

SUPREME COURT OF SEYCHELLES

Reportable/Not Reportable/Redact
[2022] SCSC ...
MC03/2021

In the matter between:

LOUDMILLA BOURLAKOVA
(*Serge Rouillon*)

Applicant

and

ACT OFFSHORE LIMITED
(*Bernard Georges*)

Respondent

Neutral Citation: Bourlakova v ACT Offshore (MA03/2021) [2022] SCSC (21st March 2022).

Before: Carolus J

Summary: Application for a further Norwich Pharmacal Order

Delivered: 21st March 2022

ORDER

- (a) The respondent shall not later than 14 days from the date of this Order disclose the following documents and/or information in the respondent's possession or knowledge in respect of Kirkwell Inc. and Shanklin Holdings Ltd:
- (i) Confirm whether the respondent acts as, has provided or arranged for others to provide a nominee shareholder for Kirkwell and/or Shanklin, and if it does or has, to disclose the relevant nominee agreement.
 - (ii) If the respondent has not already done so, confirm the nature of the relationship between the Carey Group and ACT, if any.
 - (iii) If the respondent has not already disclosed the register of beneficial owners, disclose the identity of any nominee(s) holding interest on behalf of the beneficial owner, the particulars and details of the interest held by such nominee and any relevant information regarding such nominee and interest.

- (iv) Confirm whether the respondent has provided nominee director services to Kirkwell and/or Shanklin, directly through one of its own directors or indirectly through an employee/professional officer, and if it has provided nominee director services directly through one of its own directors, provide any powers of attorney issued by such director.
 - (v) If it has provided nominee director services directly through one of its own directors to Kirkwell and/or Shanklin, disclose any information that it may have regarding assets of the companies.
 - (vi) Disclose any accounting records in its possession which show the assets of the company.
 - (vii) Disclose any Register of Charges created by Kirkwell and/or Shanklin kept at its office.
- (b) The respondent shall verify the disclosure made pursuant to paragraph (a) above not later than 14 days from the date of this Order by serving on the applicant's attorney an affidavit sworn by an authorised officer of the respondent, exhibiting copies of any documents disclosed. If the respondent is unable to provide the documents and/or information as ordered, it should explain in the affidavit the reasons for such inability.
- (c) The respondent's reasonable costs including its costs and expenses of complying with this Order shall be borne by the applicant.
- (d) This Order is to be served on the respondent forthwith.

RULING

E. CAROLUS, J

Background

- [1] The applicant, Mrs Loudmila Bourlakova has successfully obtained a Norwich Pharmacal order for disclosure of documents or information in the respondent's knowledge or possession in respect of two international business companies (the "IBCs") namely Kirkwell Inc. ("Kirkwell") and Shanklin Holdings Ltd ("Shanklin") The respondent is ACT Offshore Limited ("ACT"), the registered agent of Kirkwell and Shanklin. The Order was granted by the Supreme Court on 18th February 2021.
- [2] Mrs Bourlakova avers that she has been married to Mr Oleg Bourlakov since 1972 but petitioned for divorce in 2018 in the Monaco Courts. Mr and Mrs Bourlakov were married in Ukraine and it is averred that under Ukrainian law, the matrimonial property of the parties is deemed to be owned in equal shares and divided equally between the parties upon divorce. Mr and Mrs Bourlakov have a family home in Monaco "La Reserve". The applicant avers that the property is held by a number of offshore companies which are ultimately owned by Kirkwell of which Shanklin is the sole shareholder as a nominee for Mr Oleg Bourlakov.
- [3] Mrs Bourlakova claims that her husband has been taking steps to dissipate assets in an attempt to deplete the value of the "marital pot" and to deny her the assets forming part of their matrimonial property to which she would be entitled upon their divorce. The purpose of the original application for a Norwich Pharmacal order therefore was to obtain information and documentation in relation to both IBCs to enable a claim to be made against her husband and to identify any wrongdoers assisting him in his illegal acts.
- [4] By its Order dated 18th February 2021, the Supreme Court ordered the respondent to disclose the following documents or information in the respondent's knowledge or possession in respect of Kirkwell and Shanklin, not later than 25th February 2021, including:
- (i) Memorandum and Articles of Association;
 - (ii) Registers of directors;
 - (iii) Register of members;

- (iv) Any nominee or other trust documents of any kind whatsoever;
- (v) Register of shares and pledges;
- (vi) Board Minutes and Resolutions of members and directors;
- (vii) Copies of any Powers of Attorney;
- (viii) Copies of instructions relating to any transfer or pledge of assets;
- (ix) Proof of any transfer or pledge of assets with full particulars;
- (x) A list of any assets held formally or informally by Kirkwell Inc. and Shanklin;
- (xi) The identity of the beneficial owner(s) of Kirkwell Inc. and Shanklin Holdings Ltd;
- (xii) The identity of any third party intermediary who facilitated the formation of the business relationship between the respondent and Kirkwell Inc. and Shanklin Holdings Ltd; and
- (xiii) Any other relevant documentation and/or information held by the respondent relating to Kirkwell Inc. and Shanklin Holdings Ltd.

[5] Counsel for the applicant claims that not all of the requested documents or information have been provided by the respondent and has now made an application for a further order for disclosure of the same. He submits that only a “*limited set of documents*” was provided and the following documents (as set out at paragraph 12(a) of the Order) were not:

- (iv) Any nominee or other trust documents of any kind whatsoever;*
[...]
- (vii) Copies of any Powers of Attorney;*
- (viii) Copies of instructions relating to any transfer or pledge of assets;*
- (ix) Proof of any transfer or pledge of assets with full particulars;*
- (x) A list of any assets held formally or informally by Kirkwell Inc. and Shanklin Holdings Ltd;*
[...]
- (xiii) Any other relevant documentation and/or information held by the respondent relating to Kirkwell Inc. and Shanklin Holdings Ltd.*

[6] Mr. Karl Pragassen, the Managing Director of ACT in his affidavit in response has stated that the documents or class of documents that the applicant is seeking are not in the

respondent's control and have never been; that it is not within the power of the respondent to procure these documents; and that there is no obligation to produce them to the court.

Submissions of the Applicant

[7] Written submissions were filed by counsel for the applicant but the respondent opted to rely solely on Mr. Pragassen's affidavit.

[8] Counsel for the applicant submitted at paragraph 7 that the registered agent's response that the documents "*are not in our possession and I am unable to produce them*" is not sufficient. He states that there are two predominant reasons as to why this is so and why the respondent should be required to take further steps to provide some or all of the documents and information. Firstly he submits that the respondent has adopted a restrictive approach in interpreting the Order to relate to only those documents which are in its physical possession or custody, and failing to provide the documents and/or information that it can obtain from third parties or which it does not physically hold but has power to inspect. Furthermore, Counsel submits that even when a party does not have a document in its physical possession but has the ability to provide it (by requesting it from third parties for instance), the focus should be on the ability to provide information and the question should be only what is possible (paragraph 15).

[9] Secondly, it is submitted that the initial Order was for disclosure not only of documents but also of information, in the respondent's knowledge or possession in respect of the two IBCs. The present application seeks the further disclosure of documents listed at paragraph 22(a) and (b) and information listed at paragraph 22(c) of the submissions. In summary the applicant is asking the Court to order the registered Agent, ACT, to:

(a) disclose the **documents** referred to at paragraph [5] above in its control (i.e. documents in its physical possession, where it has a right to possession of such documents, where it has an established practice of accessing such documents or where it has a right to inspect or take copies of such documents);

- (b) verify the disclosure by an affidavit sworn by its authorised officer exhibiting the documents;
- (c) provide **information** to the best of its knowledge and belief set out in the affidavit regarding:
 - (i) full information as to any transfer or pledge of assets;
 - (ii) any assets held formally or informally by Kirkwell and Shanklin;
 - (iii) any other relevant information that it has in relation to the companies, including but not limited to, their direct and indirect ownership, their assets, any attempts to deal with the companies and their assets, and the identities of those involved in such activity.

[10] Counsel for the applicant submits that “[t]he information requirement is broad, and requires ACT to tell the applicant what it knows. Necessarily this must include the knowledge of ACT’s directors and employees. There is no need for this knowledge to be written down anywhere for it to be caught by the obligation”.

[11] In support of his submissions in regards to disclosure of information, Counsel has attached an extract from “DISCLOSURE (being the fifth edition of DISCOVERY)” by Matthews and Malek Q.C. Paragraph 1.07 (page 6) discusses the meaning of disclosure of information and states that there are several ways in which such disclosure can be made, namely: (1) by information requests being written questions which must be answered in writing and verified by a statement of truth; (2) witness statements; (3) expert reports (4), depositions of witnesses and (5) letters of request.

[12] He submits that the respondent appears to have misunderstood the purpose of giving the affidavit, and that whilst it is correct that the affidavit needs to verify the disclosure, the respondent should also have set out the requested information therein. He expresses the view that the respondent has not sought to provide the necessary information and should therefore be required to provide a further affidavit setting out this information

[13] Counsel for the applicant has also indicated (proceedings of 25th March 2021) that it is an accepted practice in the Supreme Court, where a Norwich Pharmacal Order is not fully complied with in that complete information is not provided, for the Court to make a further Order for compliance. In *Ex parte Chen Seng Kuei* (MC 62/2019) [2019] SCSC 793 (18 September 2019) the Court had granted a Norwich Pharmacal Order on 5 September 2018 (in *Ex parte Chen Sheng Kuei* (MC 44/2018) [2018] SCSC 794 (5 September 2018)) for disclosure of documents against the registered agent of an IBC and later, on 28th May 2019 granted a further order for the enforcement of the original order. After examining the documents provided, the applicant filed MC62/2019 claiming that a signature on one of the documents was a forgery and that the contents of another document concerning his personal details were false. He also claimed that a copy of a passport purporting to be his and provided to the registered agent was false. On 18th September 2019, the Court granted an Order for the disclosure of the identity of the person or entity who disclosed and/or provided the aforementioned information and documents.

Issues for Determination

[14] In light of the above, and in particular the respondent's response as set out at paragraph [6] hereof that the documents and information which were not disclosed are not and have never been in its control, that it is not within its power to procure them and that there is no obligation to produce them, I have identified the issues for determination in the present application as whether the requested documents and information are required to be kept by the registered agent and/or whether such registered agent has an obligation or the ability to request such documents and/or information from third parties, under the applicable law.

Analysis of relevant legal provisions

[15] In order to make a determination of the issues identified at paragraph [14] above, the Court is required to carry out an analysis of relevant legal provisions relating to IBCs and the obligations and duties of registered agents. In doing so, the Court will proceed on the assumption that documents or information ordered to be disclosed by the Order of 18th February 2021 which have not been requested in the present application have been

disclosed by the respondent. It is important to note that these documents or information have not been provided in support of the present application.

Record-keeping duties of a Registered Agent and an International Business Company

[16] As submitted by counsel for the applicant (paragraph 11 of his submissions), a registered agent has certain record keeping duties with regards to its clients. Section 8 of the International Corporate Services Providers Act, 2003 (the “ICSP Act”) provides:

Duties of Licensees

8. (1) A licensee shall —

[...]

(c) maintain such **records** and **documents** relating to its business or clients as may be required by or under this Act or any other law of Seychelles;

[17] The word ‘document’ is defined in section 2 of the ICSP Act. It has the same definition given under section 2 of the International Business Companies Act, 2016 as amended (the “IBC Act”). The IBC Act also defines ‘records’. The relevant provisions under those Acts are as follows:

ICSP Act

“document” means —

(a) any writing on any material;

(b) a book, graph, drawing or other pictorial representation or image;

(c) information recorded or stored by any electronic or other technological means and capable, with or without the aid of any equipment, of being reproduced;

IBC Act

“electronic form” with reference to information means any information generated, sent, received or stored in any computer storage media such as magnetic, optical, computer memory or other similar devices;

“electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form and includes any electronic code or device necessary to decrypt or interpret the electronic record;

“records” means documents and other records however stored;

[18] Paragraph 13.2 of the Code for International Corporate Service Providers, 1st October 2020 version (the “Code for ICSPs”) provides that the licensee needs to monitor compliance by specified entities (defined by section 2 of the ICSP Act as including IBCs) with their “record-keeping requirements”, notify the entity if it is non-compliant and where the entity does not comply, report the entity to the Financial Services Authority (the “FSA”) or the Registrar. Paragraph 13.2 of the Code specifies that the “record-keeping requirements” for international business companies include:

- (i) *the register of members;*
- (ii) *the register of directors;*
- (iii) *the register of beneficial owners;*
- (iv) *the accounting records (or where the accounting records are kept at a place other than its registered office, a written notification of the physical address of that place); and*
- (v) *the annual return pursuant to section 171 of the IBC Act.*

[19] Section 173(2) of the IBC Act provides for the furnishing of records by IBCs. Under that provision where a company is requested pursuant to a written law of Seychelles to furnish all or any of its records, including (without limitation) a request from the Seychelles Revenue Commission (“SRC”) (request for information under a tax treaty); the Financial Intelligence Unit (“FIU”) under the Anti-Money Laundering Act; or the Registrar for the purpose of monitoring and assessing compliance with the Act, the company shall cause the requested records to be furnished within the time period specified in the request. A company and/or its director(s) who fail to furnish such records is be liable to a fine under section 173(3) and (4).

[20] Section 173(1) of the IBC Act provides that for the purpose of that section ‘records’ include: (a) accounting records; (b) minutes and resolutions of members kept pursuant to section 125; (c) minutes and resolutions of directors kept pursuant to section 156; (d) annual returns made pursuant to section 171; (e) register of members; (f) register of directors; (g) repealed; and (h) register of charges (if any). It is to be noted that subparagraph (g) of section 173(1) which included the register of beneficial owners in the definition of ‘records’ was repealed by section 2 of the IBC (Amendment) Act, 2020 (Act 8/2020) due to the enactment of the Beneficial Ownership Act, 2020 (the “BO Act”)

which came into force on 28th August 2020. The BO Act has its own provision regarding access to information regarding beneficial owners by competent authorities or by way of Court Order but here the obligation to provide such information is on the resident agent. In that regard section 14 of the BO Act provides as follows:

14. (1) Where **a resident agent** is requested by a written notice or Order, as the case may be,—

(a) by any competent authority;

(b) by any law enforcement authority;

(c) by the Registrar of Companies;

(d) by the Registrar of Associations;

(e) by the Seychelles Licensing Authority in respect of the legal person or legal arrangement licensed under the Licences Act or a legal person or legal arrangement applying for a licence under the Licences Act or any other Act;

(f) by the Central Bank of Seychelles in respect of institutions under its regulatory control or a legal person or legal arrangement applying for a licence under the Financial Institutions Act or any other Act;

(g) by Order of a Court –

(i) to provide any information maintained in the register of beneficial owners; or

(ii) to inspect the register so maintained under section 5,

the resident agent shall provide the information or make available for inspection the register of beneficial owners within the time specified in the written notice or Order.

(2) A resident agent, who or which fails to comply with subsection (1) shall be liable to a penalty not exceeding SCR50,000 for each such failure.

(3) A resident agent, who or which intentionally provides false or misleading information as requested under subsection (1) commits an offence and shall be liable on conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding SCR50,000 or to both.

[21] Although section 173(2) of the IBC Act does not expressly provide for furnishing of records by an IBC pursuant to a court order it does not limit the furnishing of such records only upon request of the SRC, the FIU and the Registrar. The wording of section 173(2) suggests that records must be furnished when ordered by a Court provided that a

request for the same is made pursuant to a written law. Under the BO Act, resident agents must provide information maintained in the register of Beneficial Owners when requested by a Court order.

[22] Section 129 of the IBC Act further provides that wherever an obligation or duty is placed on a company in that Act, unless otherwise provided such obligation or duty shall be carried out by the directors of the company. According to that provision therefore, the duty to furnish the records under section 173 of the IBC Act is placed upon the directors of an IBC and not the registered agent. The registered agent only needs to ensure that an IBC is in compliance with its “record keeping requirements”. The registered agent can therefore request the documents and information from the company’s directors, but if the directors refuse to provide such information, the registered agent can only report the non-compliance to the FSA or the Registrar, which can then sanction the offending company and/or director. Such sanction may be a fine upon the company and/or the director. An IBC may also be struck off from the Registrar’s list of IBCs under section 272(1)(b)(iii) and (iv) respectively, if the company fails to comply with a request made pursuant to the IBC Act or other written law of Seychelles by the SRC, the FIU or the Registrar for a document or information; or fails to keep a register of directors, register of members, register of charges, accounting records or any other records required to be kept by it under the IBC Act.

[23] Although the list of ‘records’ enumerated under section 173(1) seem exhaustive, it is doubtful that where information other than those listed is requested by the authorities, an IBC may simply refuse to provide such information simply because it is not specified in that provision. It is important to note, as previously stated, that the duty to provide information under section 173 is on the IBC and its directors and not on the registered agent.

[24] ACT has provided some of the documents as required by the Court Order of 18th February 2021, as stated at paragraph 4 of Counsel for the applicant’s submissions, but he does not specify which documents have been provided. Since the following documents are no longer being requested by the applicant, it would appear that it is those documents

which have been provided namely: (i) Memorandum and Articles of Association; (ii) Registers of directors; (iii) Register of members; (v) Register of shares and pledges; (vi) Board Minutes and Resolutions of members and directors; (xi) The identity of the beneficial owner(s) of Kirkwell Inc. and Shanklin Holdings Ltd; and (xii) The identity of any third party intermediary who facilitated the formation of the business relationship between the respondent and Kirkwell Inc. and Shanklin Holdings Ltd.

[25] The documents provided are those required to be kept by an IBC pursuant to its “record keeping requirements” which its registered agent has a duty to ensure the IBC complies with. Provided that these are indeed the documents which have been disclosed, which the Court does not know for certain given that the documents have not been exhibited in support of the present application, it would appear that the registered agent has not contravened its duty to maintain records and documents relating to its clients under section 8 of the ICSP Act and has furnished the records that it has in its possession.

[26] It is now necessary to examine whether the registered agent is required to keep the remainder of the requested documents and information or obtain them from the third parties.

Any nominee or other trust documents of any kind whatsoever

[27] Section 2 of the ICSP Act provides that “international corporate services” means, among other services provided in or from Seychelles “serving as a nominee shareholder in a specified entity”. Paragraph 24.2 of the Code for ICSPs states that, “*where a licensee acts as, provides or arranges for others to provide, a nominee shareholder (whether as a registered shareholder or as a registered bearer or otherwise to hold shares on behalf of another) of a client company, the licensee must ensure that it has in place a written nominee agreement or such other nominee agreement*”.

[28] When such a service is provided by the registered agent, the nominee agreement and/or trust documents should be kept by that registered agent. However where the registered agent’s client i.e. an IBC is a direct shareholder or ultimate beneficial owner of another company by the use of other corporate structures (e.g. it is a direct shareholder of another

company B which holds shares in the main company A), there might not be any nominee agreement and/or trust declaration between the registered agent and IBC.

- [29] In the bundle of documents attached to the Order of Dismissal of the complaint against Mrs Bourlakova and her daughter in Switzerland, is a document showing the structure of the holding companies owning shares in “La Reserve” (page 46), a Declaration of Trust by Shanklin in Kirkwell (page 47), a copy of the share register (page 51) and a copy of the share certificate (page 52) of Kirkwell Inc. These documents show that Shanklin holds 100% shares in Kirkwell (or at least did so on 05/02/2019 as per the share register) as Nominee and Trustee for Mr Bourlakov since 30 March 2007. Kirkwell for its part owned all the other companies which held shares in La Reserve.
- [30] The bundle of documents also contain a Company Formation Questionnaire (pages 54-59) and Company Management Agreement (pages 60-65) between Mr Bourlakov and the Carey Group (“Carey”) executed on the 6th day of April 2007. Carey is a trust administration company in Monaco, providing either directly or through associated persons or companies, Registered Office, Secretarial, Director, Trust and Company administration services (page 54 of the Questionnaire). The Questionnaire and Company Management Agreement indicate that Mr Bourlakov requested from Carey, the formation of the Seychelles company Kirkwell (page 55) for the purpose of purchasing 4 offshore companies situated in Panama and the BVI which in turn own the property situated in Monaco (Clause 2 of the Questionnaire), with the requirement that Carey provides corporate/personal directors to administer the Company (Clause 9 (b) of the Questionnaire) and for the company’s accounts to be prepared by Carey (Clause 11 of the Questionnaire). Clause IV of the Company Management Agreement (page 61) indicates that nominee shareholder facilities (for shares issued in registered form) and the provision of corporate and/or individual director services were also agreed by Mr Bourlakov and Carey to be provided by the latter.
- [31] The nature of the relationship between ACT and Carey, if any, is not known. It is possible that Carey is the intermediary between Mr Bourlakov and ACT. This information can be verified by the applicant through documents relating to (xii) the

identity of any third party intermediary who facilitated the formation of the business relationship between ACT and Kirkwell Inc. and Shanklin Holdings Ltd, which were requested and appear to have been provided to the applicant as they were not requested in the present application.

[32] It is also not known whether ACT actually provided any nominee services to the IBCs. If not, it is possible that the authorised signatories who signed the Declaration of Trust (attached to the bundle of documents referred to in paragraph [29] hereof) on behalf of Shanklin, are persons either from Carey or other persons who have no connection to ACT. It is to be noted that the shareholders and directors of both IBCs can be verified in the Registers of Directors and Shareholders which also appear to have already been provided to the applicant. In such a case employees of Carey or other persons could have issued the Declaration of Trust but failed to inform ACT.

[33] The provisions relating to beneficial ownership are also relevant to the issue of nominees. Under the ICSP Act a registered agent has a duty to identify the ultimate beneficial owner of any company to which it provides international corporate services (see also paragraph 24.1. of the Code for ICSPs). In that regard paragraph 1(a) and (b) of Schedule 2 to the ICSP Act which contains the Code of Practice of Licensees under the ICSP Act provides that:

*1. A licensee shall at all times be able to identify —
(a) its clients;*

(b) the directors, members and beneficial owner of each company to which the licensee provides international corporate services;

[34] The registered agent is also under an obligation to keep at its office a Register of Beneficial Owners in accordance with section 5 of the BO Act. Section 3 of the BO Act defines ‘beneficial owner’ as “*one or more natural persons who ultimately own or control a customer or the natural person or persons on whose behalf a transaction is being conducted and includes those natural persons who exercise ultimate effective control over a legal person or a legal arrangement*” (emphasis added). In terms of that

definition, a Corporate Service provider is therefore required to identify the final natural person rather than the company or companies that owns shares in the IBC of which it is the registered agent (although the obligation of an ICSP to identify also extends to members – defined in section 2 of the IBC Act as “a person whose name is entered in the company’s register of members (a) a shareholder; or (b) a guarantee member”). The register of members is no longer being requested and appears to have been disclosed).

[35] Section 5(1) of the BO Act provides that an IBC shall maintain a register of beneficial owners, at the principal place of business of its resident agent, containing the following information in respect of each of its beneficial owners:

- (a) the name, residential address, service address, date of birth and nationality of each beneficial owner;*
- (b) details of each beneficial owner’s beneficial interest, as may be prescribed by regulations;*
- (c) the date on which a person became a beneficial owner;*
- (d) the date on which a person ceased to be a beneficial owner;*
- (e) where a nominee holds interest on behalf of the beneficial owner—*
 - (i) the name, residential address, service address, date of birth and nationality of each nominee holding the interest on behalf of the beneficial owner and the particulars and details of the interest held by the nominee; and*
 - (ii) the identity of the nominator, and where the nominator is a legal person, the identity of the natural person who ultimately owns or controls the nominator.*

[36] A ‘nominee’ is defined in section 5(5) of the BO Act as “*a person who holds and has control over shares or other membership interests or any other control in a legal person for and on behalf of another person or persons*”.

[37] As stated earlier, the applicant has not made a further request for documents relating to (xi) the identity of the beneficial owner(s) of Kirkwell Inc. and Shanklin Holdings Ltd, which appears to indicate that such documents were provided. However since the documents disclosed by the respondent were not provided in support of the present application, it is not known for sure by what means ACT identified the beneficial owner although I note that the Declaration of Trust by Shanklin in respect of Kirkwell provided

by the applicant herself shows the beneficial ownership of both IBCs. If ACT provided the Register of Beneficial Owners the applicant should be able to determine whether it is indeed Mr Bourlakov as shown in the Declaration of Trust in regards to Kirkwell mentioned earlier, and also see the history of the beneficial ownership. From the registers of directors and members of both companies, which appear to have been provided since they are no longer being requested, it may also be potentially possible to see the structure of the companies and whether ACT is actually providing any nominee services to Kirkwell and Shanklin. However as no documents detailing the structure of the IBCs have been tendered in support of the present application, it is difficult to determine whether ACT actually has in its possession any declarations of trust and/or nominee agreements and whether or not it is required to have them.

[38] To sum up, if ACT Offshore provides nominee shareholder services to the IBCs it should have the nominee agreement and/or declaration of trust in their possession. Nominee shareholders can also be seen in the register of members which appears to have been provided. The obligation to keep such register is on the IBC and not the registered agent but the latter is required to monitor that the IBC is keeping such records although it cannot compel the IBC to do the same. A registered agent is only required to identify the members of its client companies. The registered agent is also under an obligation to identify the beneficial owner of its client companies and to keep a register of the beneficial owners of such companies which should show any nominees of the beneficial owner(s). It appears that ACT did provide information regarding the identity of the beneficial owner as it has not been requested in this application, but the exact documents they provided is not known as they were not produced by the applicant. The documents disclosed by the applicant may well show the particulars of how ownership of the companies is structured which would in turn inform the Court as to whether ACT actually has in its possession any declarations of trust and/or nominee agreements and/or whether or not it is required to have them, but in the absence of the same the Court is left in the dark on that issue. The registers of directors and members of both companies may also show the structure of the companies and whether ACT is providing any nominee services to Kirkwell and Shanklin. They appear to have been provided but as stated the registered agent has no power to compel an IBC to keep or disclose those records to it. The

registered agent only has the obligation to identify members and directors. The keeping of registers by the registered agent applies only to beneficial owners of its client companies.

[39] In the circumstances the Court can only order the applicant:

- (a) To confirm whether it acts as, has provided or arranged for others to provide a nominee shareholder for Kirkwell and/or Shanklin, and if it does or has to disclose the nominee agreement required to be kept pursuant to paragraph 24.2 of the Code for ICSPs.
- (b) If the respondent has not already done so, to confirm the nature of the relationship between the Carey Group and ACT, if any.
- (c) If the register of beneficial owners has not been disclosed, to disclose the identity of any nominee(s) holding interest on behalf of the beneficial owner, the particulars and details of the interest held by such nominee and any relevant information regarding such nominee and interest.

Copies of any Powers of Attorney

[40] Section 39 of the IBC Act empowers IBCs to issue powers of attorney. It provides as follows:

- 39. (1) Subject to its memorandum and articles, a company may by an instrument in writing appoint a person as its attorney either generally or in relation to a specific matter.*
- (2) An act of an attorney appointed under subsection (1) in accordance with the instrument under which he was appointed binds the company.*
- (3) An instrument appointing an attorney under subsection (1) may either be – (a) executed as a deed; or (b) signed by a person acting under the express or implied authority of the company.*

[41] The document should usually be signed by the director of an IBC. Where the registered agent also provides nominee director services, the power of attorney will be signed by a director or employee of the registered agent. The term ‘employee’ is defined in paragraph 24.8 of the Code for ICSPs which deals with provision of directorship services to

specified entities, to include a Professional Officer. A Professional Officer “*means ... any individual who enters into an agreement with the [registered agent] to provide directorship services to specified entities to which the [registered agent] provides registered agent services*”. Paragraph 24.8. further states that:

*The directors should remain responsible for the exercise of the powers they delegate and should monitor the exercise of the delegated powers. **This applies to the issuing of powers of attorney, and control of bank accounts** (financial transactions and assets belonging to the client company). In all circumstances, the board should keep the delegated powers within restricted parameters as may be appropriate and ensure that it does not relinquish ultimate control over the company affairs. **Notwithstanding that the directors are not the authorised signatories or are not the only persons authorised to sign on the client company’s bank account, ultimate control thereof would be expected to remain with the directors**” (emphasis added)*

- [42] As noted previously, Mr Bourlakov requested nominee director services from the Carey Group (Clause 9 (b) of the Company Formation Questionnaire). The Company Management Agreement was entered into by Mr. Bourlakov with Carey and not ACT. The proper person to provide copies of powers of attorney in that case would be the nominee director provided by Carey.
- [43] However in the event that ACT did provide nominee director services to the IBCs, it may have a record of any powers of attorney issued by such nominee directors especially where the nominee director is a director of the registered agent. However, as stated it is the directors who are responsible for monitoring the exercise of the powers they delegate and not the registered agent, irrespective of whether those directors are nominee directors provided by the registered agent or not, hence the proper person to provide the copies of the power of attorney would be the nominee directors themselves. If ACT did not provide nominee director services it is possible that it was not informed by the intermediary and/or client company of any power of attorney that may have been issued. While it could have requested copies of powers of attorney from the companies’ directors and/or intermediary it cannot compel them to provide them.
- [44] The directors of the IBCs should be ascertainable from the Register of Directors which appears to have been disclosed to the applicant and from whom copies of any powers of

attorney issued could be requested. In my view therefore, the applicant's request for copies of powers of attorney should have been directed to the IBCs and their directors rather than to the registered agent, more so as a registered agent does not have the power to compel directors to provide such documents in the event of their refusal to do so. It must also not be discounted that it is possible that no power of attorney was ever issued. In the circumstances.

[45] The only Order that the Court can make therefore is for the respondent:

- (a) To confirm whether it has provided nominee director services to Kirkwell and/or Shanklin, directly through one of its own directors or indirectly through an employee/professional officer.
- (b) If it has provided nominee director services directly through one of its own directors to provide any powers of attorney issued by such director.

A list of any assets held formally or informally by Kirkwell inc. and Shanklin

[46] There is no duty imposed upon a registered agent either under the IBC Act or the ICSP Act to keep a list of a company's assets since the business and affairs of a company are managed by company's directors as stated by section 128 of the IBC Act which provides as follows:

128. Subject to any modifications or limitations in the company's memorandum or articles –

- (a) the business and affairs of a company shall be managed by, or under the direction or supervision of, the directors of the company; and*
- (b) the directors of a company have all the powers necessary for managing, and for directing and supervising, the business and affairs of the company.*

[47] As noted earlier, a registered agent may provide nominee director services to an IBC. Where a nominee director is provided by the registered agent, the registered agent *may* have information relating to the assets of the company. However where the directors of the IBC are not connected in any way to the registered agent, the registered agent might not have full information regarding such assets.

[48] Nevertheless, some information relating to the assets of an IBC may be found in its financial documents. Section 2 of the IBC Act defines ‘accounting records’ as follows:

accounting records”, in relation to a company, means documents in respect of –

(a) the company’s assets and liabilities

(b) the receipts and expenditure of the company; and

(c) the sales, purchases and other transactions to which the company is a party;

[49] Section 174 of the IBC Act imposes an obligation on an IBC and not the registered agent to keep reliable accounting records and provides for fines for non-compliance with such obligation. It provides:

174. (1) A company shall keep reliable accounting records that –

(a) are sufficient to show and explain the company’s transactions;

(b) enable the financial position of the company to be determined with reasonable accuracy at any time; and

(c) allow for accounts of the company to be prepared.

(2) For the purposes of subsection (1), accounting records shall be deemed not to be kept if they do not give a true and fair view of the company’s financial position and explain its transactions ...

[50] Section 175 of the IBC Act further provides in relevant part as follows:

Location and preservation of accounting records

175.(1) For the purpose of this section, the term —

(a) “large company” means a company which meets the annual turnover threshold specified for a “large business” under the Revenue Administration Act;

(b) “holding company” means company with no trade or business operations of its own, but holding interests in other companies or assets.

(1A) In the case of a company which is —

(a) a holding company; and

(b) not a large company,

the company shall, where its accounting records are kept outside Seychelles, lodge, not less than on a bi-annual basis, the accounting records at the company’s registered office in Seychelles, provided that any accounting records, whether outside Seychelles or not, shall be presented to the Seychelles authorities on request.

(1B) In the case of a company other than a company specified under subsection (1A), the company shall—

- (a) prepare an annual financial summary to be kept at its registered office in Seychelles within 6 months from the end of the company's financial year; and*
- (b) where its accounting records are kept outside Seychelles, lodge, not less than on a bi-annual basis, the accounting records at the company's registered office in Seychelles, provided that any accounting records, whether outside Seychelles or not, shall be presented to the Seychelles authorities on request.*

[...]

(2A) Where a company —

- (a) keeps a copy of its accounting records at its registered office;*
- (b) keeps its original accounting records in Seychelles at a place other than at its registered office,*

the company shall notify in writing its registered agent of the physical address of the place where the original accounting records are kept.

(3) Where the place at which a company's original accounting records are kept is changed, the company shall inform its registered agent in writing of the physical address of the new location of the records within 14 days of the change of location.

(4) The accounting records shall be preserved by the company for at least 7 years from the date of completion of the transactions or operations to which they each relate.

(5) A company that contravenes this section shall be liable to a penalty fee not exceeding US\$10,000.

(6) A director who knowingly permits a contravention under this section shall be liable to a penalty fee not exceeding US\$10,000.

[51] As can be seen, section 175 makes a distinction between IBCs which keep their original accounting records outside Seychelles and those the accounting records of which are kept in Seychelles. For an IBC which keeps its accounting records outside Seychelles, there is an obligation on the company to lodge its accounting records at the company's registered office in Seychelles i.e. the office of the registered agent, not less than on a bi-annual basis (section 175(1A) and (1B)(b)). It would seem however that an IBC may keep copies of its accounting records at its registered office, or keep its original accounting records in

Seychelles at a place other than at its registered office. In the latter case the IBC must inform the registered agent of the physical address where the original accounting records are kept (section 175 (2A)). In any event “*any accounting records, whether kept outside Seychelles or not, shall be presented to the Seychelles authorities on request*” (section 175 (1A) and (1B), presumably by the registered agent where such accounting records is in its possession, or by the IBC itself where the registered agent does not have them. Non-compliance with section 175 renders an IBC liable to a fine (section 175 (5)).

[52] It is not known whether the accounting records of the IBCs in this case are kept in or outside Seychelles. If they are kept outside Seychelles, then provided the IBCs are in compliance with their obligation to lodge their accounting records at the office of the registered agent, such records may be obtained from the registered agent who must furnish them if requested. It is to be noted that the registered agent has no power to compel an IBC to lodge the records at the registered office where the IBC does not do so. Similarly if copies of the records are kept at the registered office the registered agent must provide such copies upon request. If on the other hand, accounting records are kept in Seychelles, but not at the registered agent’s office, then the registered agent will not be in a position to provide these records which may best be obtained from the IBCs themselves. It must be noted that while the registered agent needs to monitor compliance by specified entities (i.e. IBCs) with their “record-keeping requirements” (which include keeping accounting records, or where the accounting records are kept at a place other than the IBC’s registered office, written notification of the physical address of that place) the registered agent cannot compel an IBC to comply with those requirements.

[53] To summarise, a registered agent is not required to have a list of assets of an IBC and a request for such information might be more suitably addressed to the IBC itself and/or its directors, especially where nominee director services are not provided by the registered agent. When the request for information regarding the companies’ assets is addressed to the registered agent, as in the present case, and it does not have the information, it cannot be faulted for not providing the information. However information regarding assets may be found in the accounting records, which the registered agent may or may not have at the registered office of the IBC. When accounting records are requested by a competent

authority, the registered agent which has such records in its possession must furnish it. Alternatively it is the IBC on whom the obligation to keep reliable accounting records lies, who has a duty to furnish it. In such circumstance, the registered agent can request it from its clients, the IBCs and facilitate the process. If the company and/or its directors refuse to provide accounting records, the registered agent can only report non-compliance to the Financial Services Authority which may be sanctioned by a fine or the name of the IBC being struck off the Register. Where the registered agent does not have the accounting records in its possession the better course would be to request the records from the IBC and/or its directors.

[54] Accounting records were not expressly requested by the applicant. Even if they were, considering the layered structure of the holding of the Monaco property, the financial documents of the IBCs may well only show that the IBCs hold shares in the other offshore companies in different jurisdictions which own the property in Monaco, and such information may still not be satisfactory for the applicant's purposes which is to ensure that ownership of the house in Monaco is not disposed of by her husband. In such a circumstance, even if the accounting records were to be provided by the registered agent but do not fully disclose all the assets of the IBCs, it does not appear that the applicant would have any remedy against the registered agent as the agent would have complied with its duties. In that case, the applicant's remedy would lie in seeking disclosure orders against other parties.

[55] In the circumstances the Court can only make the following Orders:

- (a) If ACT has provided nominee director services directly through one of its own directors to Kirkwell and/or Shanklin, for it to disclose any information that it may have regarding assets of the companies.
- (b) For ACT to disclose any accounting records in its possession showing the assets of the company.

Copies of instructions relating to any transfer or pledge of assets; Proof of any transfer or pledge of assets with full particulars

- [56] The ability of the Corporate Services Provider to produce these documents depends of course on whether any transfers were effected, or pledges or charges created or there were any instructions regarding the same.
- [57] With regards to transfer of assets, section 206 of the IBC Act provides that certain dispositions of assets require approval by resolution of directors and members of the company, in particular, *“any sale, transfer, lease, exchange or other disposition, other than a mortgage, charge, pledge or other encumbrance or the enforcement thereof, of more than fifty per cent in value of the assets of the company, if not made in the usual or regular course of the business carried on by the company”*. Resolutions of directors and members in general were ordered to be disclosed in the Court’s Order of the 18th February 2021. I note that they are not being requested in the present application and it therefore appears that they have been provided. Therefore any resolutions approving any transfer of assets requiring the approval of directors and members under section 206 would also have been provided by the respondent. It is to be noted however that not all dispositions are caught by this provision which targets dispositions *“of more than fifty per cent in value of the assets of the company”* and also excludes *“mortgage, charge, pledge or other encumbrance”*. The registered agent would therefore not have information on such dispositions unless it has an obligation to keep records thereon.
- [58] The transfer of the IBC shares themselves is dealt with in Sub-Part III of Part V of the IBC Act entitled Transfer of shares. Section 62(5) provides that where a transfer of shares is effected the name of the transferee shall be entered in the Register of Members. The respondent was ordered to provide the Register of Members in the Order of 18th February 2021 which is not being requested in the present application and therefore appears to have been disclosed. I note that the directors may resolve to refuse or delay registration of a transfer of shares in which case it will not be reflected in the Register of Members, but it will be reflected in the resolutions of directors, which as stated appear to have been disclosed.

[59] Pledges are dealt with in Sub-Part VII of Part V entitled “Security over shares” and in Part IX entitled “Charges over Company Property” of the IBC Act.

[60] With regards to pledges over company shares, section 89 defines ‘pledge’ as “*any form of security interest, including, without limitation – (a) a pledge; (b) a charge; or (c) a hypothecation, over one or more shares in a company, other than an interest arising by operation of law*”. Section 90 states that “[s]ubject to (a) the provisions of a company’s memorandum or articles; and (b) any other prior written agreement made by the shareholder, a shareholder may pledge a share held by him in a company”. Section 91 which relates to the form of pledge of shares provides:

Form of pledge of shares

91. (1) *A pledge of shares of a company shall be in writing signed by, or with the authority of, the shareholder whose name is entered in the company’s register of members as the holder of the share to which the pledge relates.*

(2) *A pledge of shares of a company need not be in any specific form but it shall clearly indicate –*

(a) the intention to create a pledge; and

(b) the amount secured by the pledge or how that amount is to be calculated.

[61] Section 96 of the IBC Act further provides that the company shall enter a statement that shares are pledged, in its register of members at the written request of a shareholder who has created a pledge over shares in a company. Therefore it appears that it is not compulsory to enter pledges of shares in the register of members unless the shareholder so requests and the registered agent will only have knowledge of pledges on shares where this is done. As stated it appears that the register of members was provided by the respondent as it is no longer being requested.

[62] Pledges over company property as well as other forms of charges over company property are referred to as a ‘charge’ under the IBC Act. It is distinguished from the abovementioned pledge/charge over company shares, and as noted above it is dealt with under Part IX – Charges over Company Property. Section 177 defines ‘charge’ as “*any form of security interest, including, without limitation – (a) a charge, by way of fixed or floating charge; (b) a mortgage; (c) a pledge; or (d) a hypothecation, over property, wherever situated, other than an interest arising by operation of law*”. Under the same

provision ‘property’ is defined to include “*immovable property, movable property, money, goods, intellectual property and every other type of property wherever situated and obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property*”. Under section 178, subject to its memorandum and articles, a company may, by an instrument in writing, create a charge over all or any of its property.

[63] Pursuant to section 179 of the IBC Act, where a charge has been created, a company shall keep at its registered office in Seychelles a register of all relevant charges and pre-existing charges created by the company to be known as its Register of Charges. Details that need to be included in the Register of Charges are specified in section 179(1) and are as follows:

- (a) if the charge is a charge created by the company, the date of its creation or, if the charge is a charge existing on property acquired by the company, the date on which the property was acquired;*
- (b) a short description of the liability secured by the charge;*
- (c) a short description of the property charged;*
- (d) the name and address of the chargee, who may be acting as a trustee or security agent for other persons;*
- (e) details of any prohibition or restriction, if any, contained in the instrument creating the charge on the power of the company to create any future charge ranking in priority to or equally with the charge.*

[64] Subsection (2) of section 179 provides that the Register of Charges may be in such form as the directors may approve but if it is in magnetic, electronic or other data storage form, the company must be able to produce legible evidence of its contents. A company and/or director that contravenes section 179 (1) shall be liable to penalties provided under section 179 (3) and (4). As noted earlier a company shall also furnish the Register of Charges (if any) pursuant to a request under section 173(2) of the same Act (see paragraphs [19] and [20] herein).

[65] Section 181(1) of the IBC Act further provides that where a company creates a relevant charge, an application to the Registrar to register the charge may be made. In such a case, the Registrar shall keep a Register of Registered Charges with respect to each company

containing information regarding each charge registered (section 181(3)). Where a charge has been registered, any person may ascertain whether an IBC has any registered charge by requesting a Certificate of Official Search under section 352(1), which provides that any person, on payment of the specified fee, may request the Registrar for a certificate of official search in respect of any company. The Certificate contains certain particulars in respect of an IBC including, among others, the number of outstanding and discharged registered charges (section 352(1)(i)). Certificates of official search for both IBCs are contained in the bundle of documents enclosed with the Order for Dismissal mentioned earlier (pages 48 and 50). The Certificates show that at the time of their issue there were no outstanding or discharged registered charges in relation to both companies. However, from the wording of section 181 it appears that it is not compulsory for a charge to be registered with the Registrar. Hence where a charge was created but not registered, the Certificate of Official Search will not show any charges.

[66] However, as stated above, if there are any charges, it is mandatory for the registered agent to keep a Register of Charges at its office under section 179. Nevertheless, as also stated above, where charges were created, no such document will exist or be in the registered agent's possession.

[67] In the circumstances the Court can only order the respondent to disclose any Register of Charges kept at its office.

Any other relevant documentation and/or information held by the respondent relating to Kirkwell Inc. and Shanklin Holdings Ltd

[68] The request for “[a]ny other relevant documentation and/or information held by the respondent relating to Kirkwell Inc. and Shanklin Holdings Ltd” is quite broad. As noted above, a registered agent has an obligation to keep only certain documents and if it has not provided any of these documents the applicant should specify which of those documents have not been provided. Any further documents and information beyond the scope of those required to be kept by the registered agent should be requested from the IBCs and their directors.

Decision

- [69] The Norwich Pharmacal order for disclosure granted on the 18th February 2021 is for disclosure of documents or information in the respondent's knowledge or possession in respect of the two IBCs Kirkwell and Shanklin. In the present application, Counsel for the applicant has requested for **documents** listed at paragraph 22(a) of his submissions namely: any nominee or other trust documents, copies of powers of attorney and copies of instructions relating to any transfer or pledge of assets and proof of any such transfer or pledge of assets. Counsel has also requested for **information** listed at Paragraph 22(c) of his submissions which relates to assets held formally or informally by the IBCs, any transfer or pledge of such assets as well as any other relevant information that the respondent has in relation to the IBCs.
- [70] The ability to produce documents and information is different from an obligation to do so. The registered agent of an IBC is legally required to keep certain documents in relation to its clients, some of which it has an obligation to produce upon request being made. An IBC also has its own obligations to keep certain records and provide them upon request being made. The current request however, is addressed to the registered agent and not to the IBC.
- [71] A registered agent may request certain information from third parties including the IBCs to which it provides services and/or the directors of such IBCs, but the registered agent is not obliged to do so unless it is required to keep such information. If the third parties refuse to provide the information to the registered agent the latter cannot compel them to do so. The registered agent may only report non-compliance by the IBC with its “record-keeping requirements” in relation to documents and records to the Financial Services Authority or the Registrar which may then apply the prescribed sanctions for the non-compliance.
- [72] Having analysed the relevant legal provisions relating to the obligations and duties of a registered agent of an IBC in light of the application for further disclosure of documents and information, I make the following Orders:

- (a) The respondent shall not later than 14 days from the date of this Order disclose the following documents and/or information in the respondent's possession or knowledge in respect of Kirkwell Inc. and Shanklin Holdings Ltd:
- (i) Confirm whether it acts as, has provided or arranged for others to provide a nominee shareholder for Kirkwell and/or Shanklin, and if it does or has, disclose the nominee agreement required to be kept pursuant to paragraph 24.2 of the Code for ICSPs.
 - (ii) If the respondent has not already done so, confirm the nature of the relationship between the Carey Group and ACT, if any.
 - (iii) If the respondent has not already disclosed the register of beneficial owners, disclose the identity of any nominee(s) holding interest on behalf of the beneficial owner, the particulars and details of the interest held by such nominee and any relevant information regarding such nominee and interest.
 - (iv) Confirm whether it has provided nominee director services to Kirkwell and/or Shanklin, directly through one of its own directors or indirectly through an employee/professional officer, and if it has provided nominee director services directly through one of its own directors, provide any powers of attorney issued by such director.
 - (v) If it has provided nominee director services directly through one of its own directors to Kirkwell and/or Shanklin, disclose any information that it may have regarding assets of the companies.
 - (vi) Disclose any accounting records in its possession which show the assets of the company.
 - (vii) Disclose any Register of Charges created by Kirkwell and/or Shanklin kept at its office.
- (b) The respondent shall verify the disclosure made pursuant to paragraph (a) above not later than 14 days from the date of this Order by serving on the applicant's attorney

an affidavit sworn by an authorised officer of the respondent, exhibiting copies of any documents disclosed. If the respondent is unable to provide the documents and/or information as ordered, it should explain in the affidavit the reasons for such inability.

(c) The respondent's reasonable costs including its costs and expenses of complying with this Order shall be borne by the applicant.

(d) This Order is to be served on the respondent forthwith.

Signed, dated and delivered at Ile du Port on 21st March 2022.

E. Carolus J