportionately reduced to some extent.

143. For the avoidance of doubt, I summarily reject, to the extent that these points were seriously pursued at all, the Applicants' application for the Respondents to pay the Applicants' costs of the Respondents' Summons. That Summons effectively brought the *Ex Parte* Originating Summons before the Court.

Cross-undertaking

144. For the reasons set out above, I find that the cross-undertaking initially offered by the Applicants before the 21 October 2024 hearing should be included in the Order of that

date with effect from that date. I decline to require a cross-undertaking to be included in the final Order as the price for the Disclosure Order.

Fortification

145. For the reasons set out above, I find that a case for fortification has not been made out by the Respondents.

Payment on account of costs

146. For the reasons set out above, I decline to order an interim payment in respect of costs.

Security for costs

147. For the reasons set out above, I decline to order security for costs in circumstances where the Applicants have offered an undertaking, the precise terms of which have yet to be agreed or approved by the Court.

Conclusion

148. The terms of the final Order on the Applicants' *Ex Parte* Originating Summons seeking Norwich Pharmacal relief were settled in the terms summarised in paragraphs 134-147 above.

THE HONOURABLE IAN RC KAWALEY
JUDGE OF THE GRAND COURT