[2003–04 Gib LR 463]

SECILPAR S.L. v. FIDUCIARY TRUST LIMITED and FIDUCIARY MANAGEMENT LIMITED

COURT OF APPEAL (Glidewell, P., Stuart-Smith and Otton, JJ.A.): September 24th, 2004

Civil Procedure—disclosure—Norwich Pharmacal order—scope—third party ordered to disclose identity of alleged wrongdoer if wrong allegedly carried out by wrongdoer; order necessary to enable proceedings to be brought against him; and third party mixed up in or facilitated alleged wrongdoing and able to provide information

Civil Procedure—disclosure—Norwich Pharmacal order—expediency—expedient to grant "interim relief" under Civil Jurisdiction and Judgments Ordinance 1993, s.17 such as Norwich Pharmacal order in aid of foreign proceedings if foreign court lacks jurisdiction to make order—desirable to grant relief to support foreign proceedings concerning serious civil wrongs as well as international fraud

The respondent companies applied to the Supreme Court for a disclosure order in respect of the identity of the beneficial owner of a foreign company.

The appellant, a Spanish company, brought proceedings in Portugal against the alleged controlling shareholders of a Portuguese company of which it was a minority shareholder. It claimed that as they controlled over 50% of the shares of that company they were obliged, under s.187 of the Portuguese Companies Securities Act 1999, to make a public offer on the remainder. It therefore claimed the enhanced price of its shares, which was 200m above the current market price.

The appellant was, however, unable to establish the beneficial ownership of a British Virgin Islands company which it claimed was also part of the alleged group of controlling shareholders. The appellant needed to know the identity of the beneficial owner of that company so that it could be joined as a defendant to the Portuguese proceedings.

The appellant brought the present proceedings seeking the disclosure of the identity of the beneficial owner and only in this jurisdiction could it be certain of obtaining that information. The respondents, which were Gibraltar companies, acknowledged that they knew the identity of the beneficial owner but refused to disclose it. The Portuguese court itself could not have made the order sought.

On the appellant's *ex parte* application, the Supreme Court (Schofield,

C.J.) ordered the respondents to disclose the identity of the beneficial owner of the BVI company, on the basis that there was more than a mere suspicion that there was a real connection with the other controlling shareholders. On an application by the respondents, however, the Chief Justice set aside his order. Although he was satisfied that the respondents were involved in the alleged wrongdoing of the beneficial owner, that he had jurisdiction to make the order and that he would not have set it aside if the substantive proceedings had also been in Gibraltar, as they were in Portugal it was not expedient to make the order as it might be thought to be interfering or intermeddling in the Portuguese dispute. He was also concerned as to whether he should make a disclosure order which the Portuguese court did not itself have power to make.

On appeal against the Supreme Court's decision setting aside the disclosure order, the appellant submitted that (a) the court erred in holding that because the substantive proceedings were in Portugal rather than in Gibraltar it would not be expedient to uphold the order; (b) whilst some useful evidence might also come to light as a result of the disclosure of the identity of the beneficial owner, the order was not precluded by s.17(6) of the Civil Jurisdiction and Judgments Ordinance 1993, as a provision for obtaining evidence, since it needed to know the identity of the beneficial owner to bring proceedings against it; and (c) furthermore, although there was no provision in Gibraltar law equivalent to s.187 of the Portuguese Act, there was a general trend in Europe to provide greater support for minority shareholders and the legislation was not therefore unique.

The respondents submitted in reply *inter alia* that the appellant's true purpose in seeking the disclosure order was to obtain evidence to assist it in the Portuguese proceedings rather than to discover the identity of the beneficial owner of the BVI company and the order did not therefore constitute interim relief and was precluded by s.17(6) of the Civil Jurisdiction and Judgments Ordinance 1993.

Held, allowing the appeal and restoring the disclosure order:

(1) The Supreme Court had power to make the disclosure order as, first, a wrong had arguably been committed by the ultimate wrongdoers, the controlling shareholders, which allegedly included the beneficial owner of the BVI company. Secondly, the order was necessary to enable proceedings to be brought against the beneficial owner, as its identity could not necessarily be obtained from another source or in another jurisdiction. Thirdly, the defendants were mixed up in or had facilitated the beneficial owner's alleged wrongdoing, given their direct link with the beneficial owner, and they were able to provide the information sought (para. 17; paras. 46–47).

(2) Moreover, as the respondents were domiciled in Gibraltar, the court had power to make the order even though the Portuguese court, which would determine the substantive proceedings, did not. The Supreme Court's powers were not limited only to granting interim relief which could also have been ordered by the Portuguese court. It could make an order

such as the disclosure order to supplement the Portuguese court's lack of territorial jurisdiction over the Gibraltar-based respondents (paras. 50–51).

(3) The order for disclosure of the identity of the beneficial owner could be made even if evidence which could be useful to the appellant in the substantive Portuguese proceedings might also come to light as a result. As the order was necessary to enable the appellant to discover the identity of the beneficial owner in order to join him as a defendant in the Portuguese proceedings, it constituted "interim relief," which was not a "provision for obtaining evidence" and was not precluded by s.17(6) of the Civil Jurisdiction and Judgments Ordinance 1993, even though it was possible that useful evidence might also come to light (paras. 60–61).

(4) The Chief Justice correctly considered that he had jurisdiction to make the disclosure order but erred in setting it aside on the basis that, although he would have upheld it if the substantive proceedings had been in Gibraltar, as they were in Portugal it was not expedient to make the order, which could be viewed as intermeddling in the Portuguese dispute. If a foreign court trying substantive proceedings simply lacked jurisdiction to make an order for interim relief, rather than refused to do so, it would be desirable, not only in cases of international fraud but also in cases alleging a serious civil wrong against the ultimate wrongdoer, to make an order to support the proceedings in the primary court. As the disclosure order in the present case was necessary to enable the appellant to bring its action under s.187 and would assist rather than interfere with those Portuguese proceedings, it was expedient that the order should be made. The appellant's appeal would therefore be allowed and the disclosure order originally made by the Chief Justice would be restored (para. 67; paras. 70–72).

(5) Although the Companies Securities Act 1999, s.187 was "peculiar to Portugal," there was a general trend, particularly within the European Union, to provide greater protection for minority shareholders and the provision was not unique. The court could therefore make the order sought to assist the appellant in bringing its action under s.187 of that Act despite the absence of a similar provision in Gibraltar (para. 69).

Cases cited:

(1) *Ashworth Hosp. Auth.* v. *MGN Ltd.*, [2002] 1 W.L.R. 2033; [2002] 4 All E.R. 193, *dicta* of Lord Woolf considered.

(2) *Crédit Suisse Fides Trust S.A.* v. *Cuoghi*, [1998] Q.B. 818; [1997] 3 All E.R. 724, applied.

(3) *Motorola Credit Corp.* v. *Uzan (No. 2)*, [2004] 1 W.L.R. 113, followed.

(4) *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.*, [1974] A.C. 133; [1973] 2 All E.R. 943, applied.

(5) *Refco Inc.* v. *Eastern Trading Co.*, [1999] 1 Lloyd's Rep. 159, applied.

(6) *Secilpar S.L., In re*, 2003–05 MLR 352, considered.

Legislation construed:
Civil Jurisdiction and Judgments Ordinance 1993, s.17: The relevant terms of this section are set out at para. 18.

Companies Securities Act 1999, s.187 (Portugal): The relevant terms of this section are set out at para. 5.

R. Spearman, Q.C. and *L. Baglietto* for the appellant;
C. Hollander, Q.C. and *C. Rocca* for the respondents.

1 **GLIDEWELL, P.:**

The proceedings

On November 20th, 2003, Schofield, C.J., on an application made by the claimant Secilpar at a hearing *ex parte*, *i.e.* without notice to the respondents Fiduciary Trust Ltd. and Fiduciary Management Ltd. (whom together I shall call "Fiduciary"), ordered that the respondents should immediately supply to Secilpar's solicitors full information identifying the beneficial owner or owners of Burgundy Consultants Ltd. ("Burgundy"), Trafalgar Nominees Ltd. ("Trafalgar") and/or Medex Ltd. ("Medex"). I shall refer to this as "the *Norwich Pharmacal* order." The order also said that "the applicant has permission to use the information supplied to it by either of the respondents to this order to pursue others, both within this jurisdiction and worldwide, in any legal action or actions that the applicant is advised may be appropriate." The Chief Justice also granted an injunction restraining the respondents from disclosing the existence of the *Norwich Pharmacal* order to any person except as was necessary to disclose it to the respondents' officers or employees in order to comply with the terms of the order or to the respondents' solicitors for the purpose of taking legal advice.

2 The respondents applied to set aside both the order and the non-disclosure injunction and to dismiss Secilpar's claim. The Chief Justice heard the application on March 15th and 16th, 2004, and gave judgment on March 31st, 2004 setting aside the *Norwich Pharmacal* order of November 20th, 2003. He also subsequently lifted the injunction against disclosure of the *Norwich Pharmacal* order. That injunction is therefore no longer a matter in issue.

3 Secilpar now appeals against the setting aside of the *Norwich Pharmacal* order. The appeal was lodged on April 22nd, 2004. The respondents gave notice of cross-appeal on April 29th, 2004.

The background facts

4 The claimant, Secilpar, is a private company with a registered office in Madrid. It was a minority shareholder, having approximately 9% of the

shares, in a publicly listed Portuguese company called CIMPOR, which is the holding company of a group engaged worldwide in the manufacture of and trade in cement and related materials.

5 Secilpar claims that CIMPOR is effectively controlled by shareholders who act pursuant to a voting agreement between them. In the Chief Justice's judgment these shareholders are called "the controlling group." The significance of this depends on a provision of Portuguese law, namely, s.187 of the Companies Securities Act 1999, which provides:

> "Anyone whose holding in a public company exceeds, directly or according to the terms of No. 1 of Article 20, one third or one half of the voting rights attributable to the share capital, has the obligation of launching a takeover for the totality of shares and other securities issued by the company which grant the right to its subscription or acquisition."

The Chief Justice said of this:

> "The significance of the reference to one third and one half of the voting rights is as follows. If a shareholder holds between one third and one half of the voting rights, a rebuttable presumption arises that the shareholder controls the company, whereas if the shareholder holds more than one half of the voting rights, an irrebuttable presumption to that effect arises."

6 Three of the companies alleged to be members of the controlling group are Teixeira Duarte S.G.P.S., Tedal and T.D.P. These three companies between them hold just over 30% of the shares in CIMPOR. However, Teixeira Duarte and T.D.P. deny that the former company controls the latter or that there is a voting agreement between them. The other companies alleged by the claimant to be members of the controlling group are Banco Comercial Portugues ("B.C.P.") and seven insurance companies. It will be seen that even if T.D.P. is a party to a voting agreement with Teixeira Duarte and Tedal, their combined shareholding is less than the necessary one-third to raise a rebuttable presumption. On the other hand, if it be proved that B.C.P. and the insurance companies are members of the controlling group in addition to T.D.P., the combined shareholding exceeds 50% and thus the members of the controlling group were required to purchase the claimant's shareholding in CIMPOR.

7 The benefit to Secilpar of this is that the price to be paid on such a purchase is fixed at a date which results from the legislation and would be some 200m. above the current market price. Secilpar has begun five actions in Portugal relating to CIMPOR. The relevant action for the purpose of this appeal is an action to enforce the provisions of s.187, in which Secilpar claims the benefit of the enhanced price of its shares, *i.e.* 200m.

8 The defendants in the action as originally commenced are the three companies Teixeira Duarte, Tedal and T.D.P. B.C.P., the insurance companies and several other companies have since been added as co-defendants. The present proceedings raise, amongst other issues, the ownership of T.D.P. One of the shareholders in T.D.P. is Medex, a company registered in the British Virgin Islands, which owns 19.71% of the shares of T.D.P.

9 In the year 2000, Medex and a company called Someria, registered in the Bahamas, borrowed US$60m. from B.C.P. According to the claimant, this was passed to T.D.P. and used for the purchase of a further 4% of CIMPOR's shares. The shares of both Medex and Someria in T.D.P. are pledged to B.C.P. as security for the loan. For this reason, the claimant maintains that, as the shares in Medex are pledged to B.C.P., the claimant would have to pursue the beneficial owner of Medex if its claim against the company succeeded and were to be satisfied.

10 Quoting the judgment again:

> "The claimant believes that T.D.P. is ultimately owned or controlled by some, or all, of the controlling group but it does not know the identity of the beneficial owners thereof. In particular, the claimant does not know who are the beneficial owners of Someria and Medex. It believes that it is necessary for it to establish the beneficial ownership of T.D.P. so that proceedings may be brought against that person or persons in Portugal, and in turn Someria and Medex, and potentially make them defendants in the s.187 proceedings, in which, the claimant maintains, they would be liable. The basis of the liability of the beneficial owner or owners rests, according to Miguel Pinto Cardoso, a Portuguese lawyer acting for the claimant, in s.490 of the Portuguese Civil Code which in translation reads: 'If there are several authors, instigators or auxiliaries of the wrongful action, all of them are responsible for the damage they have caused.'"

11 In his written statement in support of Secilpar's application to the Supreme Court in Gibraltar, Mr. Cardoso said:

> "The purpose of this application is to attempt to obtain details of the identity of the ultimate beneficial owner(s) of Medex, Burgundy and Trafalgar. While there is no pressing need to obtain this information urgently in itself, the claimant is of course desirous to commence any appropriate legal proceedings against such other parties who have committed wrongs against the claimant as a matter of Portuguese law, as soon as possible. It remains the case that the claimant's claim arising out of the s.187 breach amounts to approximately 200m."

12 As I have said, Medex is registered in the British Virgin Islands where it is administered by a provider of corporate services. On July 18th, 2003, the claimant obtained an order from the High Court of the British Virgin Islands against that provider of services for the disclosure of documents relating to the beneficial ownership of Medex. The response to the order revealed that the shares of Medex have at all material times been held by Burgundy and Trafalgar, which are Isle of Man companies. The first respondent is the sole shareholder of Burgundy. The first respondent and Burgundy are the shareholders of Trafalgar. The second respondent is the assistant secretary to both Burgundy and Trafalgar. Both respondents are Gibraltar companies. They acknowledge that they know who is the beneficial owner of Medex. Burgundy and Trafalgar are "in-house" companies used by the two respondents in their business of company management and they hold the shares in Medex in trust for a third party. It is for that reason that the claimant made its application for a *Norwich Pharmacal* order against the two respondents. It is no longer interested in learning who is the beneficial owner of Burgundy and Trafalgar.

13 To complete this history, on the same day as the Chief Justice granted the *ex parte* order in these proceedings, Deemster Doyle, in the Isle of Man, granted *ex parte* a *Norwich Pharmacal* order, directed to Burgundy and Trafalgar, requiring them to give information about the beneficial ownership of Burgundy, Trafalgar and Medex. No application was made to set aside that order but it was not complied with, save in so far as it was disclosed that Burgundy and Trafalgar were effectively owned by the present respondents. At a further hearing, on March 5th, 2004, Deemster Doyle required Burgundy and Trafalgar to lodge in court a sealed envelope containing the information about the beneficial ownership of Medex. Burgundy and Trafalgar then applied to set aside the orders made by the Deemster on November 20th, 2003 and March 5th, 2004. On August 31st, 2004, Burgundy and Trafalgar appealed against the Deemster's order made in the case of *In re Secilpar* (6) on August 3rd, 2004.

***Norwich Pharmacal* relief**

14 The order which grants this relief is named after the decision of the House of Lords in *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.* (4). The appellants in that case claimed that their patent for a chemical compound was being infringed by illicit importations from abroad. They did not know the names or identities of the importers but the Customs & Excise had this information. The judge at first instance ordered discovery of the names and addresses of the importers. The Court of Appeal allowed an appeal against that decision but, on further appeal, the House of Lords restored the judge's order. Lord Reid explained the

reason for doing so. After referring to earlier authorities, he said ([1974] A.C. at 175):

> "They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

15 Lord Cross of Chelsea explained the factors which a court should have in mind in deciding whether to make such an order in the following words (*ibid.*, at 199):

> "Then the court would have to decide whether in all the circumstances it was right to make an order. In so deciding it would no doubt consider such matters as the strength of the applicant's case against the unknown alleged wrongdoer, the relation subsisting between the alleged wrongdoer and the respondent, whether the information could be obtained from another source, and whether the giving of the information would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant. The full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant."

16 Lord Kilbrandon added (*ibid.*, at 203):

> "The most attractive way to state an acceptable principle, intellectually at least, may be as follows. The dispute between the plaintiff and the defendants is of a peculiar character. The plaintiff is demanding what he conceives to be his right, but that right in so far as it has patrimonial substance is not truly opposed to any interest of the defendants; he is demanding access to a court of law, in order that he may establish that third parties are unlawfully causing him damage. If he is successful, the defendants will not be the losers, except in so far as they may have been put to a little clerical trouble. If it be objected that their disclosures under pressure may discourage future customers, the answer is that they should be having no business with wrongdoers."

17 Mr. Hollander, Q.C., leading counsel for the respondents in this appeal, has summarized neatly and accurately the principles to be applied

in his book, *Documentary Evidence*, 8th ed. (2003). He says (para. 5–03, at 75–76):

> "What needs to be shown for a *Norwich Pharmacal* application to succeed is as follows:
>
> (a) A wrong carried out, or arguably carried out, by an ultimate wrongdoer;
>
> (b) The need for an order to enable action to be brought against the ultimate wrongdoer, usually to require the defendant to the *Norwich Pharmacal* order to identify the wrongdoer;
>
> (c) a person who was mixed up in, or facilitated, the wrongdoing (albeit innocently) who is able to provide the information necessary to enable the wrongdoer to be sued."

18 In *Norwich Pharmacal* (4), and no doubt in many applications for such an order, the primary litigation in support of which the order is sought is or will be in England, or in this jurisdiction in Gibraltar. In this case, however, the primary litigation is in Portugal, the proceedings based on s.187 of the Companies Securities Act 1999 of that country. May a *Norwich Pharmacal* order properly be made in Gibraltar to enable a party, once identified, to be added as a defendant in Portuguese proceedings? To answer this question it is necessary to consider s.17 of the Civil Jurisdiction and Judgments Ordinance, which has the same effect and is in the same words as s.25 of the Civil Jurisdiction and Judgments Act 1982 in England. The relevant parts of s.17 provide:

> "(1) The Supreme Court shall have power to grant interim relief where—
>
> (a) proceedings have been or are to be commenced in a Brussels or Lugano Contracting State or a Regulation State other than Gibraltar; and
>
> (b) they are or will be proceedings whose subject matter is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings).
>
> (2) On any application for interim relief under sub-section (1), the court may refuse to grant relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings in question, makes it inexpedient for the court to grant it.
>
> . . .
>
> (6) In this section 'interim relief' in relation to the Supreme Court means interim relief of any kind which that court has power

to grant in proceedings relating to matters within its jurisdiction other than—

(a) a warrant for the arrest of property; or

(b) provision for obtaining evidence."

19 In the court below it was argued that the Gibraltar court had no jurisdiction to make a *Norwich Pharmacal* order for disclosure in aid of foreign proceedings. The court ruled against this submission. The "no jurisdiction" argument was also put in a different way, *i.e.* that what is sought is not "interim relief" within s.17 of the Civil Jurisdiction and Judgments Ordinance. The Chief Justice was satisfied that it was. In my view, in this he was clearly correct. Neither of these conclusions by the Chief Justice is now disputed by the respondents.

Other authorities

20 In his judgment, the Chief Justice said: "During the hearing of these applications I expressed reservation about whether I should be granting orders which it is not in the power of the Portuguese court to order." In saying this, he was referring to the evidence of Mr. Cardoso that the Portuguese court does not have the power to make the sort of discovery order sought in these proceedings. The Chief Justice's concern, which he said was "not aired on the *ex parte* application and deserves greater consideration than it was given in the *inter partes* hearing," has been the subject of a number of decisions in the English courts. These decisions related to freezing orders rather than *Norwich Pharmacal* orders. However, counsel are agreed that the principles to be derived from those authorities apply to this case. The Chief Justice considered them in detail.

21 The most recent is the decision of the Court of Appeal in *Motorola Credit Corp.* v. *Uzan (No. 2)* (3). Reference was made in that decision to earlier authorities, which I shall consider in chronological order. The first is *Crédit Suisse Fides Trust S.A.* v. *Cuoghi* (2). Mr. Cuoghi, who was resident and domiciled in England, was alleged by the claimant to have acted together with a former employee in defrauding the claimant of the sum of US$21.6m. The claimant began proceedings in Switzerland against Mr. Cuoghi and, in support of those proceedings, applied to the English court for a worldwide order freezing his assets, a type of order which was not available in Switzerland under Swiss law. The Court of Appeal held that the English court had power to make such an order. In doing so, the court referred to the wording of s.25 of the Civil Jurisdiction and Judgments Act 1982 which, as I have said, is in the same terms as s.17 of the Civil Jurisdiction and Judgments Ordinance. Millett, L.J., giving the first judgment, said ([1998] Q.B. at 825–826):

"The wording of section 25(2) is inelegant and is perhaps not readily susceptible to close textual analysis, but its meaning is tolerably plain. On an application for interim relief under subsection (1), the court is not bound to grant relief, but may decline to do so if in its opinion the fact that it is exercising an ancillary jurisdiction in support of substantive proceedings elsewhere makes it inexpedient to grant it. It is the ancillary or subordinate nature of the jurisdiction rather than its source which is material, and the test is one of expediency. The structure of subsections (1) and (2) and the way in which their scope has been progressively widened indicate to my mind an intention on the part of Parliament that the English court should in principle be willing to grant appropriate interim relief in support of substantive proceedings taking place elsewhere, and that it should not be deterred from doing so by the fact that its role is only an ancillary one unless the circumstances of the particular case make the grant of such relief inexpedient."

22 He added (*ibid.*, at 829):

"It is in my judgment regrettable that a gloss has been placed on the words of section 25(2). The question for consideration is not whether the circumstances are exceptional or very exceptional, but whether it would be inexpedient to make the order. Where an application is made for in personam relief in ancillary proceedings, two considerations which are highly material are the place where the person sought to be enjoined is domiciled and the likely reaction of the court which is seised of the substantive dispute. Where a similar order has been applied for and has been refused by that court, it would generally be wrong for us to interfere. But where the other court lacks jurisdiction to make an effective order against a defendant because he is resident in England, it does not at all follow that it would find our order objectionable.

Mr. Cuoghi is resident and domiciled in England. He carries on business here in a substantial way, and he is alleged to have committed acts in England which were part of the fraud. He is believed to have assets in other jurisdictions, but the Swiss court has no power to order him to disclose their whereabouts. Unless we make such an order, C.S.F.T. cannot apply to the courts where the assets are located for appropriate protective measures, and any final judgment obtained in Switzerland may be rendered ineffective. There is no danger of conflicting jurisdictions, and although the Swiss court cannot make an order against Mr. Cuoghi because he is not resident in Switzerland, there is no reason to believe that it would not welcome assistance from the courts of the country where he is resident."

23 Lord Bingham said (*ibid.*, at 831–832):

> "Subsection (2) of that section makes plain that the court is not bound to grant such relief. This is not an entirely straightforward subsection, but its meaning is in my view accurately paraphrased and elaborated as follows: on an application for interim relief under subsection (1), the court may refuse to grant relief if it is in its opinion inexpedient to do so because the court has no jurisdiction in relation to the subject matter of the proceedings in question apart from section 25; but the court may grant relief if it is in its opinion expedient to do so even though the court has no jurisdiction in relation to the subject matter of the proceedings in question apart from the section. Thus attention is focused on the inexpediency or expediency of granting interim relief having regard to the absence of jurisdiction to do so apart from section 25.
>
> Where substantive proceedings are brought in this country, and there is an ancillary application for a *Mareva* injunction and an associated disclosure order limited to England and Wales, the court will wish to satisfy itself that a sufficient case is made out for granting such relief. So it will where such an application is made under section 25, and regard will be paid to expediency as required by subsection (2). In the present case it is common ground that the judge would have been fully entitled, on the present application, to grant interim relief limited to England and Wales under section 25.
>
> Where substantive proceedings are brought in this country, and there is an ancillary application for a *Mareva* injunction and an associated disclosure order on a worldwide basis, the court will wish to satisfy itself that the facts are (or appear to be) such as to justify the making of so unusual and far-reaching an order. Such relief is not, and should not be, granted routinely or without very careful consideration. Mr. Cuoghi accepts that in the present case, had the substantive action been brought here, the court would probably, and unobjectionably, have granted such relief. Where the substantive proceedings have been commenced elsewhere, and application is made here for such worldwide relief under section 25, the court will be even more cautious in granting relief having regard to the terms of subsection (2).
>
> It would be unwise to attempt to list all the considerations which might be held to make the grant of relief under section 25 inexpedient or expedient, whether on a municipal or a worldwide basis. But it would obviously weigh heavily, probably conclusively, against the grant of interim relief if such grant would obstruct or hamper the management of the case by the court seized of the substantive proceedings ('the primary court'), or give rise to a risk

> of conflicting, inconsistent or overlapping orders in other courts. It may weigh against the grant of relief by this court that the primary court could have granted such relief and has not done so, particularly if the primary court has been asked to grant such relief and declined. On the other hand, it may be thought to weigh in favour of granting such relief that a defendant is present in this country and so liable to effective enforcement of an order made in personam, always provided that by granting such relief this court does not tread on the toes of the primary court or any other court involved in the case. On any application under section 25 this court must recognise that its role is subordinate to and must be supportive of that of the primary court."

24 The next authority on this subject, in date order, is the decision of the Court of Appeal in *Refco Inc.* v. *Eastern Trading Co.* (5). In that case, the primary litigation was taking place in a US district court in the State of Illinois. A freezing order directed to defendants not resident or domiciled in England was sought. The judge at first instance decided that, before any such order was made final, the merits of the claim for ancillary relief should be considered by the Illinois court. That court declined to express an opinion. The English judge then decided not to make a final order. In the appeal, Morritt, L.J. said ([1999] 1 Lloyd's Rep. at 170–171):

> "The scope and effect of s.25 of the Civil Jurisdiction and Judgments Act, 1982 has recently been considered by this Court in *Crédit Suisse Fides Trust S.A. v. Cuoghi*, [1997] 3 W.L.R. 871. I shall consider certain passages in the judgments in that case in due course. For present purposes it is sufficient to point out that it was implicit in all the judgments that the approach of the Court in this country to an application for interim relief under s.25 is to consider first if the facts would warrant the relief sought if the substantive proceedings were brought in England. If the answer to that question is in the affirmative then the second question arises, whether, in the terms of s.25(2), the fact that the Court has no jurisdiction apart from the [section] makes it inexpedient to grant the interim relief sought."

25 The court held unanimously that the facts of the case would not warrant the relief sought if the substantive proceedings had been brought in England. However, the court thought it right to consider the expediency test. At the end of his judgment in that case, Millett, L.J. said (*ibid.*, at 175):

> "A Court which is invited to exercise its ancillary jurisdiction to provide assistance to the Court seised of the substantive proceedings need feel no reluctance in supplying a want of territorial jurisdiction

but for which the other Court would have acted. But it should be very slow to grant relief which the primary Court would not have granted even against persons present within its own jurisdiction and having assets there. Assisting a foreign Court by supplying a want of territorial jurisdiction is plainly within the policy of the Act; assisting plaintiffs by offering them a lower standard of proof is not obviously within the legislative policy. I recognize, however, that the dividing line may sometimes be hard to draw, and that the distinction is not by any means necessarily decisive. I do not wish to be understood to be circumscribing a valuable jurisdiction, but rather to be indicating matters relevant to be taken into account when the Court is invited to exercise it."

26 *Motorola Credit Corp*. v. *Uzan (No. 2)* (3) was another freezing order case. The claimant brought proceedings in New York against four defendants, Turks, alleging fraud and conspiracy. One of the defendants was resident in the United Kingdom and he and another defendant had assets in that country. The claimant obtained a worldwide freezing order from the English court. Potter, L.J. gave the judgment of the court. He said ([2004] 1 W.L.R. 113, at para. 115):

"As the authorities show, there are five particular considerations which the court should bear in mind, when considering the question whether it is inexpedient to make an order. First, whether the making of the order will interfere with the management of the case in the primary court e.g. where the order is inconsistent with an order in the primary court or overlaps with it. That consideration does not arise in the present case. Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce."

27 He went on to say (*ibid.*, at para. 119):

"In this connection, Mr Strauss has emphasised the observations of Millett LJ in the *Refco Inc* case, in which he made clear that he

> regarded it as fatal in that case on grounds of comity that the primary court would have refused to grant the ancillary relief sought. Mr Strauss argued that, now the position has been made clear in *Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc* 527 US 308, and given the absence of power in the New York court to grant *Mareva*-type relief in the general or worldwide form available in this country, refusal was the appropriate course in this case. We do not think that follows. It seems to us that the position being contemplated by Millett LJ was one where the primary court has the jurisdiction to grant relief but would refuse to exercise it on the merits or for other substantial reasons (which the court appears to have understood to be the position in the *Refco Inc* case [1999] 1 Lloyd's Rep. 159) and not the position where the foreign court simply lacks the jurisdiction (as now made clear to be the position in the US in the *Grupo Mexicano* case). In the latter event, the English court may judge it 'not inexpedient', and indeed is likely to regard it as desirable in cases of international fraud, to be supportive of the processes of the primary court."

28 As will be seen, the Chief Justice placed much reliance on these passages. Mr. Spearman, Q.C., for the appellant Secilpar, submits however that in one important respect he has misunderstood what Potter, L.J. was saying. I shall return to consider this later.

29 I refer to a passage in one other authority to which Mr. Spearman drew our attention. This was a decision of the House of Lords in *Ashworth Hosp. Auth.* v. *MGN Ltd.* (1). In that case, the defendants had published in their newspaper details of the medical records of a convicted murderer who was detained in a secure hospital managed by the claimant authority. It was likely that the records had been supplied to the newspaper, via an intermediary, by an employee of the hospital authority, in breach of his contract of employment. The hospital authority wished to identify the employee and to that end applied for, and was granted, an order under the *Norwich Pharmacal* jurisdiction. Both the Court of Appeal and the House of Lords dismissed appeals against that order. Mr. Spearman has cited to us one passage from the speech of Lord Woolf in support of the general proposition that the power of the courts to make such orders is developing and expanding. Lord Woolf said ([2002] 1 W.L.R. 2033, at para. 57):

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

> not be allowed to stultify its use now that it has become a valuable and mature remedy. That new circumstances for its appropriate use will continue to arise is illustrated by the decision of Sir Richard Scott, V.-C. in *P v. T Ltd.* [1997] 1 W.L.R. 1309 (where relief was granted because it was necessary in the interests of justice albeit that the claimant was not able to identify without discovery what would be the appropriate cause of action)."

The judgment of the Chief Justice

30 At the beginning of his judgment, the Chief Justice set out the background history much as I have done in this judgment, though giving rather more detail. In the course of doing so, he said:

> "On the basis that I was satisfied that the two defendants had become involved in the alleged wrongdoing of the three defendants to the s.187 proceedings, I granted the order of November 20th, 2003, directed at identifying the names and addresses of the ultimate beneficial owners of Medex, Burgundy and Trafalgar."

Presumably, it is to be implied from this sentence, though the Chief Justice did not say so in terms, that he was still proceeding on the basis that the two defendants were involved in the alleged wrongdoing of Medex. This is a matter which is challenged by the respondents in this appeal.

31 The Chief Justice dealt with the argument that a *Norwich Pharmacal* order could not be made in aid of foreign proceedings. He concluded: "In my judgment, this court should, in appropriate cases, make orders for disclosure in aid of foreign proceedings." As I have already said, this is not now challenged.

32 The Chief Justice quoted s.17(1) and (6) of the Civil Jurisdiction and Judgments Ordinance. He then considered an argument directed to him that what was claimed was not "interim relief" as defined in s.17(6), because once the information was given that was an end of the matter. To that, he said:

> "However, I am satisfied that this is interim relief. It does not conclude the proceedings. It is ancillary to proceedings ongoing in another jurisdiction and is in no way final in the sense that it determines liability or concludes those proceedings.
>
> In my opinion, I have power to grant the claimant's application for disclosure orders in respect of proceedings in a foreign jurisdiction. My jurisdiction is based on both s.17 of the Civil Jurisdiction and Judgments Ordinance and on common law principles."

33 The Chief Justice's conclusion that the relief claimed was interim because it did not conclude the proceedings was clearly right and the contrary is not argued in this appeal. Instead, however, there is a major argument raised, in circumstances to which I shall refer later, that what is claimed does not come within the definition of "interim relief" in s.17(6) because what is sought is a provision for obtaining evidence rather than information. I shall have to return to this issue in more detail later.

34 In his judgment, the Chief Justice considered an argument advanced to him on behalf of the defendants about the importance to Gibraltar as an offshore finance centre of issues of confidentiality. He concluded:

> "It is not in the interests of Gibraltar to become known as a safe haven for wrongdoers and it is in the interests of the jurisdiction to apply internationally accepted standards to uncover wrongdoing. The duty of the court is to strike the proper balance and apply accepted principles to applications such as has been made in this case. The fact that Gibraltar is an offshore finance centre will not be permitted to dilute the standards which we apply to such applications. If this is a proper case for a *Norwich Pharmacal* order, then the fact that it exposes the identity of clients of the finance centre will not stand in the way of the grant of the order. However, I agree with those representing the defendants that proper caution has to be exercised when considering the relief, as is evident from the authorities."

That broad statement of the proper approach was, in my view, impeccable.

35 He then considered an argument that there was insufficient evidence of Medex being guilty of any wrongdoing. He said:

> "If the beneficial owner of Medex is part of the controlling group, which is a live issue in the Portuguese proceedings, then he may be liable to the claimant. Without the information of who that beneficial owner is, the claimant will not know whether he has a cause of action against him. And a step back from the uncontroverted facts shows that there is more than mere suspicion that there is some real connection between the beneficial owner of Medex and others in the controlling group."

36 This led him to say:

> "If this was a case in which the substantive issues fell to be decided in this jurisdiction, I would hold that the balance falls in favour of holding the *Norwich Pharmacal* order in place. However, I would do so with a slight sense of unease on two issues. First, that the claimant is not prepared to come out now, with its present

knowledge that Mr. and Mrs. Duarte hold fairly substantial voting rights in T.D.P., to say they intend to bring them as defendants into the s.187 proceedings. Second, that on the evidence I have, the three present defendants to those proceedings do not hold one third of the voting rights in CIMPOR and that it will still be necessary for the claimant to prove that others of the controlling group really do have a controlling interest in CIMPOR, a matter which is very much in issue."

When the Chief Justice indicated what he would have decided if the "substantive issues fell to be decided in this jurisdiction," he must have done so on the hypothesis that there was some provision in Gibraltar law equivalent to s.187 of the Portuguese statute.

37 He then said: "During the hearing of these applications, I expressed reservation about whether I should be granting orders which it is not in the power of the Portuguese court to order." This then led him to an extensive consideration of the various authorities leading up to the *Motorola Credit Corp.* case (3), with rather longer citations from them than those that I have quoted above. The last passages which the Chief Justice cited were the two paragraphs from the judgment of Potter, L.J. in *Motorola*, which I have quoted at paras. 26–27 above.

38 The conclusion of the Chief Justice's judgment was as follows:

"Although this passage appears somewhat to dilute the effect of Millett, L.J.'s judgment in *Refco*, it is clear that the fact that the remedy being sought in this court is not available in the court where the substantive proceedings have been brought, is a significant factor for consideration. I should say that the first, fourth and fifth considerations in Potter, L.J.'s judgment ([2004] 1 W.L.R. 113, at para. 115) of *Motorola*, do not apply in this case. The third consideration is relevant to this extent. First, that Medex is not a Gibraltar company, although there is an order of the High Court of the British Virgin Islands, where Medex is registered, supporting the orders sought. On the other hand, we do not know the attitude, or the anticipated attitude, of the Portuguese courts to this court giving it assistance in obtaining information which those courts themselves could not obtain.

None of the decisions cited involves *Norwich Pharmacal* relief, although in *Duvalier* it was said that the disclosure aspect of the order was its most important part. But this is not a case such as *Duvalier*. This is not a case which involves allegations of international fraud so as to cry out for the widest use of this court's powers. At its highest, it is a case involving share manipulation in a Portuguese company which is alleged to contravene a statute

peculiar to Portugal. In the light of the above authorities, it could be viewed that this court is intermeddling in a Portuguese dispute involving a Portuguese company which is justiciable only in Portugal, although of course some of the shareholders are non-Portuguese. It is as if I am an outsider intervening in another's jurisdiction. And it is not that this court is being asked to preserve assets which are the proceeds of fraud. This court is being asked for information which does not go to the root of the Portuguese action, which provides a tiny piece in the jigsaw, and which, if it later becomes relevant to the Portuguese proceedings, may be available under that court's powers to order discovery. It is far from the situation that the case would be won or lost, or rendered unfeasible, if this application is refused.

All in all, when considering the authorities on the expediency test in s.17(2) of the Civil Jurisdiction and Judgments Ordinance, and applying them to the particular relief sought in this case, and further considering the unease I attached to my consideration of whether I would grant the orders if this was the court hearing the substantive matter, I am persuaded that I should set aside my orders of November 20th, 2003."

The Isle of Man judgment

39 Before turning to the issues raised in this appeal, I refer briefly to the judgment of Deemster Doyle in *In re Secilpar S.L.* (6), given on August 3rd, 2004. In it, the Deemster was considering the same issues and arguments as arise in these proceedings in Gibraltar. The judgment is a detailed and thoughtful consideration of the authorities and the issues. In the result, the Deemster came to a conclusion which differs from that reached by the Chief Justice on March 31st, 2004. The Deemster's judgment is of course not binding upon us in any way, and it is under appeal in the Isle of Man. Nevertheless, it is useful for us to consider his views as part of the argument.

40 Deemster Doyle concluded his judgment with the following summary. Section 56B of the Manx legislation to which he refers is in similar terms to s.17 of the Civil Jurisdiction and Judgments Ordinance in Gibraltar. He concluded (2003–05 MLR 352, at paras. 108–111):

"108 For the reasons stated, I have held that I had jurisdiction both under s.56B and the common law to grant the orders. I have held that the provisions of s.56B were satisfied, as were the requirements under the common law. I have held that s.56B(1) is satisfied in that there are proceedings in a country outside the Isle of Man, namely Portugal. I have held that I have jurisdiction to grant the relief apart from s.56B and in any event there is nothing that makes it

inexpedient to grant or continue the relief in terms of s.56B(3)(b). The relief was not for the obtaining of evidence but rather the seeking of information. I have also held that it was right and proper to exercise my jurisdiction in granting the orders which were granted. I have held in the circumstances of the case before me that there is a greater public interest in ordering disclosure than in preserving confidentiality. I have determined that there was no material non-disclosure or breach of the continuing duty to make full and frank disclosure of all material matters and even if there was I would have exercised my discretion in favour of continuing the orders.

109 Secrecy is the badge of fraud or at least serious wrongdoing. In my judgment at this early stage of the proceedings, there is *prima facie* evidence that that badge can justifiably be placed on the chest of the beneficial owner of Medex for the Portuguese courts and others to see. It may be that there is an innocent explanation to the involvement of Medex. I have not been provided with it. It may be that the beneficial owner is totally unconnected with the controlling group. I am, however, unimpressed with the generalized pleas of privacy and confidentiality. I am unimpressed in the circumstances of the case before me with arguments regarding the right to privacy under the European Convention of Human Rights. With rights come responsibilities. If you get caught up, innocently or otherwise, in the wrongdoing of others you have a responsibility to assist in identifying the wrongdoers and the full extent of the wrongdoing in order that the wrongdoers may be brought to justice. Secilpar has produced sufficient evidence before me to persuade me that Medex is in the thick of the alleged breaches of s.187.

110 The Chief Justice in Gibraltar stated that a step back from the uncontroverted facts shows that there is more than mere suspicion that there is some real connection between the beneficial owner of Medex and others in the controlling group. I entirely agree. Secilpar have produced to me at the very least *prima facie* evidence of wrongdoing (indeed it would meet the seriously arguable test) on the part of Medex and its beneficial owner. Trafalgar and Burgundy are not mere witnesses, bystanders or spectators. It is as plain as a pikestaff that Trafalgar and Burgundy have got ‘mixed up’ or are ‘involved’ or otherwise connected in that wrongdoing, innocently or otherwise and that this is an appropriate case within which to exercise the courts’ powers and discretion in favour of Secilpar. It is not sufficient for Mr. Gough to say but this at its best is ‘only’ a case of a breach of s.187, an internal Portuguese business dispute, it is not a massive international fraud crying out for the widest use of the courts’ powers. Medex may only be a tiny piece of the jigsaw but it

may turn out to be a vital piece that completes or reinforces the picture of the s.187 breach. Secilpar are entitled to have the assistance of this court in locating that piece of the jigsaw. That piece will have the name(s) and address(es) of the beneficial owner(s) of Medex upon it and is presently held by Mr. Gough in an envelope pending a further order of this court. I entirely appreciate the need to exercise caution and to balance the various interests and the importance of confidentiality in legitimate cases where there is no *prima facie* evidence of wrongdoing, but in my judgment taking into account all relevant factors I was right to exercise my discretion in favour of Secilpar. Trafalgar and Burgundy have not persuaded me that it would be right, fair, just or proper to discharge the orders I have granted.

111 I therefore dismiss the amended application of Burgundy and Trafalgar to discharge the orders made on November 20th, 2003 and March 5th, 2004."

Issues raised by the appeal and cross-appeal

41 When deciding whether to make a *Norwich Pharmacal* order for disclosure, the court has to consider, first, whether it has power to do so—in other words, has it jurisdiction which entitles it to make such an order? If the court decides it has jurisdiction, it then goes on to decide whether, in the circumstances of the particular case, it is expedient to make such an order. This is, of course, a matter of discretion, provided that the court has directed itself correctly on the authorities.

42 The Chief Justice concluded, or seems to have concluded, that he did have jurisdiction to make the order sought. Before us, the arguments as to jurisdiction therefore arose mainly on the cross-appeal. The appeal is directed largely to the question whether it was expedient to make the order, including whether the Chief Justice directed himself correctly on the authorities in one respect.

43 The issues for our decision in relation to jurisdiction can be summarized as follows:

(a) Was there a *prima facie*, or seriously arguable, case that the person whose identity the claimant seeks to discover had committed a wrongful act or acts against the claimant in Portugal?

(b) Was an order for disclosure necessary to enable an action to be taken against the alleged wrongdoer?

(c) Was the Chief Justice correct to hold that the defendants facilitated the wrongdoing?

These are the issues summarized by Mr. Hollander in his book as the

necessary requirements for the making of a *Norwich Pharmacal* order (see para. 17 above).

44 If the answers to all these questions are in the affirmative, two further questions arise out of the fact that this case involves two jurisdictions. These are:

(d) Can the Gibraltar court make an order which the Portuguese court cannot make?

(e) Can the court make an order when the alleged wrongful act would not be contrary to Gibraltar law?

45 I shall consider these issues first, before turning to the arguments on the question of whether it was expedient to grant an order in this case, or whether the Chief Justice was right to set aside his earlier order made *ex parte*.

(a) ***Is there a seriously arguable case that the person whose identity it is sought to discover has committed a wrongful act or acts against the claimant in Portugal?***

46 I have already quoted the passage in the judgment in which the Chief Justice said: "There is more than mere suspicion that there is some real connection between the beneficial owner of Medex and others in the controlling group." The borrowing by Medex and Someria of US$60m. from B.C.P., which was used by T.D.P., is a part of the evidence on which he relied in reaching his conclusion. Deemster Doyle made a finding to the same effect. Both judges, when reaching their decisions on this issue, were entitled to rely on the determination of the defendants in these proceedings not to disclose the identity of their principal as of itself a matter which they were entitled to take into account. In my view, the material before them amply justified them both in deciding that there is a *prima facie* case that the beneficial owner of Medex was party to a wrongful act or acts as alleged by the claimant.

(b) ***Was an order for disclosure necessary to enable an action to be taken against the alleged wrongdoer?***

47 It will be remembered that in his speech in *Norwich Pharmacal* (4) Lord Cross said ([1974] A.C. at 199) that one of the matters to be considered when deciding whether to order disclosure is "whether the information could be obtained from another source." In his argument before us, Mr. Hollander quotes a sentence from the judgment of Lord Woolf in *Ashworth Hosp. Auth.* (1) ([2002] 1 W.L.R. 2033, at para. 36) to the effect that the making of the order must be "a necessary and proportionate response in all the circumstances." Whether the making of the order is proportionate is no doubt a relevant factor when considering

expediency. Here, I am considering necessity. At present, the proceedings in the British Virgin Islands have hardly added to Secilpar's store of knowledge. The Manx proceedings may well do so if the appeal in that jurisdiction fails, but may not disclose the beneficial owner of Medex. Only of these proceedings in Gibraltar can it be said with some certainty that, if this court decides that it is appropriate to make the order sought, his identity will be revealed. It is therefore clear that to achieve this end the order is necessary.

(c) ***Was the Chief Justice correct in finding that the defendants in these proceedings facilitated and were thus mixed up in the alleged wrongdoing of the beneficial owner?***

48 Mr. Spearman submits that as the fiduciary respectively owned and administered Burgundy and Trafalgar, which in turn hold the shares in Medex, and as these defendants have a direct link with the beneficial owner, they have clearly facilitated the concealment of his identity and are, albeit innocently, mixed up in his alleged contravention of s.187 in Portugal. I agree with this submission. In my judgment, the Chief Justice reached a correct conclusion on this issue.

(d) ***Does the Gibraltar court have jurisdiction to make an order which the Portuguese court cannot make?***

49 The evidence of Mr. Cardoso, which the Chief Justice accepted, is that the Portuguese court does not have power to make an order in the s.187 proceedings for the disclosure of the name of the beneficial owner of Medex. It was in relation to this issue that the Chief Justice rehearsed and quoted from the English authorities which culminated in *Motorola* (3). The Chief Justice's conclusion appears to be contained in the first sentence of the last part of his judgment. He said:

> "Although this passage appears somewhat to dilute the effect of Millett, L.J.'s judgment in *Refco*, it is clear that the fact that the remedy being sought in this court is not available in the court where the substantive proceedings have been brought, is a significant factor for consideration."

This is, at best, enigmatic. It does not say that the Gibraltar court does not have jurisdiction, but it does not accept that it has.

50 The answer is to be found in the judgment of Millett, L.J. in *Cuoghi* (2), where he said ([1998] Q.B. at 827): ". . . [W]here the defendant is domiciled within the jurisdiction such an order cannot be regarded as exorbitant or as going beyond what is internationally acceptable." Later, he said (*ibid.*, at 827):

> "I recognise that an ancillary jurisdiction ought to be exercised with

> caution, and that care should be taken not to make orders which conflict with those of the court seised of the substantive proceedings. But I do not accept that interim relief should be limited to that which would be available in the court trying the substantive dispute; or that by going further we would be seeking to remedy defects in the laws of other countries."

Again, in *Refco* (5), the same learned judge said ([1999] 1 Lloyd's Rep. at 175): "Assisting a foreign Court by supplying a want of territorial jurisdiction is plainly within the policy of the Act."

51 In my judgment, it is clear that the court in Gibraltar has power to make a *Norwich Pharmacal* order despite the fact that the Portuguese court has no jurisdiction to do so.

(e) ***Can the court make an order when the alleged wrongful act would not be contrary to Gibraltar law?***

52 This issue is briefly raised in the grounds of cross-appeal in the following words: "The learned judge should have additionally held that the order should not be made in Gibraltar in aid of a 'statute peculiar to Portugal.'" Except for the last phrase, which comes from the judgment where the judge was considering whether it was expedient to grant an order, this point was not specifically addressed by the Chief Justice. However, he concluded that his jurisdiction was based both on s.17 of the Ordinance and on common law principles. In so doing, he held that the Portuguese proceedings came within s.17(1). I agree with him.

53 It follows that in the issues as to jurisdiction I have so far discussed, I would support the Chief Justice's decision and rule in favour of Secilpar.

54 The last point in relation to jurisdiction arises out of the wording of s.17(6) and an underlying common law principle under which "interim relief," which may be granted under s.17(1), does not include a "provision for obtaining evidence." The way in which this issue has come into this appeal is both extraordinary and unsatisfactory. We are told that it was raised briefly in the court below. If it was, it made so little impact on the Chief Justice that it did not appear as such in his careful and detailed judgment. His only reference was not to counsel's argument but to a passage in a textbook by Matthews & Malek, saying that their concern was met by a decision of the Hong Kong Court of Appeal. The point was not referred to in the notice of cross-appeal. However, when the respondents' skeleton argument was lodged, about a week before the hearing in this court began, the argument that the real purpose of Secilpar's application was not to identify the beneficial owner of Medex but to obtain evidence to help the claimant in the s.187 proceedings, and

thus was not "interim relief," emerged fully fledged. Indeed, to continue the avian analogy, it was not only fully fledged but a cuckoo, since it occupied 17 paragraphs, approximately half of the section of the skeleton which contains arguments rather than background. To my mind, it is clear that this has become a, if not *the*, main plank of Mr. Hollander's argument. Mr. Spearman did not object to our hearing argument on this point, nor seek an adjournment, and we must therefore rule on it.

55 I intend no discourtesy to Mr. Hollander in seeking to summarize his argument on this issue as follows:

(a) In order for Secilpar to prove in the s.187 proceedings that the controlling group controlled over one-third of the shares in CIMPOR, it will be obliged to prove that B.C.P. and the associated insurance companies were parties to the alleged voting agreement. If Secilpar fails in this, proving that Medex, and thus T.D.P., were part of the controlling group would still not prove that the group shareholding exceeded one-third of the total. On the other hand, if Secilpar proves that B.C.P. and the insurance companies are party to the voting agreement, they will show that the controlling group shareholding exceeds one-third. The addition of T.D.P. would bring it to over 50%. On either scenario, the addition of Medex, and the beneficial owner of Medex, as an additional claimant would be of no benefit to Secilpar.

(b) Moreover, if Secilpar can prove that B.C.P. and the insurance companies are parties to the alleged voting agreement, it has, as defendants, parties who are well able to satisfy a judgment for the 200m. The addition of Medex's beneficial owner as an additional target for this purpose is superfluous.

(c) Thus, the court should consider whether there is some other ulterior motive for seeking to join as a defendant the beneficial owner of Medex. The hope is that if he is joined some evidence will come to light which will be of assistance in the existing proceedings. The court should infer that this is Secilpar's true or dominant motive for seeking to join him.

56 The main obstacle in the way of this submission is the evidence of Mr. Cardoso. Mr. Cardoso is a Portuguese lawyer and occupies the position of head of the litigation department of Linklaters at their office in Lisbon. He is acting for Secilpar in its legal proceedings in Portugal. On November 7th, 2003, he made the witness statement in support of the plaintiff's application in these proceedings (quoted in para. 11 above). To repeat part of it, he said:

> "The purpose of this application is to attempt to obtain details of the identity of the ultimate beneficial owner(s) of Medex, Burgundy and Trafalgar. While there is no pressing need to obtain this information urgently in itself, the claimant is of course desirous to commence

> any appropriate legal proceedings against such other parties who have committed wrongs against the claimant as a matter of Portuguese law, as soon as possible. It remains the case that the claimant's claim arising out of the s.187 breach amounts to approximately 200m."

No request was made by the defendants for Mr. Cardoso's witness statement to be embodied into an affidavit on oath, nor was there any request at any stage to cross-examine him. Until the skeleton argument, there was no direct challenge to the accuracy of what he said. It follows that accepting this argument for the defendants involves disbelieving the direct statement made by Mr. Cardoso.

57 Mr. Hollander refers us to the affidavit which Mr. Cardoso swore in the earlier British Virgin Islands proceedings. In that affidavit, referring to documents the subject of the application, he said:

> "All these documents are of vital importance to the proceedings in Portugal . . . as I will explain below. In fact, I will go so far as to say the register of shareholder records could decide definitively many aspects central to the proceedings, and could save considerable time and costs in the process. Also, this disclosure could show that the Duarte group and B.C.P., as defined below, have been deceiving the Portuguese court."

58 We do not know the exact nature of the proceedings in the British Virgin Islands. It appears, however, from this affidavit that they were not merely proceedings for disclosure in the same way as a *Norwich Pharmacal* order but, in addition to a means of disclosure, for the discovery of books and papers. In those proceedings, therefore, it may well be that the object of the exercise was to obtain evidence as well as information and that this properly came within the ambit of the jurisdiction of the British Virgin Islands court. Of itself, this does not dissuade me that we should disbelieve what Mr. Cardoso has said in these proceedings.

59 Mr. Spearman points out that this issue was raised openly and properly from the start in the Isle of Man proceedings. Deemster Doyle ruled against it.

60 The nature of the evidence which might be revealed from disclosure of the name of the beneficial owner of Medex is not clear and Mr. Hollander has not made any suggestion as to what it might be. I can understand that, once his identity is revealed, evidence or information already in the possession of Secilpar may tend to connect him to other parties but there can be nothing objectionable in that. Mr. Spearman accepts that some evidence may come to light but submits that this of itself does not offend against s.17(6). Provided that the court is satisfied

that the claimant requires information as to the identity of the beneficial owner in order to sue him, or to consider suing him, that brings it, he submits, within the meaning of interim relief.

61 On this, I accept Mr. Spearman's submission. In agreement with Deemster Doyle, I would reject this argument on behalf of the defendants. I therefore conclude that the Supreme Court had jurisdiction to make the *Norwich Pharmacal* order sought by Secilpar in these proceedings.

62 This brings me to the second main issue: whether it is expedient that the court should make an order for the disclosure of the name or identity of the beneficial owner of Medex in this case? Of course, the decision by the Chief Justice, that it was not expedient to make such an order, was made in the exercise of his discretion, with which this court may only interfere on normal principles, *i.e.* if we conclude that in reaching his conclusion the Chief Justice made an error of law, or disregarded or gave no proper weight to some relevant factor.

63 Mr. Spearman submits that both these criticisms can be made of the judgment. The Chief Justice started correctly by deciding that, if the substantive proceedings had been in Gibraltar, "I would hold that the balance falls in favour of holding the *Norwich Pharmacal* order in place." Why then did he decide not to reach the same result because the substantive proceedings were in Portugal?

64 The Chief Justice referred to, and appeared to have adopted, the tests posed by Potter, L.J. in *Motorola* (3) (see para. 26 above). Mr. Spearman submits, first, that the Chief Justice was wrong to characterize the passage in the next paragraph of Potter, L.J.'s judgment as "somewhat to dilute" the effect of Millett, L.J.'s judgment in *Refco* (5). When Potter, L.J. said ([2004] 1 W.L.R. 113, at para. 119) that—

> "where the foreign court simply lacks jurisdiction . . . the English court may judge it 'not inexpedient', and indeed is likely to regard it as desirable in cases of international fraud, to be supportive of the processes of the primary court,"

he was not differing from Millett, L.J. but was emphasizing the difference between the situation where the foreign court has jurisdiction to make an order for discovery but declines to do so and one in which it has no jurisdiction. This, submits Mr. Spearman, was a misunderstanding by the Chief Justice which affected the remainder of this part of his judgment and was an error of law.

65 Mr. Hollander does not argue that Potter, L.J. differed from Millett, L.J., nor that we should disregard the former. Rather, he submits that this is not a matter to which the Chief Justice attached great weight.

66 Mr. Spearman further submits that the Chief Justice's misunderstanding of the combined effect of the judgments of Millett, L.J. in *Refco* (5) and Potter, L.J. in *Motorola* (3) led him to his conclusion that "it could be viewed that this court is intermeddling in a Portuguese dispute," which was a, if not the, main factor which led him to his decision.

67 In my view, Mr. Spearman's submissions in this respect are, in essence, correct, though I would put the matter a little differently. While it is true that, when Potter, L.J. said in *Motorola* ([2004] 1 W.L.R. 113, at para. 119) that the English court "is likely to regard it as desirable . . . to be supportive of the processes of the primary court," he specifically referred to cases of international fraud, nevertheless the same principle may properly be applied to disclosure where the wrong alleged in the primary court is not fraud but still a serious civil wrong. From his enigmatic reference to this as being "a significant matter for consideration," it is not clear whether the Chief Justice appreciated into which side of the scale the weight of the significant matter should be placed. Thus, he either was in error in this respect or at least totally failed to give this factor proper weight in favour of making a disclosure order.

68 Mr. Spearman makes other, though less formidable, criticisms of this part of the Chief Justice's judgment. He submits that it is not sufficient to say that the first, fourth and fifth considerations in Potter, L.J.'s judgment do not apply; the fact that they do not apply, or are satisfied, means that they are not reasons for refusing to make an order. Secondly, there is no reason to believe that the Portuguese court will be opposed to the Gibraltar court obtaining information which it has no power to obtain itself. If the Portuguese court would welcome such assistance, as it might well do, it would not think that the Gibraltar court was intervening in its jurisdiction or intermeddling.

69 As to the Chief Justice's observation that the statute (the Companies Securities Act 1999) is "peculiar to Portugal," this may be strictly correct. Nevertheless, there is a general trend, particularly in the European Union, to provide greater protection for minority shareholders. Although there is no equivalent legislation in Gibraltar, Mr. Spearman has shown us that the scheme of s.187 of the Portuguese legislation is very similar to that of the voluntary code regulated by the Takeover Panel in England, a fact which seems not to have been drawn to the Chief Justice's attention. There is, therefore, nothing idiosyncratic in the Portuguese legislation.

70 For the reasons set out in para. 67 above, I conclude that there was no sound basis for the Chief Justice's decision on expediency. I understand his concerns but I believe they were, for the most part, unjustified. We are therefore in a position in which we can properly exercise our own discretion.

71 In summary:

(i) Secilpar wishes to join, or to consider joining, Medex as a defendant in the s.187 proceedings in Portugal;

(ii) in order for proceedings against Medex to achieve a useful result, it is also necessary to join the beneficial owner of that company;

(iii) there is a seriously arguable case that the beneficial owner is a party to a breach of s.187;

(iv) in order to join the beneficial owner, it is obviously necessary to know his identity but, until now, the defendants, who acknowledge that they know it, have refused to disclose it;

(v) in order that his identity be disclosed, it is necessary that the disclosure order be made in these proceedings;

(vi) there is no provision for making such an order in Portugal; and

(vii) the making of the disclosure order in this jurisdiction against defendants based here would aid, but not interfere or intermeddle with, the Portuguese proceedings.

72 I therefore conclude that in this case it is expedient that the *Norwich Pharmacal* order should be made. I would therefore allow the appeal and order that the disclosure order originally made by the Chief Justice in relation to Medex should be restored.

73 **STUART-SMITH** and **OTTON, JJ.A.** concurred.

Appeal allowed.