



Orders of this Court on 11 December 2017, the Receivers were recognised as being those through whom the Silk Road M3 Fund (M3 Fund) may act in this jurisdiction. Further, this Court then specifically recognised the Receivers' right to apply for *Norwich Pharmacal*<sup>1</sup> relief against the Respondents. Reasons for the Order of 11 December 2017 were given in a judgment delivered on 8<sup>th</sup> February 2018.

2. Having obtained recognition by order of this Court, the Receivers brought their application for *Norwich Pharmacal* relief on 18 December 2017. The application was brought ex parte but a notice to the Respondents, the Joint Official Liquidators of both Caledonian Bank Ltd. (In Liquidation) and Caledonian Securities Ltd. (In Liquidation) (“the JOLs”, “CBL” and “CSL” and respectively).
3. By their ex parte originating summons, the Receivers seek wide disclosures from the JOLs in relation to accounts held by CBL and CSL in the names of or on behalf of (1) Eurasia Capital Ltd.; (2) Eurasia Capital Limited; and (3) Silk Road Management Limited; the entities controlled by or connected to the Investment Advisor to the M3 Fund. The assets of the M3 Fund are now the subject to the receivership. As Mr. Clingerman explains in his first affidavit, requests by the Receivers to Mr. Alisher Ali (“Mr. Ali”) for information necessary to locate the assets, have gone unanswered. Mr. Ali who has a common connection to the three entities named, is further described below.
4. Mr. Dunne appeared for the JOLs, as he stated, not to oppose or obstruct the Receivers' investigations but to raise concerns about the technical premise of their application against the JOLs.



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<sup>1</sup> *Norwich Pharmacal v Customs & Excise Comm.* [1974] AC 133.

5. In essence, the JOLs' objection is that the application should not be brought against them but against CBL and CSL themselves. The reason given by Mr. Dunne is this: although the JOLs are currently in control of CBL and CSL, this was not the case at the time of the matters cited by the Receivers as requiring of their investigation; those matters all relate to periods prior to the commencement of the liquidations.
6. As a result, it cannot be said that the JOLs were "*mixed up*" in the alleged wrongdoing so as to engage the *Norwich Pharmacal* jurisdiction against them.
7. As was stated in *ORB A.R.L v Fiddler*<sup>2</sup>, the third threshold condition for *Norwich Pharmacal* relief (as the conditions were restated by Popplewell J in that case), is that the person against whom the order is sought must be involved in the wrongdoing in a way which distinguishes him from being a mere witness. Here, it cannot be said that the JOLs were themselves involved in the transactions to be investigated. At most, having become appointed as liquidators of CBL and CSL *ex post facto* the times of the transactions, the JOLs relate to them as but witnesses to whatever evidence may have been found of the transactions within CBL and CSL, after the JOLs assumed office.
8. Recognizing the force of this submission from Mr. Dunne, Mr. Wright on behalf of the Receivers applied to amend their *ex parte* originating summonses to remove the JOLs and to name CBL and CSL as the respondents. That amendment was allowed, it having been acknowledged by Mr. Dunne that the JOLs would of course, be responding on behalf of CBL and CSL.
9. The application for *Norwich Pharmacal* relief proceeded accordingly.

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<sup>2</sup> [2016] EWHC 361 (Comm) at [89].



## **Factual background**

10. The factual background to the Application, including information regarding the M3 Fund, Silk Road Fund Ltd (“Silk Road”) and how those entities interrelate and operate under Bermudian law, is set out in full detail in the Affidavit of Mr. Clingerman. The key facts are as follows:

10.1 On 14 February 2013, US\$10,000,000, representing subscription monies paid by Goodwill PTC Limited (as Trustee of the Prosperity Trust) (“Goodwill) as consideration for 10,000 participating shares in the M3 Fund, were transferred to the M3 Fund’s bank account at DBS Bank (Hong Kong) Ltd (“DBS Account”).

10.2 Between 26 March 2013 and 16 October 2013, six transfers totalling US\$7.6 million were made from the DBS Bank Account to an account at CBL held in the name of “Eurasia Capital Ltd”. The Applicants have been unable to identify “Eurasia Capital Ltd”. It is likely to be either Eurasia Capital Limited (ECL) or Eurasia Capital, Ltd (ECLtd). The former is an active Cayman Islands company. The latter is also a Cayman Islands company, but was struck from the Register of Companies in January 2015. The number of the account at CBL to which the transfers were made is 02-01-420-311851-001.

10.3 For four of the six transfers identified above, the supporting wire remittance advice includes either the narrative description "Transfer to EC Brokerage" or "Brokerage Account Transfer." These would be accounts at CSL and it is for this reason that CSL has been included in the Application.



- 10.4 On 3 October 2014, US\$300,000 was transferred from the DBS Account to a different account held at CBL, in the name of Silk Road Management Limited, the Investment Advisor of the M3 Fund (“Investment Advisor”) and also a Cayman Islands company. The number of that account at CBL is 02-01-420-311850-001.
- 10.5 It is not clear which of ECL and ECLtd is the holder of CBL account no. 02-01-420-311851-001. Both entities are seemingly linked to Mr. Ali, who is the sole director and sole shareholder of the Investment Advisor. He is also the chairman of “Eurasia Capital”, according to the Silk Road Information Memorandum dated November 2011 (“Information Memorandum”), although it is not clear precisely which entity this refers to. “Eurasia Capital” is described in the Information Memorandum as a *“pan regional investment bank with its major focus on Mongolia”*.
- 10.6 There is no good reason for nor explanation offered why the M3 Fund’s subscription monies were transferred to an account in the name of “Eurasia Capital”. Brokerage statements detailing the investments purportedly made on behalf of the M3 Fund bear the name “Eurasia Capital Mongolia”, another company seemingly linked to Mr Ali but with no documented, legitimate connection with the M3 Fund or Silk Road.
- 10.7 The M3 Fund’s administrator, Apex Fund Services Ltd (Apex), has confirmed that it has been unable to locate any account opening documentation in relation to any accounts held at CBL or CSL.
- 10.8 Therefore, the Receivers are, absent provision of the documentation sought from CBL and CSL, unable to ascertain what entity or person was responsible



for, or at the very least involved in, the transferal of the M3 Fund subscription monies to the “Eurasia Capital Ltd” account at CBL and/or CSL. This knowledge would be the first step in piecing together the whereabouts of the M3 Fund’s assets, which, as yet, are unknown.

### **Investments made with M3 Fund Money**

11. A number of the investments reportedly made with the M3 Fund’s subscription money give the Receivers serious cause for concern. Such investments include:

11.1 Investments of US\$1.3m in an entity named Silk Road Finance Inc (“SRFI”) of which Mr. Ali was CEO, director and chairman of the board. The contractual purchase documents were executed on behalf of SRFI by an individual who the Receivers have been unable to locate. Moreover, when Mr. Ali, the President, director, CEO and CFO of SRFI was contacted and asked about the individual who signed the purchase documents, he said he had no idea who that individual was and had no recollection of him. That same President, director, CEO and CFO did not, when asked by the Receivers, recognise or recall the M3 Fund’s purported investments in SRFI.

11.2 The Receivers are also troubled by the apparent inaccuracy contained in a Report of Exempt Distribution filed on behalf of SRFI which records the issue of 1,781,625 shares in SRFI to the M3 Fund. Such shares are not recorded in any M3 Fund brokerage statement. The shares, much like the money originally invested in SRFI, are as yet untraceable.

11.3 Investments in certain stocks purportedly on behalf of the M3 Fund have not, according to the brokerage statements, resulted in a payment of dividends to



the M3 Fund, despite at least one of the companies in which the M3 Fund allegedly invested having declared dividends on four separate occasions since the investment was made.

12. The above is said not to be an exhaustive list of red flags but simply serves to highlight that without sight of the documents sought from the Respondents, the Receivers have no means of knowing what has been done with the M3 Fund's money and by whom.

### **Contact with involved parties**

13. According to Mr. Clingerman, the attempts by the Receivers to obtain information with which to construct their knowledge of what has happened to the M3 Fund's money and the location of the assets of the M3 Fund have been met largely with a lack of co-operation, particularly from those who would appear to be responsible for the movement of the M3 Fund's cash.
14. Firstly, the Receivers' request to Mr. Ali, the Investment Advisor and other parties connected to "Eurasia Capital", to provide control of the M3 Fund's assets or the information with which to locate those assets has been unsuccessful due to a lack of co-operation. Further, it is not known where Mr. Ali is, rendering difficult and likely unproductive any attempt to issue proceedings to compel him to co-operate.
15. The Receivers also contacted the JOLs in order to obtain information regarding the Eurasia Capital account at CBL. The email exchange ended with an email from the JOLs advising the Receivers that the information requested cannot be provided "*due to confidentiality*".



## The Law

16. The principles established in *Norwich Pharmacal* have been applied in the Cayman Islands in a number of cases, including, for example, *Miller v. Gianne*<sup>3</sup> and *Braga v. Equity Trust Company (Cayman) Ltd.*<sup>4</sup>. In the latter, I described the *Norwich Pharmacal* jurisdiction as “*broad, flexible and developing*”<sup>5</sup> and the principle underpinning the jurisdiction, as:

*“The principle of equity by which the Courts make orders for discovery against persons who are not themselves to be sued as parties to the action, and who are not mere witnesses to events which give rise to an action.”*

17. The well-known and oft cited dictum of Lord Reid from the *Norwich Pharmacal* case itself<sup>6</sup> remains the classical statement of the jurisdiction:

*“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.”*

18. The conditions required to be satisfied were recently restated by Popplewell J. in *ORB A.R.L. v. Fiddler*<sup>7</sup> to recognise the jurisdiction as it has developed in the cases since Lord Reid’s dictum. It is a comprehensive re-statement of the principles which is

<sup>3</sup> *Miller v Gianne* [2006] CILR note 26 (Henderson J)

<sup>4</sup> *Braga v. Equity Trust Company (Cayman) Ltd* [2011] (1) CILR 402

<sup>5</sup> *Supra*, para 49

<sup>6</sup> *Supra*, at p175 B-C.

<sup>7</sup> *Supra* at paras 82 to 90





suitable for adoption and which I accept for application here. Although extensive, the dicta is worthy of being set out in full:

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

85. *The second condition is that the disclosure sought must be necessary in order to enable the applicant to bring legal proceedings or seek other legitimate redress for the wrongdoing. In Rugby Football Union v Consolidated Information Services Limited (formerly Viagogo Limited) (in liquidation) [2012] 1 WLR 3333 Lord Kerr said at paragraph 15:*

*“Later cases have emphasised the need for flexibility and discretion in considering whether the remedy should be granted: Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2033, para 57, per Lord Woolf CJ; Koo Golden East Mongolia v Bank of Nova Scotia [2008] QB 717, paras 37-38, per Sir Anthony Clarke MR. It is not necessary that an applicant intends to bring legal proceedings in respect of the arguable wrong; any form of redress (for example disciplinary action or the dismissal of an employee) will suffice to ground an application for the order: British Steel Corpn v Granada Television Ltd [1981] AC 1096, 1200, per Lord Fraser of Tullybelton.”*

86. *In Ashworth Lord Woolf CJ said:*

“59 *One of the arguments Mr Browne placed before their Lordships for not adopting the non-technical approach which I regard as being correct was that if the disclosure was not linked*



*with proceedings which would actually be brought, there would be no means of the court protecting a defendant against misuse of the material which was disclosed.*

- 60 *I agree that this is a matter for concern. However this concern will be met if an order for disclosure is not made unless a claimant has identified clearly the wrongdoing on which he relies in general terms and identifies the purposes for which the disclosure will be used when it is made. The use of the material will then be restricted expressly or implicitly to the disclosed purposes unless and until the court permits it to be used for another purpose.”*
87. *The test is one of necessity as a threshold condition; the desirability of the disclosure is not simply a matter for consideration in the exercise of discretion: see Ashworth per Lord Woolf CJ at paragraph [57] and R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2014] QB 112 per Maurice Kay LJ at paragraph [30]. The need to order disclosure will be found to exist only if it is a necessary and proportionate response in all the circumstances, although the necessity test does not require the remedy to be one of last resort (see Ashworth at paragraphs [36], [57]; R (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs (No.1) [2009] 1WLR 2579 at paragraph [94]; and RFU v Consolidated Information at paragraph [16].*
88. *The third threshold condition is that the person against whom the order is sought must be involved in the wrongdoing in a way which distinguishes him from being a mere witness. It is not necessary to analyse further where the line is to be drawn between involvement on the one hand and acting as a mere witness on the other for the purposes of deciding this application.*
89. *If the three threshold conditions are met, there remains a discretion to be exercised, which involves weighing a number of relevant factors and deciding whether disclosure should be ordered in order to do justice. In paragraph [17] of RFU v Consolidated Information, Lord Kerr identified such factors, non-exhaustively, as follows:*
- “17 *The essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors. Various factors have been identified in the authorities as relevant. These include: (i) the*

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



*data protection regime of the individuals whose identity is to be disclosed: the Totalise plc case [zoo,] EMLR 750, at paras 18-21, per Owen J; (x) the public interest in maintaining the confidentiality of journalistic sources, as recognised in section 10 of the Contempt of Court Act 1981 and article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: the Ashworth case [2002] 1 WLR 2033 para 2, per Lord Slynn of Hadley.*

90. *To this non-exhaustive list may be added that innocent third parties can be compensated for their costs (see Ashworth at paragraph [36]).”*

### **Ancillary Considerations**

19. As the passages quoted above from *RFU v Consolidated Information*<sup>8</sup> explain, the Court nonetheless retains a discretion whether to award *Norwich Pharmacal* relief, even if all the above criteria are satisfied.

20. Here, two factors in particular are emphasized by the Receivers for the exercise of my discretion:

- (1) the strength of the possible cause of action contemplated by their application;
- (2) the strong public interest in allowing the applicant to vindicate the legal rights of the creditors.

21. These are compelling reasons and I accept, of course, that the essential purpose of the *Norwich Pharmacal* remedy is to do justice<sup>9</sup>.

### **Application of the Law**

22. I accept that there is an arguable case of wrongdoing. As is set out in the Clingerman Affidavit, the vast majority of the US\$10m generated by the subscription into the M3

<sup>8</sup> Rugby Football Union v Viagogo Ltd. [2012] UKSC 55

<sup>9</sup> Per Lord Reid, supra, at p175 B-C.



Fund by Goodwill was transferred, for no apparent reason, by the Investment Advisor to an account in the Cayman Islands belonging to an entity which either seemingly does not exist or alternatively does not have any legitimate involvement with the M3 Fund, but does have links to Mr. Ali.

23. Further, neither Mr. Ali nor the Investment Advisor has co-operated with the Receivers' request for assistance in delivering control of, or information relating to the location of, the M3 Fund's assets.

24. In addition, one of the entities into which the M3 Fund allegedly invested, SRFI, is an entity of which Mr Ali was a CEO, director and chairman of the board and likely the individual responsible for the movement of the M3 Fund's money, allegedly for investment into SRFI through Eurasia Capital.

25. Mr. Clingerman asserts that all that the M3 Fund has to show for its US\$10m subscription monies are some brokerage accounts statements bearing the name of another Eurasia entity (Eurasia Capital Mongolia) with links to Mr. Ali, and listing a number of illiquid investments in Mongolian and Uzbek companies, which the Receivers have been and remain unable to trace.

26. It is submitted that these circumstances, either combined or taken in isolation, are indicative of a wrongdoing having been committed against the M3 Fund, or at the very least, that there is an arguable case that wrongdoing has been committed.

27. In regard to the second condition identified in *ORG. A.R.L. v Fiddler*<sup>10</sup>, the relief sought is “*necessary*” relief. The Receivers were appointed by the Bermuda Supreme Court and charged with the powers and functions set out in the Appointment Orders and recognised by this Court, including but not limited to:

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<sup>10</sup> *Supra*, [55].



- (a) The power to do all such things as may be necessary for the purposes of the distribution of the assets linked to the M3 Fund;
- (b) The power to ascertain the assets of the M3 Fund and their situs and take all steps necessary including Court actions where appropriate to obtain possession of such assets and to bring the same under their control and further, where appropriate, bring the same into the jurisdiction of the Cayman court and, for this purpose, to seek the assistance of the courts of the various jurisdictions in which assets of the M3 Fund are located;
- (c) The power to bring this Application.

28. It is said that the documents sought from CBL and CSL are necessary for the functions listed above, to address any wrongdoing which has taken place and to protect the M3 Fund from any further wrongdoing.

29. Moreover, the documents sought are proportionate in circumstances where, in the absence of provision of the documents sought:

- (1) it cannot be known by the Receivers by whom the M3 Fund's money was sent to the accounts at CBL and/or CSL;
- (2) it cannot be known by the Receivers which of ECL and ECLtd are the holders of the accounts at CBL and/or CSL;
- (3) it cannot be known at whose behest or on whose instructions money was transferred from the account at CBL and/or CSL and for what purpose;
- (4) it cannot be known if there were any onward transfers or use of the money sent to accounts at CBL and/or CSL under the previous management of CBL and/or CSL;



- (5) it cannot be known by the Receivers what investments were made, sold or whether any investors were paid dividends;
- (6) it cannot be known whether any distributions by the JOLs from the estate of CBL and/or CSL have been made using the M3 Fund money. Furthermore, in the event there were such distributions, it cannot be known who the beneficiary was or where those monies were destined.

30. I accept that, without the documents sought, the Receivers have no means of knowing what has happened to the M3 Fund's assets, and the Receivers cannot perform those functions which they were appointed by the Bermuda Court to perform; which functions have been recognised by this Court.

31. I also accept that CBL and CSL have innocently become mixed up in the wrongdoing by:

- (1) Accepting the transfer of the subscription monies from the DBS Account to the accounts at CBL and/or CSL;
- (2) Carrying out instructions for the transferral of monies out of the accounts at CBL and/or CSL.

32. The JOLs may have innocently become mixed up in the wrongdoing by effecting distributions from the liquidation estates of CBL and/or CSL to the holders of accounts into which the assets of the M3 Fund were paid but who may have no entitlement to such assets.

33. The Receivers submit, and I accept, that the following considerations should be taken into account as buttressing their application:

- (1) the cause of action which they will have against the wrongdoers is strong;

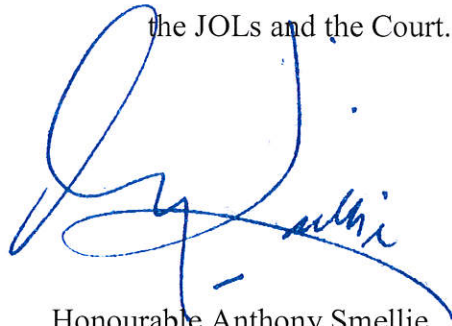


- (2) there is significant public interest in allowing them to comply with their court-mandated duties and take what steps are necessary to locate and preserve the assets of the M3 Fund, and to take such actions as are deemed necessary against those who have committed a wrongdoing against the M3 Fund;
- (3) the information sought has proven to be unavailable elsewhere; and
- (4) The documents and information sought should be readily available to the JOLs from the records of CBL and CSL.

34. I grant the Receivers' application for *Norwich Pharmacal* relief, for all the foregoing reasons.

35. The order will also provide for the Receivers to pay the JOLs' reasonable costs of compliance with the order. This was as proffered by the Receivers and accepted by

the JOLs and the Court.



Honourable Anthony Smellie  
Chief Justice



February 9 2018

The embargo from publication of this Judgment is hereby released this 30<sup>th</sup> day of May 2019.