



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 2 OF 2019 (IKJ)

IN THE MATTER OF AN APPLICATION FOR A DISCLOSURE ORDER

BETWEEN

ARCELORMITTAL NORTH AMERICA HOLDINGS LLC

PLAINTIFF

AND

**(1) ESSAR GLOBAL FUND LIMITED
(2) ESSAR CAPITAL LIMITED**

DEFENDANTS

IN CHAMBERS

Appearances: Lord Falconer QC of counsel instructed by Mr Paul Smith, Ms Anya Allen and Ms Rhiannon Zanetic of Harneys, on behalf of the Plaintiff

Mr Vernon Flynn QC of counsel instructed by Mr William Jones and Ms Nour Khaleq, Ogier, on behalf of the Defendants

Before: **The Hon. Justice Kawaley**

Heard: **22 October 2021**

Draft Ruling Circulated: **5 November 2021**

Ruling Delivered: **16 November 2021**

HEADNOTE

Norwich Pharmacal Order-granted to enable plaintiff to obtain evidence in aid of enforcement of foreign arbitration award-application to set aside on grounds of material change of circumstances-whether order final or interlocutory – appropriate test for establishing grounds to set aside-whether grounds for setting aside made out-relevance of pending appeal – Grand Court Law sections 11-11A – Court of Appeal Rules (2014 Revision) rules 12(3), 12(5) – Grand Court Rules, preamble, paragraph 4.1 – Grand Court Rules Order 45 rule 11



RULING ON APPLICATION TO SET ASIDE ORDER

Introduction

1. The acronyms of the substituted and original Plaintiffs AMNAH and AMUSA, read together, seem to echo the attitude each Plaintiff has displayed as aggrieved award creditors throughout the present proceedings: “I am not amused”. Because of the strong legal policy leaning towards effectively enforcing foreign judgments and arbitration awards, there is a need for judges to balance applying this legal policy with legal objectivity. The present proceedings have presented unique challenges in this regard. In granting a case management stay of the present application on October 5, 2020, I observed¹:

“12. While it was said to be common ground that the Defendants’ Set-Aside Summons to set aside the NPO was arguable, I made it clear in the course of argument that I was quite flummoxed by the spectre of being invited to set aside an Order that the Defendants had on a previous occasion (at the hearing on 29 May 2019 when the Defendants were represented by different Leading Counsel) submitted was final, while the parties were awaiting judgment on the Defendants’ own appeal.”

2. From the beginning of Mr Flynn QC’s oral submissions, I peppered the Defendants counsel with a series of questions which doubted the validity of his arguments. The Defendants’ counsel unflinchingly stood by his opening position, however. I was initially inclined to accept the Plaintiff’s case that the Defendants’ present application was potentially an abuse of process and to dismiss it without further consideration at the end of the hearing. I was however concerned that the strength of my provisional views had compromised the fairness of my assessment of the Defendants’ application which appeared to raise legal issues which were not illuminated by any direct authority. Moreover, the present application was initially filed in somewhat unusual circumstances while an appeal was pending before the Court of Appeal. I accordingly decided that the application deserved a considered judgment.
3. The Defendants applied by Summons dated May 1, 2020 for the following substantive relief:

- “1. *The Norwich Pharmacal Order of the Honourable Justice Kawaley dated 31 May 2019 (the ‘NPO’) be set aside.*
2. *The Plaintiff’s Ex Parte Originating Summons dated 19 January 2019 be dismissed.”*

¹ *ArcelorMittal USA LLC-v- Essar Global Fund Limited and Essar Capital Limited*, FSD 2 of 2019 (IKJ), Judgment dated October 5, 2020 (unreported).



4. They did so against the following procedural background:

- **January 14, 2019:** AMUSA obtains a *Norwich Pharmacal* Order in the “English 2019 Proceedings”;
- **January 19, 2019:** the original Plaintiff, ArcelorMittal USA LLC (“AMUSA”) obtains the NPO on an ex parte basis having obtained an ICC Award against a subsidiary of the First Defendant, Essar Steel Ltd (“Essar Steel”/ “Award Debtor”) on December 19, 2017 in Minnesota (“Award”);
- **May 31, 2019:** the Defendants’ application to set aside the NPO on legal jurisdictional grounds is refused. The Court indicates its view that the NPO is a final order for appeal purposes;
- **June 20, 2019:** the Defendants file a Notice of Appeal;
- **July 17, 2019:** this Court conditionally stays execution of the NPO pending appeal;
- **November 6, 2019:** the Court of Appeal hears AMUSA’s appeal;
- **December 30, 2019:** AMUSA serves the “English Conspiracy Claim”/the “English Proceedings” (commenced in or about early November 2019 against the 1st Defendant (“EGFL”) and other related parties);
- **March 20, 2020:** Henshaw J dismisses AMUSA’s application for a Worldwide Freezing Order (“WFO”) on the grounds of the absence of a good arguable case (the “Henshaw Judgment”);
- **April 7, 2020:** the Cayman Defendants write to the Court of Appeal indicating their intention to apply to this Court to discharge the NPO on the grounds that the English Conspiracy Proceedings showed the NPO was not needed. Because such an application might make the pending appeal judgment academic, the Court of Appeal was being notified;
- **April 15, 2020:** AMUSA invites the Court of Appeal to proceed to deliver its judgment because the “*intended application to set aside the Order is not*



relevant to the issues before the Justices of Appeal...Any application to set aside the Order would be a separate matter for consideration by the Honourable Justice Kawaley in due course...”;

- **May 1, 2020:** the Clerk to the Court of Appeal confirms that the Court of Appeal will proceed to deliver its judgment. The Defendants file their set-aside Summons;
- **August 7, 2020:** the Defendants indicated to AMUSA that they intended to proceed with their Summons rather than awaiting delivery of the pending Court of Appeal decision;
- **August 19, 2020:** AMUSA applies for a case management stay of the set-aside Summons;
- **September 8, 2020:** this Court grants temporary case management stay of Defendants’ Summons²;
- **March 22, 2021:** AMNAH is substituted for AMUSA as Plaintiff;
- **May 3, 2021:** the Court of Appeal dismisses the Defendants’ appeal against the NPO (“CICA Judgment”);
- **May 6, 2021:** the Court of Appeal refuses leave to appeal to the Privy Council;
- **June 7, 2021:** the Defendants apply to the Privy Council for permission to appeal;
- **August 18, 2021:** AMNAH commences the New York Avoidance Claim;
- **September 7, 2021:** the Defendants assert the New York Avoidance claim provides further grounds for setting aside the NPO on the grounds that it was not needed.

² *ArcelorMittal USA LLC-v- Essar Global Fund Limited and Essar Capital Limited*, FSD 2 of 2019 (IKJ), Judgment dated October 5, 2020 (unreported).



5. The present Summons raises the following issues of law and practice which could not directly be answered by reference to any local or foreign authority:
- (a) whether *Norwich Pharmacal* Orders (“NPOs”) are final or interlocutory, both generally and/or specifically as regards the grounds on which NPOs may be set aside;
 - (b) whether NPOs are a hybrid form of order in relation to which a bespoke continuing review jurisdiction, analogous to that applicable to interim freezing injunctions, applies so that the trial judge retains the competence to set-aside NPOs made on an *inter partes* basis on the grounds of a material change of circumstances.
6. It seemed clear that if NPOs are final orders for review purposes that this Court had no jurisdiction to set-aside the NPO on the grounds of material change of circumstances alone. On the other hand if NPOs are interlocutory in nature for review purposes, if not otherwise, a factual evaluation of whether or not the English Conspiracy Proceedings and the New York Avoidance met the requirements for setting aside an *inter partes* interlocutory orders had to be carried out.

THE RESPECTIVE SUBMISSIONS

The Defendants’ Submissions

Final or interlocutory and applicable test?

7. In the Defendants’ Skeleton Argument, Mr Flynn QC advanced two reasons why the NPO should not be regarded as a final order for review purposes:

“20. *First, the fact that the NPO is to be regarded as a final order for one purpose does not necessarily mean that it must so regarded for another, different, purpose:*

20.1. *In the context of permission to appeal, the distinction between interlocutory and final orders is defined by reference to rule 12 of the Court of Appeal Rules (2014 Revision)... which (at 12(1)) states that ‘for all purposes connected with the appeals to the Court of Appeal, a judgment or order shall be treated as final or interlocutory in accordance with subrules (2) to (7)’ (emphasis added). A conclusion that that a particular order is a final order within the meaning of rule 12 does not therefore dictate that it must be regarded as a final order for any purpose other than one connected with appeals to the Court of Appeal...*



21. *Second, an NPO is a highly unusual form of order, which has features of both a final and an interim order:*

21.1. *An NPO is not an order sought in the context of an existing domestic claim. It is free-standing relief, and is therefore sought by way of Originating Summons. Once an NPO has been granted, the substance of the relevant action has been substantially disposed of. These features are indicative of an NPO being a final order.*

21.2. *However, the procedure which the Court may adopt in granting an NPO (and which it adopted in this case) is indistinguishable from that applicable to an application for urgent interim relief. Here, the NPO was originally granted at an ex parte hearing, and was then continued on the return date. However, the return date itself bore no resemblance to a full a trial on the merits. The NPO itself was made on the basis that both parties would have permission to apply.*

21.3. *The adoption of an essentially interlocutory procedure has important consequences. For example, in order to obtain the NPO, the Plaintiff needed to satisfy the Court that the order was necessary for it to be able to seek legitimate redress in respect of relevant alleged wrongdoing.²³ However, the question of necessity did not receive anything like the scrutiny which it would have received had it been an issue for trial. Such scrutiny would have required disclosure and evidence from the Plaintiff concerning (a) the information in its possession; (b) its intended future course(s) of action; and (possibly) (c) its assessment of its ability to take particular steps without the benefit of an NPO. These are matters which could never realistically have been subject to full consideration on their merits within the confines of the interlocutory procedure which was adopted in relation to the NPO.*

22. *There is obviously a relationship between these two points. The fact that NPOs share features with both final and interim orders is the key factor which leads to (and can be said to justify) the Court of Appeal's conclusion that they may be regarded as final orders for some purposes, and as interim orders for others."*

8. This is in part a coherent analysis. NPOs are final in the sense that they constitute freestanding relief, but both the procedure they typically entail and the function which the orders serve are quite similar to that which applies to interim/interlocutory relief. This view is supported by the fact that the CICA Judgment suggested that NPOs could potentially be granted under section 11A of the Grand Court Law in aid of foreign proceedings, and regarded as interim as regards the foreign proceedings. It was next argued:

"23. *Accordingly, the question now before the Court is not whether an NPO is, in some absolute sense, an interim or final order. It is whether the NPO should be treated as an interim or final order for the purposes of the particular application which the Defendants have brought. As to this:*



- 23.1. *The Defendants' application is premised on there having been a material development in respect of the very foreign proceedings which the NPO was intended to enable the Plaintiff to bring (in the form of the English Proceedings as originally framed); and*
- 23.2. *As per the Court of Appeal's analysis (see 20.4 above), the NPO is properly to be regarded as an interim order vis a vis the English Proceedings – and (from a domestic perspective) for the purposes of s.11A of the Grand Court Act. It therefore can (and should) be treated as an interim order for the purposes of this application – which invites the Court to assess the impact of the foreign proceedings (in particular the English Proceedings) on the appropriateness of the NPO itself.*
- 23.3. *Put another way, the NPO was only ever justifiable as an order made in support of some future course of action which the Plaintiff might wish to take. It makes sense for this Court to be able to consider whether, in light of the actions which the Plaintiff has been able to take without the benefit of further information, the NPO remains (or ever was) appropriate.*
- 23.4. *As well as being consistent with the Court of Appeal's analysis, this approach fairly balances the parties' rights. The question of whether the Plaintiff actually needed the NPO was one which could only be dealt with cursorily in the context of an essentially interlocutory procedure (see 21.3 above). If further developments in connection with the English Proceedings (or indeed any other steps taken by the Plaintiff in relation to the wrongdoing it alleges) shed light on that question, then that is something which this Court ought to be able to consider.*
- 23.5. *Further, this approach facilitates the NPO serving its proper function. If the NPO is being granted in support of steps to be taken in other (actual or contemplated) proceedings, then it is appropriate that the Court should be able to review (and if necessary, revisit) its order in light of developments in those other proceedings.*
24. *The Defendants therefore submit that, for the purposes of this application, the NPO ought to be treated as an interim order. However, even if the NPO were to be treated as a final order, it is apparent from the above submissions that it is a final order of a very unusual type. This ought to inform the Court's approach to whether the NPO should be set aside."*

9. These submissions form the centrepiece of the present application. Two limbs of the analysis appeared subject to both factual and legal doubt:

- (a) first, the suggestion that that the NPO was actually granted in aid of foreign proceedings, and should accordingly be subject to ongoing review in light of developments in those proceedings. This implied that the present proceedings were akin to parallel insolvency proceedings where conscious efforts were being made in different jurisdictions to coordinate the orders being made. No such analogy can



sensibly be said to exist in the present case simply because similar relief was sought against related parties from the English Court and/or because the present proceedings sought relief in connection with enforcement of the foreign Award;

- (b) second, the suggestion that interim orders can ordinarily be set aside on the grounds of a material change of circumstances. In my experience, a material change in circumstances is usually a ground for varying an interim order which has continuing effect over a period of time (such as maintenance orders in family cases). Even then, the Court requires the change relied upon to be “material” to justify changing the initial order. The set-aside test proposed seemed at first blush to be an overly liberal one, even in the context of ‘substantive’ interlocutory orders (as opposed to purely procedural or case management orders).

10. As regards the Court’s powers to vary or set aside interim orders, the Defendants submitted that these powers were inherent ones: *Kirkconnell-v-Cook-Bodden* [1996 CILR 326] (Smellie J, as he then was). This decision contains very helpful *dicta*, but they only address the jurisdiction to vary interlocutory orders, seemingly in aid of their implementation. However liberal a test it appears the Defendants are contending for, it is important not to misunderstand the central tenet of it. The argument was not just that the NPO should be set aside because of any material change of circumstances, but rather that because the circumstances here show that the NPO is not in fact needed at all. Although Lord Falconer QC rightly poured scorn on the idea of any analogy between the facts of the second case the Defendants relied upon and those in the present case, the following *dicta* of Morris LJ (as he then was) in *Thynne –v-Thynne* [1955] P. 272 at 314 are at least potentially relevant:

“(g) *a court may in the exercise of its inherent jurisdiction in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment. An example of this would be where it comes to the knowledge of a court that a person named as a judgment debtor was at all material times, at the date of the writ and subsequently, non-existent.*”

Merits of the application

11. The pivotal factual analysis on the merits of the set-aside application is found in the following passages in the Defendants’ Skeleton Argument:

“28. *In light of the legal analysis set out above, the real question is whether the Defendants are correct to allege that the Plaintiff’s ability to bring the English Proceedings and the New York Proceedings demonstrates that it does not need,*



and/or never needed, the NPO. The Defendants submit that they are correct on that point for reasons set out below.

29. *As originally formulated, the English Proceedings advanced a conspiracy claim in relation to any and all acts of dissipation in respect of ESL's assets. These were the very claims which the Plaintiff had told this Court it needed the NPO in order to be able to pursue. By definition, there were no wider, or further, claims which the Plaintiff could have brought in respect of the alleged wrongdoing which underpinned its application for the NPO. Any disclosure which the Plaintiff could properly have sought in relation to that alleged wrongdoing could have been obtained in the English Proceedings (or in this jurisdiction, pursuant to the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 [AB/3/21]).*
 30. *The English proceedings were (and are) also capable of resulting in a grant of all the meaningful relief which the Plaintiff could ever reasonably expect:*
 - 30.1. *The First Defendant (the top company in the Essar Group), Ravi and Prashant Ruia (the persons who the Plaintiff alleges to be the ultimate beneficial owners of the Essar Group) are all already parties to the English Proceedings.*
 - 30.2. *If and to the extent that disclosure (all of which could be obtained in the context of the English Proceedings) identified further persons against whom the Plaintiff could properly seek relief, then the Plaintiff would be at liberty to apply to join them to the English Proceedings.*
 31. *There was no change of circumstance after May 2019 (following the grant of the NPO) which resulted in the Plaintiff being in a better position to commence the English Proceedings. Whilst the Plaintiff chose to wait until December 2019 to bring the English Proceedings, it could therefore have done so much earlier. Crucially, it was able to bring those proceedings without the benefit of any disclosure having been given under the NPO.*
 32. *Had the English Proceedings (as originally constituted) been commenced prior to the Plaintiff applying to this Court for an NPO, that application would certainly have failed. The same would have been true had the Plaintiff told this Court that, without the benefit of an NPO, it was willing and able to commence proceedings in the form of the English Proceedings. In either case, it would have been impossible for the Plaintiff to maintain an argument that the NPO was 'necessary' in any relevant sense. In this context, the following analysis of Kawaley J in Discover Investment Company v Vietnam Holding Asset Management Ltd & Another [2018 (2) CILR 424] at [13]-[15]... is significant..."*
12. These submissions are on their face coherent, but it is difficult to eliminate the initial impression that Mr Flynn QC was, Rumpelstiltskin-like, trying to make gold out of straw. To the extent that the English Proceedings alleged, to some extent, a conspiracy to evade enforcement of the Award, and sought damages by way of compensation, it was not immediately obvious why that suggested that the information sought by AMUSA was not needed in January or May 2019 to



support debt recovery actions in respect of assets belonging to the Award Debtor anywhere in the world.

13. The Defendants' Skeleton did not place great weight on the New York Avoidance Claim, perhaps because it was recently commenced and the precise evidential basis for it is not presently clear. It was merely submitted (with a sprinkling of hyperbole):

“34. *The Plaintiff has now also been able to commence the New York Proceedings. Whilst those proceedings are narrower in scope than the English Proceedings, they show that the absence of disclosure under the NPO has not prevented the Plaintiff from litigating in respect of the alleged wrongdoing in multiple jurisdictions, and on an extravagant scale.*”

14. However, the First Affirmation of Nour Khaleq dated October 1, 2021 exhibited AMNAH's Complaint filed against EGFL and Mesabi Metallics Company LLC (f/k/a Essar Steel Minnesota) in the United States District Court for the Southern District of New York, together with Ogier's related letter dated September 7, 2021 and Harneys' September 20, 2021 response. The central allegations apparently underpinning the New York Avoidance Claim and set out in the Introduction to the Complaint are as follows:

“2. *According to Essar Steel's 2013, 2014, and 2015 audited financial statements, Essar Global owned a receivable of \$1.48 billion to Essar Steel. The receivable, which constituted nearly 60 percent of Essar Steel's total assets, was stated to be payable on demand and to bear no interest. In 2016, shortly after ArcelorMittal USA, LLC ('ArcelorMittal USA') commenced its ICC arbitration against Essar Steel to recover damages under a supply agreement governed by New York law (the 'ICC Arbitration'), Essar Global and Essar Steel attempted to make the nearly US\$1.5 billion receivable 'disappear' by restating Essar Steel's 2014 and 2015 audited financial statements to remove the Essar Global receivable that had previously recorded on Essar Steel's books and records. Their attempt to eliminate the Essar Global receivable was made in order to make Essar Steel judgment proof so that ArcelorMittal USA could not recover any amounts awarded to it in the recently commenced arbitration. The purported elimination of almost 60% of Essar Steel's assets was intended to, and, not surprisingly, did, leave Essar Steel insolvent and unable to pay its debts on an ongoing basis. The 2016 conveyance is fraudulent pursuant to Sections 273, 273-a, and 276 of New York's Debtor & Creditor Law ("DCL"). Plaintiff respectfully requests that this Court disregard the fraudulent conveyance pursuant to DCL § 278 and enter judgment against Essar Global for the full amount of the fraudulently conveyed \$1.48 billion payable-on-demand receivable owed to Judgment Debtor.*”

15. These allegations summarise the basis for AMNAH's fraudulent conveyance claims set out in the First-Third Counts in the six-Count Complaint. The Complaint broadly asserts claims pursued by way of enforcement of the Award as converted into a Minnesota judgment. They



are clearly claims based on information which the Plaintiff has obtained without relying on the NPO. It is less clear whether the claims are also based on information the Plaintiff had when the NPO was obtained. The historic acts of dissipation which were primarily relied on in the recently filed New York Avoidance Action do have a familiar ring to them. It was conceded in the Plaintiff's Skeleton Argument (at paragraph 42.7), that reliance had been placed on "*the alleged asset stripping in respect of the US\$1.5 Billion Obligation*" in obtaining the NPO. It was also pointed out that the New York proceedings are being vigorously contested.

16. The New York Avoidance Claim together with the English Conspiracy Claim potentially support the Defendants' case on the present application that some avoidance proceedings could indeed have been started without recourse to what Mr Flynn QC described as the "warehouse" of information required to be produced under the NPO. It obviously does not follow without more that there was never any need for the NPO at all. Less clear still is how, if at all, these claims demonstrate that the NPO is no longer needed at all.

The Plaintiff's submissions

Final or interlocutory and applicable test

17. In AMNAH's Skelton Argument, it was firstly submitted that this Court and the Court of Appeal had already determined that the NPO was a final order so it was not open to the Defendants to reopen that issue. Lord Falconer QC reiterated in oral argument that the correct legal position was that an order was final or interlocutory for all purposes. The Defendants' Summons was said to be "*misplaced*" for the further following reasons:

"7. *The Cayman Defendants' set aside application is also misplaced for the following reasons:*

7.1. *First, the NPO is a final order which cannot be set aside lest there be 'rare' or 'exceptional' circumstances. None exist. Moreover, the basis for the Cayman Defendants' application – 'material change of circumstances' – is not a ground for setting aside a final as opposed to an interim order...*

7.2. *Second, and in any event, there has been no 'change of circumstances', still less a 'material' one sufficient to discharge the NPO. Neither the commencement of the English Conspiracy Claim nor the New York Avoidance Claim (both as defined below), nor the material facts that underpin those proceedings, fall into this category..."*



18. Perhaps because AMNAH’s counsel was confident that that the Defendants’ application was unmeritorious even applying the set-aside test for interim orders, no attempt to fortify the submission that the NPO was a final order because it had been determined to be a final order for appellate purposes was made. However, the assumption that the characterisation of an order as final or interlocutory for appeal purposes by necessary implication normally leads to the same characterisation for review purposes is an entirely orthodox one. Nonetheless in the Plaintiff’s Skeleton Argument, a general basis for distinguishing between final and interlocutory orders was commended to the Court; this was the distinction made in the English White Book 2021 paragraph 3.1.17.2. The need for this distinction to be explained under the CPR regime appears to arise from the fact that the same jurisdictional power to set aside an order applies to all orders; but a different ‘operational’ test applies when exercising that jurisdiction in relation to final and interlocutory orders respectively. I still found it surprising that no English case law elucidating the status of NPOs as either interim or final for appeal or review purposes had been found.
19. In oral argument Lord Falconer QC submitted that it was significant that the Grand Court Rules conferred no jurisdiction to set aside a final *inter partes* order. He contended that the Court’s jurisdiction to supervise the implementation of a final order and respond to material changes of circumstances was adequately provided for by GCR Order 45 rule 11:

“Matters occurring after judgment: stay of execution, etc. (O.45, r.11)

11. *Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.”*
20. This rule, it was persuasively argued, was flexible enough to accommodate any need the Court had to supervise the implementation of NPOs after they were granted. There was no inherent jurisdiction to set aside final orders. Moreover, AMNAH’s counsel firmly rebuffed the suggestion that the NPO was a hybrid form of order neither final nor interlocutory for all purposes. Reliance was placed on *Sangha-v-Amicus Finance Plc* [2020] EWHC 1074 (Ch) where Zacaroli J observed:
- “32. *Mr Brown was unable to point to any authority to support his contention that there was a third –hybrid-category of order in addition to final orders and interim orders...”*

21. As regards the test for setting aside a final order, counsel referred to my own NPO stay Ruling in these proceedings³ where I cited *Terry-v-BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422 at paragraph 75 (Hamblen LJ), *Sangha-v-Amicus Finance Plc* [2020] EWHC 1074 (Ch) (at paragraphs 35-36) and *Simmons-v- City Hospitals Sunderland NHS* [2016] EWHC 2953 (QB) at paragraph 15 (Leggatt J, as he then was). The Plaintiff’s Skeleton Argument concluded on this issue:

“35. *The authorities reveal that those exceptional circumstances are only likely to be: (i) in cases obtained by fraud; (ii) where an order was made in the absence of the party now seeking to set it aside; and (iii) final orders on admissions. Absent these exceptional circumstances, it can be an abuse of process to seek to set aside a final order by way of application to the trial judge rather than via an appeal*⁴.”

22. As regards the test for setting aside an interim order, it was crucially submitted that:

“36. *In comparison to a final order, the primary circumstances by which an interim order may be set aside are normally only (i) where there has been a material change of circumstances since the order was made; or (ii) where the facts on which the original decision was made were misstated. However, the Courts have consistently emphasised that ‘such is the interest of justice in the finality of a court’s order that it ought normally to take something out of the ordinary to lead to variation or revocation of an order’: Tibbles v SIG plc [2012] 1 WLR 2591 at 2602 (per Rix LJ).*”

The Merits of the application

23. It was most significantly submitted in the Plaintiff’s Skeleton Argument:

“7.3. *...the Cayman Defendants’ application effectively amounts to a submission that the Grand Court should adopt the findings on wrongdoing of the Henshaw Judgment (as defined below) in the English Commercial Court to discharge the NPO. That is unprincipled not only because the Grand Court and Cayman Islands Court of Appeal (“CICA”) have already considered and decided the issue of wrongdoing but also because the Henshaw Judgment was made in a different context and applied a different test (see paragraph 46 below). It cannot be used as some form of quasi res judicata.*

7.4. *...the Cayman Defendants’ application proceeds on the misunderstanding that Norwich Pharmacal relief is unavailable where an applicant is already able to plead a claim and/or where related proceedings in other jurisdictions are on foot. That is simply incorrect as a matter of law. It may sometimes be the case that Norwich Pharmacal relief cannot be obtained if a claim is already pleaded. However, if the purpose of the NPO (as in the present case) is to identify where and against whom you can pursue anti-avoidance relief, the fact*

³ *ArcelorMittal USA LLC-v-Essar Global Fund Limited and Essar Capital Limited*, FSD 2/2019 (IKJ), Judgment dated July 2, 2019 (unreported)

⁴ *Clutterbuck-v-A* [2017] EWHC 1127 (Ch) at paragraph 72.



that you can bring such relief in one country does not mean that the purpose of the NPO has been exhausted...

- 7.5. Finally, this set aside application is purely opportunistic. So much is clear from the Cayman Defendants' conduct to date. In circumstances where the review and storage of the documents under the NPO is, according to the Cayman Defendants, already complete, it makes little sense for the Cayman Defendants to resist disclosure in such a hard fought manner – incurring serious delay and significant costs – if there was really nothing incriminating in that disclosure.
42. ... the reasons advanced at the time of applying for the NPO remain as good today as they did when the application was made. In other words, the purpose for seeking the NPO remains as valid as ever and the commencement of the aforementioned proceedings does not alter this. Simply put, the information sought under the NPO (and the requirement to preserve documents) remains necessary. Indeed, given consideration of time limitation for potential (as yet unknown) claims, the need for such NPO relief is even more pressing...
- 42.6. Moreover, the wrongdoing that formed the basis of the NPO application – the asset stripping from ESL – still remains unanswered and unexplained. While AMNAH believes that assets have been removed during the pendency of the arbitration in an attempt to put them beyond reach of ESL's creditors, the particulars of how this occurred and which entities or individuals were involved in it are not known (and will not be known) until such time as the NPO is executed.
- 42.7. The commencement of the English Conspiracy Claim and the New York Avoidance Claim does not affect this position or does not otherwise exhaust the purpose of the NPO. AMNAH is still unable to identify the persons and jurisdictions who it is entitled to commence anti-avoidance claims against in respect of the asset-stripping of ESL." [Emphasis added]

ARE NPOS FINAL OR INTELOCUTORY FOR REVIEW PURPOSES?

Preliminary analysis: status of NPOs for appeal purposes

24. In *ArcelorMittal USA LLC-v-Essar Global Fund Limited and Essar Capital Limited*, FSD 2/2019 (IKJ), Judgment dated July 2, 2019 (unreported), I explained my earlier summary decision communicated to the parties by email on May 31, 2019 that the NPO was a final decision. The issue was raised and decided to clarify what appellate procedure the Defendants should follow to challenge the NPO Judgment dated May 31, 2019. At the May 31, 2019 hearing, counsel then appearing for EGFL contended the NPO was a final order. I agreed for the following reasons.

- “12. Section 6 of the Court of Appeal Law (2011 Revision) provides that no appeal shall lie ‘from an interlocutory judgment without leave of the Grand Court, or of the Court’, subject to five exceptions, none of which at first blush applied to

the NPO. Mr Stanley QC submitted that although the analysis was not entirely straightforward, it was ultimately clear that a Norwich Pharmacal order was a final order. It was, viewed simply, the substantive relief granted upon the final determination of a freestanding action commenced by originating summons. It mattered not that ancillary applications might subsequently arise by way of implementation of the order. Rule 12 of the Court of Appeal Rules (2014 Revision) provided firstly and most broadly:

- ‘(3) A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it.’*
13. *The NPO also qualified as a final order because it was ‘an order for discovery of documents made in an action for discovery only’: Rule 12(5) (a). However, if neither of these applied to the NPO, it might be viewed as a form of injunction. One of the exceptions to interlocutory orders which may only be appealed with leave under section 6(f) of the Law is ‘(ii) where an injunction or the appointment of a receiver is granted or refused’.*
14. *Mr Weisselberg QC did not ultimately challenge these submissions, seemingly being content (consistent with the position adopted in correspondence) to let the Court decide.*
15. *In my judgment in the NPO Proceedings (at paragraphs 99-101), I expressed the tentative view that the NPO might perhaps be viewed as a form of interim relief in aid of contemplated foreign proceedings for the purposes of section 11A of the Grand Court Law. This is not necessarily at odds with viewing the NPO, from a purely domestic perspective, as falling within the ambit of rule 12(3) and qualifying as a final order. However, it is more straightforward to regard the Norwich Pharmacal jurisdiction as an ‘action for [equitable] discovery only’ falling within the ambit of Rule 12(5) (a). This is also more consistent with the way in which this jurisdiction has long been viewed under Cayman Islands law. For instance, in Braga-v-Equity Trust Company (Cayman) Limited [2011(1) CILR 402], Smellie CJ (at 419-420) opined as follows:*
- ‘42. The equitable principle by which the courts make orders for discovery against persons who are not themselves to be sued as parties to the action, and who are not mere witnesses to events which give rise to an action, has been settled ever since Norwich Pharmacal Co. v. Customs and Excise Commrs. was decided by the House of Lords some 37 years ago. Indeed, the equitable principle itself has existed for at least 150 years...’*
16. *Moreover, in Discover Investment Company-v-Vietnam Holding Asset Management and Saigon Asset Management Corporation, FSD 76 of 2018 (IKJ), Judgment dated November 5, 2019 (unreported), it was essentially common ground that “[t]his Court’s jurisdiction to administer and grant relief derived from common law and/or equity legal principles is derived from section 11 of the **Grand Court Law**” (paragraph 7).*

17. *Accordingly, I was satisfied that the NPO was a final order in relation to which leave to appeal was not required, pursuant to either rule 12(3) and/or rule 12(5) of the Court of Appeal Rules (2014 Revision)."*
25. Although I accepted the submission of counsel then appearing for EGFL, Mr Stanley QC, that the NPO was in substance a final order, it is clear that all I was actually deciding was the status of the Order for the purposes of the Court of Appeal Rules (2014 Revision). The structure of those Rules, on a superficial analysis, does not make it entirely clear that the final and interlocutory classification is intended to apply generally as opposed to merely for the purposes of the narrow question of whether leave to appeal is required. On the other hand, at first blush it seems completely counterintuitive to suggest that the same order should be regarded as final for appeal purposes but interlocutory as regards the jurisdiction this Court retains to vary it or set it aside. The first sub-rule in rule 12 provides as follows:
- “(1) *For all purposes connected with appeals to the Court of Appeal, a judgment or order shall be treated as final or interlocutory in accordance with subrules (2) to (7)."*
26. I specifically found that the NPO was final under either sub-rule (3) or (5):
- “(3) *A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it...*
- (5) *Notwithstanding anything in subrule (3), the following orders shall be treated as final-*
- (a) *an order for discovery of documents made in an action for discovery only;...*
27. In each case, the sub-rule defines a final order in a way which conforms to what lawyers would generally understand a final order to be without reference to legislative or other authority. Rule 12 defines interlocutory orders with considerable specificity rather than adopting a general definition. Because NPOs have been regarded as similar to freezing orders, and might be granted in aid of foreign judgments, the following paragraphs in sub-rule (6) are indirectly relevant to the present analysis:
- “(6) *Notwithstanding anything in subrule (3), but without prejudice to subrule (5), the following judgments and orders shall be treated as interlocutory-*
-
- (r) *an order granting an interlocutory injunction or for the appointment of a receiver;...*



(bb) *an order made for or relating to the enforcement of an earlier order (whether such earlier order is final or interlocutory) or giving further directions as to such an order...*”

28. It is clear that, where this sub-rule applies, a freezing order is interlocutory for appeal purposes. This is entirely consistent with what one would assume the position to be. However, a freestanding application for injunctive relief in aid of foreign proceedings under section 11A of the Grand Court Law would clearly potentially qualify as a final order under rule 12(3). However, a more straightforward view would be that for domestic purposes such an order would be a final one. As regards the possibility of NPOs being granted under section 11A of the Grand Court Act, a point canvassed in argument, the position must in principle be the same. Without deciding this narrower point, which does not directly arise in relation to the present application, the application of rule 12(6) (bb) would appear to be limited to domestic orders. It ought to be uncontroversial that orders for “interim” relief in aid of foreign proceedings under section 11A of the Grand Court Act, when sought as the substantive relief on an Originating Summons, are treated as “final” for appeal purposes. However, this point will be considered further below.

29. In summary, there is no reason to doubt that the NPO is final for appeal purposes.

ARE NPOS “HYBRID” IN CHARACTER: FINAL FOR APPEAL PURPOSES BUT INTERLOCUTORY FOR OTHER PURPOSES?

Is a hybrid final and interlocutory order a legally cognisable proposition?

30. In *Essar Global Fund Limited and Essar Steel Limited-v-ArcelorMittal USA LLC* CICA No.15 of 2019, Judgment dated November 29, 2020 (unreported), Martin JA observed in relation to *Norwich Pharmacal* relief generally (at paragraph 63) that “*such relief is final as between the parties to the application*”. Implicit in those terse words, on one reading at least, is the notion that the stamp of finality binds the parties to the final order for all purposes, as regards appeal rights or otherwise. That is a logical starting assumption. Accordingly, before considering the specific status of NPOs, it is necessary to consider whether the very proposition of hybridity posited by the Defendants is conceptually sound in general terms.

31. The only authorities Mr Flynn QC relied upon in support of his hybridity argument were my own *obiter dicta* in the NPO Judgment (at paragraph 101) and Martin JA’s *obiter dicta* in the Court of Appeal (at paragraph 63). These observations related to the character NPOs would

bear in relation to foreign proceedings if granted under section 11A of the Grand Court Act. So no authority was actually cited in support of the counterintuitive general proposition that orders may be final for appeal purposes but interlocutory for others. Not only was there no authority for this general proposition; Lord Falconer QC pointed to authority going the other way. In *Sangha-v-Amicus Finance Plc* [2020] EWHC 1074 (Ch), the context of the final/interlocutory dispute was precisely that which is in issue here. The issue was not what the status of the order was for appeal purposes, but rather what was the trial court's jurisdiction to revoke or vary its own order. Zacaroli J opined as follows:

“32. Mr Brown was unable to point to any authority to support his contention that there was a third – hybrid – category of order in addition to final orders and interim orders. While it is correct to say that in none of the authorities cited was there an attempt to set aside a possession order under Rule 3.1(7), so that the question whether a possession order is a final order for the purposes of the Rule was not determined, it has been at least implicitly recognised by the Court of Appeal on at least one occasion that a possession order is a final order. In the most recent Court of Appeal case cited by the parties in which Rule 3.1(7) was considered, *Daniel Terry v BCS Corporate Acceptances Limited* [2018] EWCA Civ 2422, at [75], for instance, Hamblen LJ gave, as an example of a final order which may be set aside under Rule 3.1(7) notwithstanding the importance of the principle of finality (to which I refer below), a possession order made in the absence of the defendant. In *Findlay, Arden LJ*, at [23] also appeared to assume that a possession order is a final order.” [Emphasis added]

32. That is direct persuasive authority for the proposition that there is no hybrid category of orders between final and interlocutory orders for the purposes of analysing the scope of the power of a court to revoke or vary its own orders. Some points are not addressed by much authority because they have never arisen. Some points are not addressed by much authority because they are simply conceptually unsound. The hybridity argument, despite the attractive way in which it was advanced by Mr Flynn QC, falls into the latter category.
33. The most fundamental reason why orders cannot be final for some purposes and interlocutory for others is that their status is necessarily a fixed one. The appellate status of an order and the jurisdiction the court which made the order retains to revoke or vary it are two sides of a single coin. The jurisdiction retained to set aside or vary an order is defined by reference to whether, for appeal purposes, the order is final or interlocutory. In the former case the retained reviewing jurisdiction is narrower, while in the latter case the retained reviewing jurisdiction is (potentially at least) broader. The appellate status of an order and the retained jurisdiction to revoke it are inextricably intertwined expressions of the finality principle.

34. I accordingly find that as a matter of general legal principle, the notion of a hybrid order which is final for appeal purposes but interlocutory for retained reviewing purposes is not a legally cognisable proposition.

Are Norwich Pharmacal Orders a special category of order to which sui generis rules apply?

35. I was initially attracted by the idea that NPOs might represent a special species of hybrid order. As the Defendants’ counsel rightly submitted, there is a similarity of process involving initial *ex parte* applications and if an *inter partes* order is made continuing to supervise the implementation of such an order in applications for NPOs and interim freezing orders. However, based on my findings that the character of an order is defined by its status for the purposes of an appeal, it ultimately becomes clear that the posited case for *sui generis* hybridity is an illusory one. There is, in any event, no authority for the proposition that NPOs are a special category of order in relation to which the court which makes them as final orders (for appeal purposes) retains reviewing powers commensurate with those generally applicable to interlocutory orders.
36. There is no merit to the suggestion that the Court of Appeal’s observations about the different character NPOs may enjoy in relation to local and foreign proceedings has resonance for their status within a local proceeding. Martin JA’s observations, on the contrary, point in the opposite direction. Martin JA merely stated, with considerable clarity, after setting out the terms of section 11A of the Grand Court Act:

“Although the relief sought in this case was not sought under this section, it clearly provides a basis for the grant of relief in support of foreign proceedings. On the face of it, that relief would include Norwich Pharmacal relief: although such relief is final as between the parties to the application, section 11A is clearly contemplating relief that is ‘interim’ in relation to the actual or projected foreign proceedings...” [Emphasis added]

37. I read this as affirming that even if the NPO had been granted in aid of foreign proceedings under section 11A, it would still have been for domestic purposes a final order. That would be entirely consistent with my understanding that the Court of Appeal has frequently entertained appeals as of right in respect of final orders made under section 11A which are also “*interim’ in relation to the actual or projected foreign proceedings*”.
38. Finally, it reflects a misunderstanding of the functional purpose of the finality/interlocutory distinction to assume, as I was myself initially inclined to do, that a more restrictive test for varying or revoking a final order necessarily means a lack of flexibility in terms of supervising the enforcement or implementation of the final order. Finality attaches itself to the substantive



issues the final order has actually decided, most importantly whether or not the order should have been made at all. When the Court is engaged in enforcing or implementing NPOs (like any other final orders), it has the ability to make a potentially infinite variety of supplemental interlocutory orders. These supplemental, ‘mini-enforcement’ orders will themselves be amenable to review on the more flexible interlocutory review basis. However, the flexibility of the reviewing jurisdiction will depend on the content of the order; a ruling on a point of law or principle would ordinarily only be challengeable by way of appeal. A procedural or quasi-procedural order will more easily be subject to review by the judge who made it, for reasons which I explain below. More broadly still, Lord Falconer QC rightly submitted that GCR Order 45 rule 11 provides amply broad and flexible reviewing powers in relation to final orders designed to enable genuinely aggrieved judgment debtors to seek relief based on developments subsequent to the making of the order:

“(11) Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.”

The NPO is a final Order for appeal purposes and otherwise

39. For these reasons I find that the NPO is a final Order for the purposes of delineating this Court’s jurisdiction to revoke (i.e. set-aside) and vary one of its own orders by reason of subsequent developments.

SHOULD THE NPO BE SET ASIDE?

Applicable test for setting aside the NPO as a final order

40. In the Defendants’ Skeleton Argument, the following concession was made as to the approach if the NPO was treated as being final:

“26.2 The Defendants accept that there is a strong public interest in finality in litigation which means that the Court will only exercise this jurisdiction in an exceptional case...”

41. But this concession followed the assertion that the NPO “*is a final order of a very unusual type. This ought to inform the Court’s approach to whether the NPO should be set aside*” (paragraph 24). I reject that submission. Only in a judgment debtor’s paradise would the test for setting



aside a final order be as malleable and shape-shifting as to permit complete revocation based merely on a fluid and unbounded evaluation as to whether the order was or was not a “*very unusual one*”.

42. However, I accept Mr Flynn QC’s submission that the Grand Court’s power to set aside its own orders must be viewed as deriving from its inherent jurisdiction. I reject the contrary submission by Lord Falconer QC that this Court’s Rules are, in effect, an exhaustive code in this regard. In the absence of any express power conferred by the Rules to set aside a judgment on specified or general grounds, the Rules cannot be read as codifying the broad inherent jurisdiction this Court undoubtedly possesses to maintain the integrity of its processes. In any event, section 11 of the Grand Court Act (2015 Revision) provides:

- “11. (1) *The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by-*
- (a) *Her Majesty’s High Court of Justice; and*
 - (b) *the Divisional Courts of that Court, as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amending or replacing that Act.”*

43. The English High Court’s inherent jurisdiction and current practice is available to fill any gaps in the local statutes and rules. The converse also applies. English practice must be read subject to relevant local statutes and rules. I am guided by two persuasive authorities upon which AMNAH’s counsel more pragmatically relied. Firstly, in my own Case Management Stay judgment herein⁵, I quoted the following English authorities:

- “40. *Reliance on a ‘material change of circumstances’ to set aside the NPO is only ordinarily apposite for applications to vary or revoke interlocutory orders. Without reference to authority, the most well-known basis for setting aside an inter partes final order is fraud. The grounds on which a final order may be set aside by the court which made the order were recently described in Sangha-v-Amicus Finance plc [2020] EWHC 1074 (Ch) (May 5, 2020), which was not referred to in argument, where Zacaroli J held:*

- ‘34. *The most recent authoritative statement of the test to be applied under Rule 3.1(7) is to be found in the judgment of Hamblen LJ, giving the judgment of the Court, in Terry v BCS... at [75]:*

⁵ See footnote 1 above.



*'In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality. An example is provided by cases involving possession orders made when the defendant did not attend the hearing where CPR 39.3 may be relied upon by analogy – see *Hackney London Borough Council v Findlay* [2011] EWCA Civ 8, [2011] HLR 15. Another example is the use of powers akin to CPR 3.1(7) to vary or revoke financial orders made in family proceedings in relation to which there is a duty of full and frank disclosure and the court retains jurisdiction – see, for example, *Sharland v Sharland* [2015] UKSC 60, [2016] AC 871 and *Gohil v Gohil (No 2)* [2015] UKSC 61, [2016] AC 849.'*” [Emphasis added]

44. Lord Falconer QC also relied on another extract from Zacaroli J’s judgment in *Sangha*, which followed a recitation of the same passage from *Terry*. which I consider to be more apposite:

“Three things are clear from this passage. First, in relation to a final order, it is not sufficient to show that there was a change in circumstances or that the facts were misstated at the time of the original decision. Second, the importance of finality is a critical consideration in an application to set aside a final order. Third, the circumstances in which it might be appropriate to set aside a final order will be very rare.

*Precisely what needs to be established (aside from the examples given by Hamblen LJ in the paragraph quoted above) in order to set aside a final order was not spelt out in *Terry v BCS*. In the *Prompt Motors* decision (above), HHJ Paul Mathews said, at [31] that he doubted whether anything less than fraud would do.. In *Madison v Various* (above), Hildyard J, having noted the uncertainty in the authorities as to whether Rule 3.1(7) applies at all to final orders and concluding that it does, said that ‘it will be the truly exceptional case where it might be exercised.’” [Emphasis added]*

45. Again one sees a lack of clear authorities defining with any particularity in what circumstances final judgments or orders may be set aside by the court which made them. This can only be attributable to the fact that, apart from fraud, no clearly defined category of circumstances exists.
46. In my judgment the starting point for any analysis of whether recourse to such a truly exceptional inherent jurisdiction is available in the circumstances of any particular case must be to remember that, apart from the nuclear option of setting aside, judgment debtors have access to a broad array of lesser remedies available under GCR Order 45 rule 11. Applying to

set aside a final order on the grounds that it was procured by fraud would ordinarily be pursued through a separate action. Apart from that, the sort of exceptional circumstances which would justify this Court setting aside one its own final orders made on an *inter partes* basis would have to be circumstances which, like fraud, undermine the basis upon which the order was made in a fundamental way.

47. I draw support for this reasoning from *Thynne –v-Thynne* [1955] P. 272 at 314 and Morris LJ’s hypothetical example of setting aside an order made against a debtor who was later found to have been “*non-existent*” at the date when the final order was made. It is neither easy nor necessary to formulate other potential scenarios; it is unclear whether further attempts have been to do so over the last 66 years. However, this sort of hypothetical scenario is illustrative of what Hildyard J (in the passage from *Sangha* quoted in paragraph 45 above) doubtless meant by “*the truly exceptional case*”.
48. For the avoidance of doubt, having mentioned only GCR Order 45 rule 11 above, these legal findings are not intended to rule out the application of powers expressly conferred by this Court’s Rules to vary or set aside final orders on the application of a defendant. Examples, referred to by Lord Falconer QC in the course of argument, are the power to set aside default judgments (GCR Order 13 rule 9) and ex parte orders (GCR Order 32 rule 6).

Should the NPO be set aside despite the fact that it is a final order?

49. Based on these legal findings it becomes readily apparent that the circumstances relied upon by the Defendants for setting aside the NPO, even if it is to be characterised as a final order, do not qualify for such relief. The most pithy summary statement in their Skeleton Argument which captured the essence of their application was as follows:

“27. *The Defendants submit that, if the factual case which it advances on this application (namely that subsequent developments have demonstrated that the NPO is no longer necessary, and indeed never was) then that would represent a sufficiently exceptional basis for the Court to exercise its inherent jurisdiction to set the NPO aside, even on the hypothesis that the NPO is a final order for these purposes...*”

50. This is a carefully framed argument which seeks to avoid any suggestion of rearguing what has already been determined by this Court and the Court of Appeal. But the first limb of the argument must nonetheless be rejected shortly and decisively without any need to evaluate the Defendants’ factual arguments:



- (a) the fact that “*subsequent developments*” show that the NPO is “*no longer necessary*” is simply not an exceptional circumstance which undermines the basis on which the Order was made in a fundamental way;
 - (b) the ground for setting aside a final order must in my judgment relate to the date when the order was made and demonstrate that the order ought never to have been made;
 - (c) the appropriate remedy for obtaining relief from the burden (based on post-judgment developments) of complying with a final judgment or order which is for any reason effectively spent, or otherwise causing injustice, is to apply for a stay or other appropriate relief under GCR Order 45 rule 11.
51. Of course Order 45 rule 11 is not (I should add) designed for abusive re-litigation by stealth. It is at least partly designed for use by judgment debtors who have done their best to comply with final orders and are entitled to say “enough is enough”. Various post-judgment events in the judgment enforcement phase of an action may make it just to stay a validly made judgment altogether. It is unsurprising that the Defendants, who are straining every sinew to avoid complying with the NPO and have not yet exhausted their appeal rights, have not elected to seek relief under Order 45 rule 11.
52. It will in any event be very rarely appropriate for a judgment debtor to substitute its judgment for those of an unpaid judgment creditor as to whether or not further enforcement steps are required. One exceptional scenario in which the judgment debtor’s views might be relevant would be where an aggressive judgment creditor is substantially paid and is pressing the judgment debtor to incur a disproportionate amount of expense through enforcement proceedings which are being unreasonably prosecuted in breach of the Overriding Objective. Another potential exceptional scenario which might also entitle a judgment debtor to relief under Order 45 rule 11, which I believe was canvassed in argument, would be where the judgment creditor has, post-order but pre-compliance, obtained all the information sought from a third party. But these considerations are wholly irrelevant as potential grounds for seeking to set a final order aside.
53. The second limb of the Defendants set-aside case is more conceptually sound, although it is evidentially weak. Demonstrating that the NPO ought never to have been made, based on information discovered after the event, is a potentially valid general ground. But, condescending to particulars, the newly discovered evidence must reveal that:



- (a) the NPO was procured by fraud; or
- (b) the NPO was granted on the basis of some fundamental mistake or misrepresentation which is analogous to fraud.

54. As a forensic matter, it is usually not an uphill task to demonstrate to the judge who initially made an order that something is amiss with the basis of an order in light of newly discovered facts, if something has indeed gone seriously wrong. Being misled by a litigant who has obtained an order by fraudulent means, or by conduct bordering on fraudulent, will ordinarily provoke a strong instinctive judicial reaction. Discovering that a fundamental mistake has been made, for instance about the corporate existence of the judgment debtor, will likely provoke a vivid sense of surprise. The factual foundation of the present application provoked none of these responses in me. Rather it had the opposite effect. My instinctive feeling was that the very making of the present application was itself a thinly-veiled manifestation of the Defendants' determination to frustrate the Plaintiff's attempts to enforce the Award through the instrumentality of the NPO granted by this Court. This feeling finds tangible support in the fact the Defendants have already unsuccessfully argued before me and the Court of Appeal that the NPO could only properly be granted if the Plaintiff could identify specific avoidance actions it wished to bring (see paragraph 66 below).

55. Primary reliance was placed on the fact that the English Conspiracy Proceedings had been commenced to make out the assertion that the NPO was not "necessary" when it was obtained initially in January and ultimately in May, 2019. It was centrally asserted that if the English Conspiracy Proceedings had been commenced before the NPO was granted, the Plaintiff's application would have been refused on the grounds that all the information it sought could have hypothetically been obtained through disclosure orders granted in support of an English worldwide freezing order. This submission seemed to require head-spinning mental gymnasts to grapple with such a counterfactual hypothetical scenario, because Henshaw J has in fact declined to grant a worldwide freezing order in support of the English Conspiracy Claim. Moreover, in my Ruling on the application to discharge the *ex parte* Order, I expressly continued the NPO despite being aware that in the English 2019 Proceedings an application for a worldwide freezing order had been refused. My approach was to narrow the scope of relief to avoid ordering what amounted to pre-trial discovery:

"133. ... Bearing in mind that the WFO was not granted in the English Proceedings against the Defendants, it is not entirely straightforward to justify such extensive disclosure in the present proceedings under the NPO. I have found above that as a matter of law it is permissible to grant Norwich Pharmacal relief



(a) in aid of foreign enforcement proceedings and (b) to “police” a foreign post-judgment Mareva injunction. Attention has focussed on (a) and I have not forensically examined what (b) actually means in practical terms as regards the scope of the NPO. The main rationale for the information requests has been enabling the Plaintiff to confirm its suspicions of wilful evasion of enforcement actions so that appropriate remedial steps can be undertaken. On that basis the Defendants’ counsel was correct to complain about being compelled to produce information which is not likely to evidence assets dissipation.

134. *Subject to the Plaintiff having liberty to apply to seek extended discovery in aid of the WFO, if so advised, I would accept that the discovery should at this stage be limited to asset transfers to related parties which have resulted in or contributed to a net reduction in Essar Steel’s assets over the period (as modified by this Ruling) covered by the NPO. Schedule B paragraph 4(a) should accordingly be amended by adding the following words (or language to like effect) at the end of the sub-paragraph: “which has resulted in or contributed to a net reduction in Essar Steel’s assets.”*

56. The Defendants’ central submission falls far short of meeting the test which I have now held applies to setting aside a final order. There simply was no fundamental mistake or misrepresentation at all, let alone one analogous to fraud. Neither the English Conspiracy Proceedings nor the New York Avoidance Claim are based on facts or allegations which were concealed from this Court during the course of the January and March 2019 hearings. The narrow scope of these two proceedings is not fundamentally inconsistent with the NPO having been granted with a view to assisting the Plaintiff to obtain information about the award debtor’s worldwide assets. The Plaintiff in any event expressly mentioned the possibility of a tortious conspiracy claim being brought. When NPOs are granted in aid of award or judgment enforcement, the rationale for the relief being granted is not narrowly confined to starting specific substantive proceedings.

57. In the absence of asserting and establishing a fundamental mistake or misrepresentation central to the basis upon which the NPO was granted, which the Defendants were unable to do, no legally valid grounds for setting aside the NPO have been made out in any event. It follows that the Defendants’ application to set-aside the NPO must be refused.

ALTERNATIVE FINDINGS ON THE HYPOTHESIS THAT THE NPO IS AN INTERLOCUTORY ORDER

Preliminary

58. Mr Flynn QC persuasively argued that in light of the way the present application came to be listed before this Court, it would be fundamentally unfair if this Court simply found that the



NPO was a final order and that this Court had no jurisdiction to consider the merits of the application. The correspondence, already alluded to above, records the following relevant events:

- (a) Ogier on behalf of the Defendants wrote the Clerk to the Court of Appeal indicating they wished to apply to this Court to set aside the NPO unless the Court of Appeal wished to deal with the matter;
 - (b) Harneys on behalf of AMNAH, somewhat enthusiastically, insisted the matter was nothing to do with the appeal and implicitly reserved their position on the merits of any set-aside application;
 - (c) the Court of Appeal tacitly signified that they did not wish to postpone the delivery of the appeal judgment to entertain additional arguments.
59. On balance, the Defendants in my judgment freely elected to bring the present application before this Court. It seems to me that their election was informed by an orthodox legal analysis; if subsequent events warranted setting the NPO aside such an application should logically be dealt with first by this Court. Appellate courts sparingly adjudicate appeals based on fresh evidence not considered by the trial court. The listing of the application was a case of “adults playing poker”; Harneys made no concessions about the basis on which the present application would be argued.
60. Having fully considered the appropriate character of the NPO and the test for setting-aside final orders, I consider that it is appropriate for me to deal with the alternative position, in case I am wrong, on a far more summary basis.

The test for setting-aside an interlocutory order

61. In my judgment the relevant test for setting aside an *inter partes* interlocutory order altogether, as opposed to varying its mode of implementation, is not greatly different to the test for setting aside a final order. This is apparent from a case upon which the Defendants relied, *Kirkconnell-v-Cook-Bodden* [1996 CILR 326]. There an application to vary procedural, case management orders was made and opposed on the grounds that the substance of the orders were no different



to final orders. Smellie J (as he then was) cited the following principles with apparent approval (at page 332):

“In opposition, Mr Turner also relied upon the following passage from the notes to O. 20 of the Rules of the Supreme Court (1 The Supreme Court Practice 1995, para. 20/11/8, at 387) which guide the application of our local Grand Court Rules:

‘Interlocutory orders stand in the same position as final orders, and cannot be altered except by means of an appeal...save in certain cases expressly provided for ...But it appears that although the substance of the order cannot be changed, the method of giving effect to it may be...’

62. The opposition to the variation application was rejected not on the basis of the governing principles, but rather on the basis that the variations sought were procedural in nature. After citing the observations of Denning LJ in *Cristel-v-Cristel* [1951] 2 All E.R. 574 at 577 (about the ability to vary maintenance orders), Smellie J pivotally opined as follows (at page 334):

“Mr. Lamontagne urged me to accept that approach as being applicable outside the narrow context of matrimonial provisions, to cases such as the present where there has been a significant change of circumstances and where liberty to apply has been expressed or is to be inferred. I am persuaded that a similar scope must be allowed here to take account of changed circumstances where two orders expressly give liberty to apply and, a fortiori, where the orders do not purport finally to determine any substantive right or obligation of the parties but simply set the procedure for the determination of the real issues.”

63. That the normal way to challenge the substance of the decision to make an interlocutory order granted on an *inter partes* basis is by way of appeal is indirectly illustrated by what happened in the present case where my refusal to set aside the *ex parte* NPO was appealed by the Defendants to the Court of Appeal. The same procedure would have been followed in relation to a clearly recognised interlocutory order such an interlocutory injunction. The merits of the substance of the NPO have been fully argued in this Court and in the Court of Appeal. Even if the NPO was for present purposes an interlocutory order, this Court clearly does not retain a flexible jurisdiction to reconsider whether or not the Order should have been made. The position would surely have been the same had the relevant order been an order which was interlocutory for appeal purposes and in relation to which leave to appeal was required.
64. The Plaintiff relied upon *Tibbles v SIG plc* [2012] 1 WLR 2591 at 2602 (per Rix LJ) as formulating the appropriate test for setting aside interim orders. There, the approach to setting aside interlocutory orders was expressed in broad terms in relation to the very broadly drafted CPR 3.1(7). The English jurisprudence on an initially problematic new rule is in general terms



unhelpful in the Cayman Islands as it relates to a broad discretion “to vary or revoke” orders which has no counterpart in this Court’s Rules. Nonetheless it is instructive (and in line with the approach Smellie J (as he then was) in *Kirkconnell-v-Cook-Bodden* [1996 CILR 326]) that Rix LJ noted in *Tibbles*:

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

65. In my judgment this Court has a flexible jurisdiction to vary interlocutory orders to respond to material changes of circumstances or misrepresentations (and possibly mistakes which cannot be cured under the slip rule as well), particularly in relation to what may broadly be termed “case management orders” or “procedural orders” but also in relation to “continuing” orders which are made expressly or impliedly subject to “liberty to apply”. Then Smellie J’s adoption of a more flexible approach to procedural orders in *Kirkconnell-v-Cook-Bodden*, in the pre-CPR era, may well to some extent have been consistent with existing practice; but it also anticipated future developments. The distinction between the reviewability of substantive and procedural orders has far greater import today when this Court is positively required to “*further the overriding objective by actively managing proceedings*” (Grand Court Rules, Preamble, paragraph 4.1). However, there is no correspondingly flexible jurisdiction to revisit the substantive merits of those parts of an interlocutory order which are neither procedural in nature nor expressly or impliedly subject to a liberty to apply clause. Exceptional circumstances would be required to justify revoking or setting aside an *inter partes* interlocutory order altogether in circumstances where it is not spent. Although this point has not received the benefit of full argument, it seems clear that GCR Order 45 rule 11 affords an array of potential alternative remedies to setting-aside in respect of interlocutory as well as final orders. It is probably the jurisdictional basis for the Court’s power to vary interlocutory orders, codifying the inherent jurisdiction this Court would otherwise have possessed:

“Matters occurring after judgment: stay of execution, etc. (O.45, r.11)

11. *Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.*” [Emphasis added]

Merits of application

66. If the NPO was to be classified for the purposes of the Defendants' present application as an interlocutory order, I would still decline to set it aside on essentially the same grounds which form the basis of my primary findings. There is no sufficient factual or legal basis for finding that the filing of the English Conspiracy Claim or the New York Avoidance Claim demonstrate that either (a) the NPO ought never to have been made, or (b) is no longer needed. The NPO was not granted to enable the Plaintiff to commence one or more specific proceedings. The far broader purpose was to confer a right to receive information about suspected but un-particularised asset dissipation during a period of time relevant to AMUSA obtaining the Award against Essar Steel. The Defendants present application merely repackages an argument which has been advanced and rejected by both this Court and (admittedly after the present application was filed) the Court of Appeal. As Martin JA held giving the leading judgment of the Court of Appeal⁶:

“38. *As I have indicated, the appellants accepted that anti-avoidance provisions directed at such conduct exist in most systems of law. They contended, however, that the precise scope and effect of such provisions often differed substantially from jurisdiction to jurisdiction. It could not therefore simply be assumed that a particular asset disposal would inevitably fall foul of any insolvency law which might happen to be capable of applying to it. Accordingly, so the appellants said, it was necessary for AMUSA to go at least some of the way to showing how a particular asset disposal would arguably fall foul of some relevant anti-avoidance provision.*

39. *The judge rejected this suggestion (paragraph 95 of the judgment, quoted in paragraph 31 above: ‘I reject the submission ... that it is incumbent on the Plaintiff to identify statutory insolvency avoidance provisions which might be invoked by a liquidator of [ESL] before this Court is entitled to find that an arguable case of wrongdoing is made out’. In my judgment, he was right to do so. AMUSA cannot be expected at this stage to identify every – or, indeed, any – jurisdiction in which it will seek to invoke the local anti-avoidance provision. To require it to do so would be to impose too high a burden on AMUSA: the whole point of AMUSA’s application is that it does not at this stage have sufficient information to enable it to identify whom it might wish to pursue or where it might wish to pursue them...’ [Emphasis added]*

67. The Court of Appeal has now explicitly found that the Plaintiff was not required as a basis for obtaining the NPO “*to identify every – or, indeed, any – jurisdiction in which it will seek to invoke the local anti-avoidance provision*”. It follows that the Plaintiff’s ability to bring the English Conspiracy Claim, which is a different species of claim to that which the NPO was designed to facilitate, is wholly immaterial to the basis on which the NPO was granted. The New York Avoidance Claim is potentially relevant, but not to a material (let alone fundamental)

⁶ *Essar Global Fund Limited and Essar Steel Limited-v-ArcelorMittal USA LLC* CICA No.15 of 2019, Judgment dated November 29,2020 (unreported).

extent because the Plaintiff was not as a matter of law required to identify “every” jurisdiction in which it would pursue avoidance proceedings. So even if I was required to treat the NPO as an interlocutory order for the purposes of the Defendants’ present application, I would refuse the application on the same grounds that the subsequent developments do not undermine the fundamental basis upon which the NPO was granted.

SUMMARY

68. For the above reasons, the Defendants’ Summons dated May 1, 2020, principally seeking to set aside the NPO, is dismissed. The Plaintiff’s counsel did not positively assert that the present application was an abuse of process. That was a well-judged assessment and the only proper position to adopt. In the course of the case management stay hearing (as noted in paragraph 1 above), the Plaintiff conceded that the present application was arguable. There is also, marginally, some substance to Mr Flynn QC’s argument that the Defendants might have sought to pursue these arguments before the Court of Appeal had they not been encouraged to pursue the subsequent developments before this Court. Unless any party applies by letter to the Court within 21 days of the date of delivery of this Ruling to be heard as to costs, the Plaintiff’s costs of the present application shall be paid by the Defendants in any event to be taxed if not agreed on the standard basis.



THE HON. MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT