

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. FSD. 025 OF 2011 (ASCJ)  
(Formerly Causes G0209, G0216, and G0257 of 2010)



20-05-11

**BETWEEN**            **AFONSO HENRIQUE ALVES BRAGA**    **PLAINTIFF**  
                                    **(In his capacity as Administrator)**

**AND**                  1. **EQUITY TRUST COMPANY**  
  **(CAYMAN) LIMITED**

2. **CIBC BANK AND TRUST COMPANY**  
  **(CAYMAN) LIMITED**

3. **COMMERCE MANAGEMENT SERVICES LIMITED**

4. **COMMERCE CORPORATE SERVICES LIMITED**

5. **COMMERCE ADVISORY SERVICES LIMITED**

**DEFENDANTS**

**AND**                  1. **ARNAGE HOLDINGS LIMITED**

2. **BROOKLANDS HOLDINGS LIMITED**

3. **SECURINVEST HOLDINGS S.A.**

4. **BANCO RURAL S.A.**

5. **KATIA RABELLO**

**APPLICANTS**

**IN CHAMBERS**  
**BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE**  
**THE 5<sup>th</sup> – 8<sup>th</sup> APRIL 2011 AND 20<sup>TH</sup> MAY 2011**

**APPEARANCES:    Mr. Anthony Akiwumi with Mr. Richard Annette and Mr. Christopher Levers of Stuarts for the Applicants**

**Mr. Justin Fenwick QC instructed by Mr. Nicholas Dunne of Walkers for the Plaintiff**

## JUDGMENT

1. By their summons the applicants seek orders to set aside earlier orders made by this Court on 27<sup>th</sup> May 2010 (per Justice Cooke); on 1<sup>st</sup> July 2010 (per Justice Henderson) and further ancillary orders made pursuant to section 4 of the Confidential Relationships (Preservations) Law (“the CR(P)L”) on 16<sup>th</sup> June 2010 (“the CR(P)L Order”).
2. By the Orders of 27<sup>th</sup> May and 1<sup>st</sup> July 2010, the Plaintiff, Dr. Braga, obtained directions to the Defendants for disclosure of confidential information held by them in respect of the affairs of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants and which information relates also to and affects the interests of the 3<sup>rd</sup> to 5<sup>th</sup> Applicants.
3. These Orders were made by the invocation of the principles laid down in the Norwich Pharmacal case (on the basis that the Defendants - all corporate service providers in the Cayman Islands – had become innocently “mixed up” in the wrong-doing of the Applicants: see Norwich Pharmacal Co. v Customs and Excise Commis. [1974] A.C. 133 (hereinafter “the Norwich Pharmacal Orders”).
4. The CR(P)L Order was made in furtherance of the Norwich Pharmacal Orders on the basis of the requirement under section 4 of the CR(P)L, that confidential information obtained during the course of a professional relationship, may be disclosed without the consent of the beneficiaries for the purpose of being given into evidence in judicial proceedings, only after the seeking and obtaining of directions from this Court for those purposes. The CR(P)L Order thus came to contain provisions by which Dr. Braga was required to give certain undertakings for the protection of the confidential information before it was released to him for

evidential purposes in Brazil. It is on the basis of his alleged breach of those undertakings that the Applicants seek the setting aside of the CR(P)L Order and the making now of consequential orders. For the further reason also of Dr. Braga's alleged misrepresentations and non-disclosures upon his applications for the Norwich Pharmacal Orders, the Applicants also seek the setting aside of those Orders.

5. This application is in no sense an appeal against the making of the Norwich Pharmacal or CR(P)L Orders. Having been made *ex parte*, all those orders are now susceptible of review, variation and even being set aside on the basis that the Applicants, as persons whose interests they affect, are now able for the first time to challenge the bases upon which they were made; including challenges as to the fulfillment of the duties of full disclosure and good faith on the part of the Plaintiff when seeking disclosure. See *In C. Corporation v P [1994] CILR 89* as authority for that well settled proposition and in which is discussed the leading case authorities on the duties of disclosure and good faith. These include *Dubai Bank Ltd. v Galadari and Others [1990] Vol. 1 Lloyds Rep. 120* and *Brink's Mat v Elcombe 1 WLR 1350* in the latter of which it was held that:

*"...on any ex parte application it was imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances; but that, notwithstanding proof of material non-disclosure which justified or required the immediate discharge of an ex parte order, the court had a discretion to continue the order or make a new order..."* (as taken from the head note at page 135).

6. Dr. Braga accepts the full meaning and effect of the duties which were upon him as the applicant but seeks to rely nonetheless on the *locus poenitentiae* to be

afforded by the discretion mentioned in the latter aspect of that dictum, in the event it is found that he failed in any aspect of his duties as applicant.

### **The Factual Background**

7. I will, of course, come to examine and decide upon the allegations of Dr. Braga's failure to make full disclosure, of his alleged misrepresentations and breaches of undertakings but, before so doing, the factual context of this complex matter must be explained. It arises from amidst allegations of the fraudulent stripping away of the assets of the Petroforte Group of companies which are in bankruptcy in Brazil, by the former principal of the group Ari Natalino de Silva (now deceased), in collusion with another large group of companies called the Rural Group, whose principals are the Rabello family. I preface the findings and observations made in this judgment about the allegations raised by Dr. Braga against Securinvest, its affiliates and beneficial owners in this way: all such allegations are, for the purposes of this judgment to be regarded only as allegations, as yet unproven. This judgment proceeds on the basis that it is for the Brazilian Courts and not this Court, to decide upon the factual merits or lack of merits of all such allegations.
8. The allegations of asset stripping are said to have involved five companies in particular, used in varying degrees by the Natalino and Rabello interests for the purpose of alienating some of the Petroforte Bankruptcy's most valuable assets – assets which include an ethanol plant and a sugar cane plantation valued by Dr. Braga in the order of US200 million.
9. The corporate structure allegedly employed pivoted around the use of the third Applicant – Securinvest Holdings S.A. ("Securinvest") – a Brazilian company in

which the shares are held by the first and second Applicants (“Arnage” and “Brooklands” respectively) which are Cayman Islands companies. It is this corporate connection that causes the train of enquiry to come to this jurisdiction and before this Court.

10. It must be squarely recognised and understood, that the information obtained by Dr. Braga through the Norwich Pharmacal Orders in this jurisdiction, is firstly the identity of the ultimate beneficial owner of Securinvest, as well as information that arguably shows that the Superior Court of Brazil (“the STJ”) was provided with false information by Securinvest as to its real beneficial ownership. This happened in response to an order of 22 September 2009 by which the STJ stayed bankruptcy proceedings which had been instituted against Securinvest. While there is controversy before me now as to its meaning and effect, it is clear at least that that order was specifically made to allow Securinvest to provide that Court with proof of its true beneficial ownership, the issue that was central to Securinvest’s appeal to the STJ.
11. The information obtained here is described by Dr. Braga as proof that representations were made to the STJ as to the ownership of Securinvest which were untrue, such representations supported by false certificates which showed a structure of purported ownership (per certain Costa Rican entities and individuals) only brought into existence on 4 December 2009 and so some two months after the 22 September 2009 STJ stay order was made.
12. Unattractive a proposition as it would be that such potentially relevant and probative information must be recalled and once again cloaked with the mantle of

confidentiality; that would be the result if, in particular, the Applicants' primary allegation - that Dr. Braga was not authorised under Brazilian law to seek and obtain it in this jurisdiction and that he misled this Court in that regard – is proven.

### **Case Summary**

13. The case arises from investigations by Dr. Braga who is the Judicial Administrator of *Petroforte Brasileiro de Petroforte Ltda* (“Petroforte”), a Brazilian company, and approximately 369 others which make up the Petroforte Group (together the “Petroforte Bankruptcy Estate”). The Petroforte Group was owned by the now deceased Ari Natalino de Silva (“Mr. Natalino”), against whom wide-ranging allegations of criminal conduct were made involving the Petroforte Group, including the alleged use of ‘front’ companies designed to conceal the true beneficial ownership of assets. It is the Applicants’ position that they are innocent of and have no direct knowledge of those allegations and their position in respect of them and their purported relevance to these and the proceedings under way in Brazil, is wholly reserved. Dr. Braga was appointed as Petroforte’s Judicial Administrator by the Brazilian Courts in 2003. Dr. Braga’s assessment is that the Petroforte Bankruptcy Estate has been fraudulently deprived of hundreds of millions of dollars in assets which will result in a significant shortfall to creditors. The Petroforte Bankruptcy Estate has approximately US\$1.16 billion in debts owed to creditors

### **The SOBAR Transaction**

14. Dr. Braga alleges that Rural Leasing S.A. (“Rural Leasing”) – one of the companies of the Rural Group which includes Banco Rural (a mid-size Brazilian retail bank), Securinvest and others – were involved in a sham leaseback transaction (or series of transactions) involving a Brazilian company called Sobar S.A. Alcool e Derivados (“SOBAR”) (formerly part of the Petroforte Group); whereby value was concealed and removed from the Petroforte Bankruptcy Estate to the ultimate prejudice of its creditors.
15. In this respect, SOBAR owned and operated the ethanol plant in Brazil, which Dr. Braga estimates by itself has a present day value of US\$60-120 million.
16. Under the terms of the transaction – the bona fides and validity of which are in dispute before the Brazilian Courts – Rural Leasing provided financing to SOBAR pursuant to a sale/leaseback arrangement which the Applicants maintain required SOBAR to pay back the debt in order to re-acquire ownership of the ethanol plant. It is the Applicants’ case that this arrangement was legal and proper, that SOBAR defaulted on its repayment obligations and so that Rural Leasing sued SOBAR for breach of contract.
17. Rural Leasing then sold the “bad debt” so acquired to Securinvest in April 2002 but remained responsible for collecting it.
18. In May 2002, Rural Leasing and SOBAR entered into a revised agreement which was again defaulted upon by SOBAR.

19. In 2003 Rural Leasing, on behalf of Securinvest, commenced a legal action to recover the collateral, that is, the SOBAR ethanol plant. Possession was accomplished in April 2003.
20. On 21 May 2003, Turvo Participações Ltda. (“Turvo”), a Securinvest subsidiary, bought the ethanol plant. It is however crucially alleged by Dr. Braga, that Turvo was then 49% owned by a British Virgin Islands company called River South S.A. and 51% by Securinvest.
21. Further, Dr. Braga maintains that in Mr. Natalino’s testimony, given to the Brazilian Bankruptcy Court on 22 November 2007, Mr. Natalino admitted that he owned River South S.A.. Thus, Dr. Braga points to the revelation of a secret partnership between Mr. Natalino and the Rabellos through Turvo.
22. In 2005 Turvo conveyed the SOBAR plant to Kiaparack Participações Serviços Ltda. (“Kiaparack”). There came a time when the SOBAR plant was then leased by Kiaparack to Agroindustrial Espírito Santo do Turvo Ltda (“Agroindustrial”). It is Dr. Braga's case that Agroindustrial is secretly and beneficially owned by the Rural Group and/or by the Rabello family.

### **The Revocation Proceedings**

23. In December 2006, Dr. Braga filed a revocation suit in Brazil against Turvo, Rural Leasing, Agroindustrial and Kiaparack (“the Revocation Suit”). It is part of the Applicants’ case before me, that the Revocation Suit challenges the legitimacy of the SOBAR transactions described above and that, having filed it, Dr. Braga has wrongfully failed to pursue it, opting instead to appropriate the assets of the Applicants by obtaining the illegitimate and unfair extension of the Petroforte



Bankruptcy so as to include them, through different proceedings through the Brazilian Courts.

**The Extension of the Petroforte Bankruptcy to Securinvest and other Rabello interests**

24. On 20 July 2007, Dr. Braga commenced these proceedings before the Brazilian Courts to seek an order, inter alia, that the Petroforte Bankruptcy be extended to Rural Leasing and Securinvest, on the basis that the SOBAR assets (and other assets) belonging to the Petroforte Group, had been wrongfully diverted out of the Petroforte Group and that this had been done on the basis of Securinvest's alleged links to the Petroforte Group through Turvo and Agroindustrial.
25. On 24 August 2007, the Bankruptcy Court in São Paulo found (on Dr. Braga's ex parte application) that the SOBAR transaction had been a sham and so provided basis for the extension of the Petroforte Bankruptcy. It is said that as the hearing was ex parte, Rural Leasing and Securinvest had no opportunity to make submissions to that Court in that respect. The Judgment is nonetheless challenged on appeal by Rural Leasing and Securinvest in which context they (and other affected entities) deny that the sale and leaseback transaction was not a bona fide transaction and that the foreclosure was a sham. These proceedings remain pending as explained further below.

**Appeal of the Extension of the Bankruptcy to Securinvest**

26. Securinvest's first appeal against the 24 August 2007 bankruptcy extension order was dismissed by the Court of Appeal of São Paulo.

27. The same was the result of appeals taken by Rural Leasing, Turvo and Agroindustrial.
28. Securinvest then took a special appeal to the STJ in Brasilia, the highest court for civil appeals in Brazil. Securinvest argues before the STJ that the extension to it of the Petroforte Bankruptcy was improper because, according to Securinvest, Securinvest and Petroforte belong to separate economic groups.
- (i) On 22 September 2009, the STJ granted the provisional appellate stay order, suspending the bankruptcy extension order pending appeal (hereinafter “the Suspension”), due to its expressly stated concern that Securinvest could be damaged” if it was improperly and prematurely placed into bankruptcy. The Applicants assert that the continuation of the Suspension has been ratified by the STJ on three occasions, by way of Orders dated 7 May 2010, 20 August 2010 and 17 December 2010. While there is controversy also about the meaning and effect of these ratification orders, uncontrovertibly, the Suspension remains in effect.
29. As already mentioned, in the present proceedings the parties disagree as to the meaning and effect of the Suspension. Dr. Braga understands and so contends before this Court now, that the Suspension operates only to prevent the liquidation by him of the assets held by Securinvest but does not suspend (a) his primary duty to investigate as Judicial Administrator of the Petroforte Estate, (which he asserts includes Securinvest, despite the Suspension) and (b) the freezing of Securinvest’s assets.

30. Also, by the terms of the Suspension, the STJ required Securinvest to disclose documents that would reveal the entire chain of its share ownership. It is Dr. Braga's case that this aspect of the Suspension required Securinvest to disclose documents which would reveal the identities of all individuals holding any interest in the share capital of Securinvest, whether directly or indirectly. The Applicants deny that the Suspension contains this disclosure requirement.
31. Rather, in response to the Suspension, it was represented to the STJ on 15 October 2009 and 5 November 2009 by Securinvest, that its shares were owned by the two Cayman Islands companies, Arnage and Brooklands, and that these were in turn owned, as already mentioned, by Costa Rican companies, the shareholders of which were two Costa Rican individuals.
32. Investigations in Costa Rica completed by Dr. Braga in the Spring of 2010, suggested that these individuals were in fact of limited means, the inference being invited that they were "straw men" and that the STJ had been misled as to the identity of the true ownership of Securinvest. It is now also said that at least one of the Costa Rican individuals denies any knowledge of Arnage or Brooklands and disavows any interest in Securinvest.
33. On or about 27 April 2010, Dr. Braga filed a further application and report dated 26 April 2010 with the STJ presenting his private investigator's preliminary findings as at that date and the preliminary conclusions that the above-mentioned Costa Ricans were "straw men" and that the Court had allegedly been misled.
34. It is Dr. Braga's case that, on or about 17 April 2010, he had also moved the STJ to (a) impose a secrecy order over the documents filed by him in connection with

his foreign investigation so that it would not be frustrated; (b) that by written orders dated 27 April and 25 June 2010, Judge Nancy Andrichi of the STJ granted such secrecy relief and (c) that Dr. Braga requested he be given a period of 60 days to attempt to conclude his investigations abroad before the STJ ruled finally on the merits of Securinvest's special appeal. It is, however, the Applicants' contrary case that the STJ entered on 7 May 2010 as stated above, the first order ratifying the Suspension – thus confirming the discontinuation of the extension of Petroforte's bankruptcy to Securinvest. Dr. Braga's case, in response, is that the said ratification order was made in reply to a separate petition filed by Securinvest (in respect of a different asset – a hotel property) and was unconnected with the report of his investigation of 26 April 2010 which was specifically made the subject of judicial secrecy before the STJ. He maintains that the Suspension continues to operate only in the limited sense explained by him.

#### **The Applications to the Cayman Islands Courts for Norwich Pharmacal Relief**

35. Dr. Braga applied on 27 May 2010 before Justice Cooke for Norwich Pharmacal relief against the First Defendant – as the registered office provider for Arnage and Brooklands – seeking documentation principally to identify the ultimate beneficial owner(s) of those companies.
36. Dr. Braga stated in his submissions and evidence before the Court then that (1) he is “*authorised to pursue a direct proprietary claim as the insolvency officeholder of Securinvest*” (paragraph 37 of Dr. Braga's first Affidavit); and that (2) “*Securinvest is included in the Petroforte Bankruptcy Estate*”(paragraph 5 of his

Written Submission dated 27 May 2010). Statements to the above effect were repeated throughout the submissions and evidence then put before the Court. The Applicants maintain that in light of the Suspension by the STJ and the other STJ ratification orders, that these and other statements made to this Court were false and should compel me now to discharge the Norwich Pharmacal Orders.

37. The first Norwich Pharmacal Order was granted ex parte by Cooke J on 27 May 2010. Following an application shortly thereafter by the First Defendant (“Equity Trust”) under section 4 of the CR(P)L, the material from Equity Trust was provided to Dr. Braga subject to the undertakings required by this Court of Dr. Braga.
38. The disclosed material indicated that Equity Trust had only recently been appointed as the registered office of Arnage and Brooklands, and consequently, the further Norwich Pharmacal Order was sought against the Second to Fifth Defendants, who were indicated to have provided various services to Arnage and Brooklands in the past. This is the Order that was granted ex parte by Henderson J. on 10th July 2010, and disclosure was made, again following an application under section 4 of the CRPL.
39. All orders were made by this Court subject to comprehensive confidentiality provisions in order to preserve the confidentiality of Dr. Braga's investigation, which was itself represented as then being subject to strict judicial secrecy orders, of both the Bankruptcy Court in São Paulo and of the STJ in Brasília. In the case of the first Norwich Pharmacal Order, this was ordered on an ongoing basis and in

the case of the second, for an initial period of two weeks which was subsequently extended until 7 September 2010.

40. The Applicants' summons is supported by Katia Rabello ("Ms. Rabello") and Sistema Financeiro Rural (a financial group which operates Banco Rural, the Brazilian retail bank of which Ms. Rabello is the principal beneficial owner).
41. The existence of the Cayman Islands' disclosure became apparent to the Applicants upon deployment by Dr. Braga of the subject documents in the Brazilian proceedings on 28 October 2010, following which the Applicants applied to this Court to have the Norwich Pharmacal and CR (P)L Orders set aside, for delivery up of the documents disclosed and for the grant of an injunction restraining their use in any further proceedings.

**The arguments for the setting aside of the *Norwich Pharmacal Orders***

42. These may now, after the conclusion of the hearing, be summarised under five heads as follows:
  - (i) Dr. Braga's alleged misrepresentation to this Court as to the nature, meaning and effect of the Suspension – that is; the Stay Order of the 22 September 2009 of the STJ, as ratified or confirmed by the STJ on 7<sup>th</sup> May 2010 (Subsequent confirmations of the Suspension on 20<sup>th</sup> August 2010 and 17 December 2010 are now relevant only as to the true meaning and effect of the Suspension itself, not to the pivotal question of Dr. Braga's state of mind at the time of the Norwich Pharmacal applications which pre-dated those latter confirmations).

As a corollary of this, the alleged misrepresentation by Dr. Braga as to his status as officeholder over Securinvest in light of the suspensive meaning and effect of the Suspension.

And, as a further corollary, Dr. Braga's alleged misrepresentation to this Court as to his authority to act in the Cayman Islands as the equivalent of trustee in bankruptcy of Securinvest – the basis upon which he obtained the Norwich Pharmacal Orders.

- (ii) Dr. Braga's alleged non-disclosure of the Revocation Suit which he had instituted in respect of the SOBAR transaction and which he had failed to pursue; instead, seeking to extend the Petroforte Bankruptcy to Securinvest and other Rural Group entities.

As a corollary of this, the effect of the Revocation Suit as a matter of Brazilian law.

As a further corollary, the alleged failure of Dr. Braga to disclose to this Court, Securinvest's defence to the SOBAR fraud allegations.

- (iii) Dr. Braga's alleged breach of the express undertakings given to this Court upon the grant of the CR(P)L orders for disclosure of the confidential information belonging to Arnage and Brooklands and so relating to or belonging to their ultimate legal and/or beneficial owners. Related to this, Dr. Braga's alleged breaches of the implied undertakings given to this Court upon seeking and obtaining the Norwich Pharmacal Orders.
- (iv) Whether or not Dr. Braga was obliged to seek recognition and authorisation to act in the Cayman Islands pursuant to Part XVII of the

Companies Law, (were he properly to be regarded as a foreign representative of a bankruptcy estate) instead of bringing an application or Norwich Pharmacal relief as he did.

- (v) Other issues of principle relating to the seeking and obtaining of Norwich Pharmacal relief or related Bankers Trust relief (*Bankers Trust v Shapira* [1980] 3 ALL E.R. 353) – which further relief was also given as part of the Norwich Pharmacal Orders.

(i) **The nature and effect of the Suspension**

- 43. The Applicants do not allege that Dr. Braga failed entirely to disclose the existence of the Suspension to this court upon this application for the Norwich Pharmacal Orders.
- 44. Their complaint is, instead, that the true nature, meaning and effect of the Suspension was not explained and that there was an obligation on Dr. Braga as the Plaintiff claiming to be a foreign trustee in bankruptcy, to bring to the attention of this Court matters peculiarly within his knowledge and all matters that could affect the exercise of its jurisdiction and discretion. It is in this regard they say that Dr. Braga deliberately failed to explain that the Suspension operated so as to discontinue fully any remit he might have had as trustee over Securinvest – a state of affairs which the Applicants say, properly understood, would have led this Court to refuse the making of the Norwich Pharmacal Orders.
- 45. Moreover, it was on the 27<sup>th</sup> May 2010, after the affirmation of that date by the STJ of the Suspension, that the Plaintiff obtained the Norwich Pharmacal Orders here without identifying and explaining the affirmation.



46. The crucial issue as to whether Securinvest and Petroforte are of one “economic group” – so as to justify the extension to it of the Petroforte Bankruptcy – was and is still at large, and so the Applicants say, Dr. Braga had an obligation to identify that as a pivotal issue leading to the grant of the Suspension by the STJ and that that issue should also have been explained to this Court. Dr. Braga failed to do so.
47. Ultimately, assert the Applicants, Dr. Braga’s failure to explain that his own appointment over Securinvest was no longer in effect, is a failure which should be fatal to the relief which he obtained.
48. The Suspension, as it is contained within the STJ’s rulings as put before this Court upon the Norwich Pharmacal applications, form part of the written decision of Justice Nancy Andrichi who gave judgment on behalf of the STJ.
49. Set out following are the relevant extracts from the English translation in similar terms to that put before this Court upon the Norwich Pharmacal applications (now taken from Exhibit 7 to the Affidavit of Dr. Caetano De Vasconcellos Neto, at Volume 4 Tab 1.6 of the Applicants’ evidence):

REPORT

*[HER] EXCELLENCY Mrs. Justice Nancy Andrichi (relator).*

*“This is a provisional remedy proposed by Securinvest Holdings SA in order to give a suppressive effect to a special appeal filed in order to challenge the court decision recorded by [the Appellate Tribunal of Justice Sao Paulo].*

*The claimant states that in the legal records of the bankruptcy of the company Petroforte Brasileiro De Petrolio Ltda, the singular court, considering that there are irregularities in the transfer of assets of the bankrupt company to a number of other companies, determined the extent of the effects of bankruptcy to all of them, including the claimant.*

*It states [the claimant] that it was not timely made aware of this act, so that it could not defend itself in the first instance, and that the (extension) of bankrupt(cy) could only be determined, incidentally, without contradiction, if there were companies belonging to the same economic group.*

*In order to challenge the said decision of the singular judge, the claimant filed an interlocutory appeal which was not granted with a suppressive effect. Upon the trial occasion on the merits of the appeal the Court found it fit to negate granting, revoking the previously granted suppressive effect.*

....

#### *VOTE*

*In order to grant an injunctive relief in a provisional remedy it is necessary to combine two elements, embodied in the appearance of the law (“fumus boni juris”) and in the danger of delay in the court rendering (“periculum in mora”). As is generally known, in cases such as this one, where the part aims to give suppressive*

*effect to a special appeal, these two requirements...should be analyzed considering only the chances of success for the said special appeal – with all the restrictions for its admissibility – as well as the effects that shall be produced from any possible granting.*

*In the event of the legal records, the special appeal is caged to [(contained in)] the three lines of argument.*

*...In the first place, one affirms that the court decision lacks of recital.... Secondly, it is argued that the lack of citation of Securinvest prior to the extension of the Insolvency, would have offended the principle of contradiction[(due notice)] and full legal defence....Thirdly, considering that, although it is considered possible to extend the insolvency to third parties without an independent process, it could be done only in the event that marked the existence of an economic group, which is not proven in this lawsuit....*

*The first two lines of arguments do not present major difficulties...*

*For the granting of a provisional remedy, which seeks to advance the protection appeal however, it would be needed more than that, namely, to be demonstrated the likelihood of success for the appeal as for the merits of the controversy. On the other hand, the possibility of extending the insolvency to other companies, through a decision taken incidentally in the bankruptcy court, without*

*necessity of an independent process or demonstration of guilt, is a pacific subject in the STJ.*

...

*By allowing the extension of the Bankruptcy through incidental procedure, the STJ took aim at the assumptions that there is corporate commitment. Without it, we cannot reach, by disregarding the assets of a third party unconnected with the economic group.*

*The gravity of the decision determining the effects of one company's failure to another is evident. Usually, the bankruptcy constitutes an irreversible extent. Such being the case, every precaution must be taken so that such a decision is taken only in a safe manner.*

*The doubt as for the economic group to which Securinvest pertains, recommends that, initially, its right is to be safeguarded.*

*Until we can define to which economic group this company belongs, I understand (it) convenient to suspend for the time being, the declared bankruptcy before damages caused to the company becomes irreversible. However, this measure cannot be extended indefinitely. The uncertainty that hangs over the issue should be clarified.*

*Securinvest, as shown by the information contained in this provisional remedy, is a company composed by two partners:*

Arnage Holdings Ltd. and Brooklands Holding Ltd. (both legal entities incorporated in a foreign country). There are documents, submitted in the process, realizing that none of these foreign companies has, among its partners, either companies or natural persons that...join Rural Group or Petroforte Group. This information, however, is not sufficient to clarify any doubts that this case raises. It is necessary that Securinvest does not just tell who does not participate in its capital. For example, it is possible that the companies Arnage and Brooklands have, among their partners, other legal entities that indirectly, it is possible to identify both economic groups. Thus, in place of saying who are not its partners Securinvest, in order to eliminate impasses as for the issue, must indicate who effectively has shares in its capital stock.

Strong on such grounds, I grant this injunctive relief, suspending the declaration of the bankruptcy of Securinvest for the time term of fifteen (15) days. In this said period, the claimant shall submit to the STJ any documents that show who they are, precisely, its partners and in the case of legal entities, who are its respective partners, partners of the partners and so forth, so that we may clear up the corporate chain up to indicating all material persons who have a direct or indirect share in the capital stock of the company.

*After submitting such information, the legal records should return to the conclusion for ratification or revocation of the injunctive relief now granted...” (emphasis added).*

It is acknowledged that the reference to “partners” means “shareholders”.

50. On the basis of the presentation of the evidence of Costa Rican ownership then before them, the STJ affirmed the suspension of the extension of the bankruptcy to Securinvest in the following terms on 7<sup>th</sup> May 2010, again per Justice Nancy Andrichi:

*“Decision*

*I ratify the granted injunctive relief until the judgment of the special appeal to which is tied this Provisional Remedy*

*Publish. Notify  
Brasilia (DF) May 7, 2010*

*Justice Nancy Andrichi  
Relator*

*Provisional Remedy No. 15,526 – SP (2009/0081499-0).”*

51. This decision of the 7<sup>th</sup> May 2010, it is common ground, was not put before this Court on the Norwich Pharmacal applications.
52. On Dr. Braga’s account, this decision came after the orders given by the STJ on 27<sup>th</sup> April 2010 (said by him to have been given orally by Justice Andrichi on 17 April 2010 but also apparently produced in writing on 27<sup>th</sup> April 2010); in which his investigations were endorsed by the STJ (allowing an extension of a further period of 60 days for their completion) and on 25<sup>th</sup> June 2010 when the STJ ordered the closure of the STJ Court file to protect the confidentiality of the documents recovered by the Plaintiff – all part of a process described as being “subject to judicial secrecy”.

53. Dr. Braga further explains that the STJ order of the 27<sup>th</sup> April 2010 followed on his application for the extension of time and in which he advised Justice Andrighi of the ongoing investigations (earlier approved by the First Instance Bankruptcy Court by order on or about March 19, 2010) (see page 351 of Volume 1 of Dr. Braga's evidence). These ongoing investigations by way of the private investigatory firm – *OAR Brasil Consultatria Ltda* – and their report revealing the falsity of the alleged Costa Rican ownership of Securinvest were brought to Justice Andrighi's attention. Dr. Braga then moved the STJ in these terms on the 26<sup>th</sup> April 2010 (see page 360-366 of Volume 1 of the Plaintiff's evidence):

*“Consequently, in view of the foregoing and taking into account the fact that information to be investigated by the bankrupt party [that is: the Plaintiff in his official capacity] is relevant for the proper unraveling of this matter, this petition serves to request the suspension of these proceedings for a period of 60 (sixty) days or until the bankrupt party has finished gathering new documents.*

....

*I hereby request...as with case No. 1819 commenced by the Court of First Instance processing the bankruptcy proceedings – that these proceedings be conducted subject to judicial secrecy, in order that the Petitioner, SECURINVEST, only may know of the investigation works carried out by the bankrupt party for this purpose following conclusion thereof, in order that those works are not obstructed or thwarted.”*

54. Justice Andrichi's order on behalf of the STJ on the 27<sup>th</sup> April 2010 followed in these terms (taken from page 395 of Volume 1 of the Plaintiff's evidence):

"Decision

*I hereby order for the following proceedings to be carried out under judicial secrecy [giving the relevant Cause numbers] due to the confidential nature of documents attached hereto, at the request of this Reporting Minister.*

*Let it be published and notified.*

*Brazilian (Federal District) April 27, 2010.*

*Minister Nancy Andrichi  
Reporting Minister"*

55. This order of the 27<sup>th</sup> April 2010 is discussed in some detail in Dr. Braga's 3<sup>rd</sup> Affidavit (at paras. 82-84) where he refers interchangeably to it as a written and oral order (and similarly in his 2<sup>nd</sup> Affidavit). The reason for this varying description of the order of the 27<sup>th</sup> April 2010 is not readily apparent but in light of the written record of it, it must be deemed to exist in writing and so to speak for itself.
56. Then next, on the 25<sup>th</sup> May 2010 in furtherance of the same proceedings "*subject to judicial secrecy*";, it appears that after interrogation of the named Costa Rican individuals by OAR, Dr. Braga again reported and applied to the STJ in the following terms:

*"1. ...the supposedly owner – partner "Andriana Condero Ehrenberg", disclosed by SECURINVEST in these records, is unaware of her condition as shareholder and President as well of the existence of the company itself....*



2. Finally, for the information of Your Honour, the Administrator informs that other investigations are being carried out abroad, and the documents obtained from such investigations will be provided within the 60 day term already granted by this Honourable Court.

....

Sao Paulo, May 25, 2010  
AFONSO Henrique Alves Braga”

(emphasis added)

57. That was the state of things before the STJ immediately before the application to this Court on 27<sup>th</sup> May 2010 and that report evinced the following later response of 25<sup>th</sup> June 2010 from the STJ (again per Justice Andrighi); after it had come to light that there had been an erroneous and unauthorised breach of secrecy by the photocopying of the Court file by an STJ member of staff:

“Decision

*Remove the documents on pages 1.379 to 1.399 so they can be recorded in a separate file kept under secrecy, in office, allowing examination by the parties only when the Reporting Minister expressly authorises it.*

*Brasilia (Federal District) June 25<sup>th</sup>, 2010*

*Minister Nancy Andrighi  
Reporting Minister”*

58. “Judicial secrecy” having been thus re-imposed, the next development before the STJ, while it occurred after the grant of the Norwich Pharmacal relief here, serves nonetheless also to inform the debate over the true nature of Dr. Braga’s standing before that Court, following the Suspension and as at the time of his application to this Court.

59. It appears from page 435 of Volume I of the Plaintiff's evidence – a further report and application by Dr. Braga to the STJ dated 20 July 2010 in which he reported, inter alia, as follows:

- “4 (i) ...
- (ii) ...some information below was obtained through a break of secrecy in the Cayman Islands.
- (iii) Letter from Mrs. Katia Rabello addressed to the former administrator of Arnage and Brooklands, dated November 9th 2009, requesting the transfer of the “register offices” to the company Equity Trust, of which she is a final beneficiary (“owner”).
- (iv) Equity Trusts forms prove that just on December 4<sup>th</sup>, 2009, the Costa Rican companies became “shareholders” of Arnage and Brooklands....

*It is therefore concluded that the information brought by Securinvest, besides being incorrect due to the fact that it omits the real owner – did not even exist when they were brought to the records, since, as the documents included in the attached report show, the aforementioned change just took place on December 4<sup>th</sup> 2009. It is noteworthy that Securinvest manipulated the information, falsifying the true facts just to mislead the Judicial Authority.*

6. *At last, for the information of Your Excellency, the Administrator informs that other diligences are being carried out abroad, and the documents obtained from such diligences will be brought to the records within 60 days.*

....

7. *Thus, being certain that (i) besides not complying with the order [(that is the Suspension of 22 September 2009)]dictated by Your Excellency, Securinvest has falsified the true facts; (ii)adding to the already confirmed association between many companies of the Economic Group Petroforte – Rural; (iii) and, at last, it has been proved that Mrs. Katia Rabello is the owner of Securinvest and Rural Bank and their many companies; this is to reiterate the petition to reconsider the injunction granted*

*to suspend the bankruptcy effects to Securinvest, or else, to keep the Bankruptcy Estate in possession of Hotel Nacional [(a hotel belonging to the Rural Group earlier ordered by the First Instance Bankruptcy Court to be taken over by Dr. Braga)] which has been kept completely operational, generating revenues. Please note that keeping the current situation does not produce any risks to Securinvest since the Bankruptcy Estate will not sell any assets until the final consolidation of the Bankruptcy extension, keeping them operational. This judicial security does not exist otherwise due to the fact that it has already been stated in other records, requesting the possession of assets that are under the control of the Bankruptcy Estate.*

....

*Sao Paulo, July 24, 2010  
Afonso Henrique Alves Braga”*

60. It is relevant to identify two other aspects of the chronology of events before turning to examine what it reveals.
61. The first, as regards Hotel Nacional, is the fact (as revealed by the report of the accountant Jose Massun Dos Santos to the First Instance Bankruptcy Court) that as at 2<sup>nd</sup> February 2011, the amounts deposited by Hotel Nacional in favour of the Bankruptcy Estate of the Petroforte Group was BR\$3,543,200.10, including some BR\$2,078,200.10 deposited after the date of the Suspension of 22 September 2009 and up to 13<sup>th</sup> April 2010.
62. This is presented by Dr. Braga as compelling evidence to show that the Suspension notwithstanding, he has been allowed to continue to control and manage assets of the Rural Group in favour of the Bankruptcy Estate of the Petroforte Group; subject to accounting in the event Securinvest’s appeal (and those of other Rural Group entities) were to succeed.

63. The second – going to the relevance of the evidence obtained in the Cayman Islands – derives from what was put before the Court of Appeal for the State of Sao Paulo (“the TJSP”) on behalf of Securinvest in its appeal against the extension of the Petroforte Bankruptcy to it.
64. This second point appears from the written case as presented to the TJSP by Dr. Antonio Goncalves Tavares, Securinvest’s advocate and one of a number of lawyers who provide affidavits in support of the Applicants’ application before this Court:

“1) *THE APPELLANT [SECURINVEST] DOES NOT BELONG TO PETROFORTE’S NOR RURAL’S ECONOMIC GROUP*

*The appealed decision extended the effects of the bankruptcy to Petroforte to the Appellant based, exclusively, on the petition of the Administrator of the reported bankruptcy, who makes groundless and awkward accusations, stating that the Appellant belongs to the same economic group of Petroforte and Banco Rural S.A. Finally, the existence of a true promiscuous relationship between the parties is suggested.*

*With all due respect, the statement is not true, and it eventually led the Honourable First Instance Judge to believe false assumptions at the time of sentencing.*

*Your Honour should be asking: then, what is the truth?*

*The truth is that the Appellant is a financial credit securitization company, whose shareholders are two foreign investor companies who saw the opportunity to make good business acquiring bank credits of dubious recovery in Brazil, at a discount, of course, to then collect them judicially or not recovering them, whether partially or in assets. Its profit comes exactly from the difference between receiving more than the amount paid for the discounted credits.*

...

*All this is easily proven by the attached document.... Such fact shows and proves that the only existing relationship between the Appellant and Petroforte's group is one of litigation and confrontation; the Appellant never mingled with Petroforte's group or any other "group". In this way, Honourable Appeals Court Judge, to extend the bankruptcy effects to the company that is merely and only the creditor of a bankrupt group is a true judicial violation, with all due respect.*

....  
*It should be pointed out that there is no evidence of the link between the Appellant with the economic group of the bankrupt company or even with Rural Group, as suggested by the Judicial Administrator. And that evidence simply does not exist because the Appellee was never part of any group, be it Petroforte's or Rural's." (Emphasis added.)*

65. As already noted, that appeal which sought, among other things, an order discontinuing the effect of the extension of the Petroforte Bankruptcy to Securinvest, was refused. It is this decision, taken on further appeal to the STJ that resulted in the Suspension as well as the further subsequent affirmation by the STJ on the 7<sup>th</sup> May 2010, as described above.
66. Against all that background, the two further decisions of the STJ – the first given at the instigation of Securinvest – coming as they did after the fact of the Norwich Pharmacal applications before this Court (that is: on the 20<sup>th</sup> August 2010 and 17<sup>th</sup> December 2010 respectively) and further re-affirming the effect of the Suspension are – as already recognised – of limited assistance in deciding the immediate questions; that is: what was the meaning and effect of the Suspension?; and what was Dr. Braga's true status, at the times of the Norwich Pharmacal applications?

67. However, to the extent there is to be discerned a clear continuity between the Suspension and the subsequent orders of the STJ, the following excerpts from the decisions of 20<sup>th</sup> August 2010 and 17<sup>th</sup> December 2010 are of assistance. First from that of the 20<sup>th</sup> August 2010:

*“Decision*

*The uttered decision pronounced for this 3<sup>rd</sup> Panel when the application of the required injunctive relief, was limited to suspend the effects of the decision that extended the insolvency of the company Petroforte to the claimant.... The content of the decision...is clear: the decree of bankruptcy extension is suspended.*

*It does not compel, however, in this court, directly, to assess each application made as a result of such suspension. Any request that the parties may have are to be assessed individually by the brilliant [(that is: Honourable)] first instance court, that upon ruling shall have only to consider the suspension of the extent of the insolvency to the claimant. In case any of the parties understands that there is injury to its right in relation to acceptance or rejection of an application filed on the first hand, it falls to it to challenge the decision in the manner prescribed in the procedural law.”*

68. The further decision of 17<sup>th</sup> December 2010 appears to have followed on an application (described as “explanation and request”) by the Plaintiff Dr. Braga (dated 5<sup>th</sup> October 2010 to be seen at p. 512 of the Plaintiff’s evidence Volume 1), in which he explains his understanding of the meaning and effect of the Suspension (and subsequent decisions of the STJ) and requests of the STJ clarification that the Suspension does not prevent him as Administrator of the Petroforte Bankruptcy Estate (as extended to Securinvest) from continuing to possess and operate Hotel Nacional, as a Securinvest asset.

69. This explanation and request recognises that the very issue of continued possession and operation had already been taken up before the First Instance and Appellate Courts and approved by them.
70. Against that background, the STJ's decision of 17<sup>th</sup> December 2010 reads in relevant parts as follows (from page 494 of Volume 1, Plaintiff):

*“Decision*

*As pointed out in the decision of page 1.415 [(that is: of 20<sup>th</sup> August 2010)] since the approval of the injunction, the extension of the bankruptcy decree to the petitioner was suspended. Such suspension refers specifically to the decision that was the subject of the interlocutory appeal that resulted in the special relief for which this injunction is reported.*

*Taking this into consideration, I indicated on the referred decision of page 1.415 that “eventual requests that the parties were to make would have to be assessed individually before the honourable first-level court: and that “in the case of any of the parties to understand that their rights are affected in relation to the approval or denial of a filed request (...) the decision taken against him or her through the means provided in the procedural legislation”.*

*From what is shown in the documents attached to the records, this is exactly what happened. The decision regarding the renewal of the lease contract hereby discussed is currently under review by the Court of Justice of the State of Sao Paulo under the authority of the interposition for interlocutory appeal.*

*Thus, there is nothing to decide regarding the matter, under penalty of being overruled by a higher court.*

...

*Brasilia (Federal District) December 17<sup>th</sup> 2010  
Minister Nancy Andrighi  
Reporting Minister”*

71. So much for the chronology of the Brazilian court decisions, the meaning and effect of which remain to be analyzed.

72. Since the obtaining of the Norwich Pharmacal Orders before this court and in the face of the challenge to the obtaining of that relief brought here by the Applicants, Dr. Braga has framed a Letter of Request, addressed to Justice Nancy Andrichi of the STJ, which he would invite that Honourable Judge to issue to this Court in order to “*clarify the issue brought before the Grand Court of the Cayman Island.*”
73. That application for a Letter of Request, though dated 3 February 2011, had not yet however been taken or granted and so there was no such letter issued to this Court by the time of the hearing of this Application.
74. Faced with the Applicants’ challenge to his authority and their allegations that he had been effectively suspended as officeholder over Securinvest and had misled this Court in that regard, Dr. Braga also moved the First Instance Bankruptcy Court of Sao Paulo (that which had appointed him in the first place) to send a Letter of Request to this Court confirmatory of his status and ongoing entitlement to investigate the affairs of Securinvest. As explained in Dr. Braga’s 3<sup>rd</sup> Affidavit (at paragraph 75) that Court, in the person of Hon. Judge Beethoven did so in his Letter of Request addressed to this Court dated 12<sup>th</sup> January 2011. While the Letter of Request had not arrived through the customary Diplomatic Channels, Dr. Braga has exhibited it. It reads, in relevant part, speaking to Judge Beethoven’s understanding of the meaning and effect of the Suspension, as follows:

*“The aforementioned preliminary suspension decision does not prevent the Administrator (Dr. Braga) from (i) continuing to represent the interests of the bankruptcy estate in reference to the performance of his duties, consisting on the location and recovery*



*of assets and obtaining documents and/or pertinent information, as well as (ii) defend the interest of the bankruptcy estate's creditors. The referred preliminary Suspension Order dated September 22<sup>nd</sup> 2009, merely prevents, for now, the Administrator (i.e. Dr. Braga) from selling or liquidating the assets of Securinvest. ”*

75. A similar Letter of Request appears to have been issued by Judge Beethoven to the Florida District Court to facilitate Dr. Braga's investigations into Securinvest in that State and similarly seeking to explain to that Court his ongoing status as officeholder over Securinvest.

### **Analysis**

76. This first issue, as identified above – going to the meaning and effect of the Suspension (and subsequent decisions of the STJ) and the status of the Plaintiff, including his standing as officeholder over Securinvest to have applied for Norwich Pharmacal relief – is a matter to be decided by me having regard to the record itself of the Brazilian Courts; the competing evidence – including that of the Applicants' experts on Brazilian law; that of Professor Keith Rosenn on behalf of Dr. Braga and that of Dr. Braga himself – as well as the arguments of counsel before me (but, perhaps regrettably, without the benefit of the clarification by Letter of Request sought from Justice Andrichi herself).
77. All that said, there can be no doubt that on the 22<sup>nd</sup> September 2009 Justice Andrichi made an order suspending the effect of the Bankruptcy initially for a period of fifteen (15) days. This was, in my view on the face of the decision, in the first place to allow and require Securinvest to present evidence as to its true beneficial ownership. The pressing issue at that time (and ultimately still remains to be decided) was whether there is any link with Securinvest such as to show an

economic grouping of association between it, Banco Rural and the Petroforte Group.

78. The only information on the Public Record of the Brazilian Courts (up until 5<sup>th</sup> November 2010) was the material submitted by Securinvest on 4<sup>th</sup> and 5<sup>th</sup> November 2010 that showed falsely, it is said by Dr. Braga, that the ownership of Securinvest was held by Costa Rican companies and individuals.
79. On the basis of that evidence Justice Andrichi further extended or “ratified” the Suspension on 7<sup>th</sup> May 2010 “*until the judgment of the special appeal*” that is: the appeal then taken before the STJ by Securinvest from the TJSP against the extension of the Petroforte Bankruptcy to it.
80. The meaning that the Applicants argue now that must be ascribed to the Suspension and its “ratification” by the STJ, is that Dr. Braga’s position as Administrator over Securinvest had been completely set aside and that Securinvest (and related Rural Group entities) were thenceforth free to deal with their assets, including disposing of them.
81. This interpretation is supported by the opinion evidence not only of the several lawyers in the employ in one capacity or another of Securinvest or its Rural Group affiliates (including Dr. Vasconcellos Neto and Dr. Tavares); but also by the independent expert opinions of two other lawyers – Mr. Raul De Araujo Filho and Dr. Francisco Satiro De Souza.
82. I have read and carefully considered the evidence of all the Securinvest lawyers on this question and on the further questions of alleged non-disclosure and breach of undertakings by the Plaintiff leading to the abusive deployment of information

- obtained in this jurisdiction against not just Securinvest and Katia Rabello, but also against Banco Rural; and the devastating impact this disclosure is said to have had upon the operations and financial viability of that bank.
83. However, as the meaning and effect of the Suspension (and its “ratification”) and the effect it had upon Dr. Braga’s status as Bankruptcy Trustee are matters of Brazilian procedural law, I conclude that greater emphasis should be placed upon the opinion evidence presented by the independent lawyers touching on these questions.
84. The Applicants’ independent expert evidence on this was presented (as mentioned above) in the Affidavits of Mr. Raul De Araujo Filho (a Brazilian attorney of some 52 years standing specializing in business law litigation including bankruptcy) and Dr. Francisco Satiro De Souza (also a Brazilian attorney but of 17 years standing, nonetheless having wide and varied practical and academic experience in Brazilian procedural and business law, as well as international experience in the field of bankruptcy practice).
85. Mr. Araujo addresses specifically the effect of the Suspension on Dr. Braga’s power to investigate Securinvest, (which he describes as a third party company outside the Petroforte Estate), in the Cayman Islands and the representations made to the Cayman Islands Court in that respect. He opines that any such power cannot derive from the Plaintiff Dr. Braga being an “officeholder” or trustee in respect of Securinvest because that position had been suspended. To the extent therefore that this Court was led to understand that the Plaintiff had such authority

- (deriving from such an alleged position) that is, in Mr. Araujo's opinion, simply not correct as a matter of Brazilian law.
86. Equally, the Plaintiff he asserts, is, among other things, under a duty to identify transactions involving the Petroforte Estate which are subject to revocation for the benefit of the creditors of the Estate but the lawful way to exercise this duty is through the Revocation Suit and through obtaining express orders authorizing obtaining information relating to third parties (such as Securinvest).
87. Mr. Araujo goes on to criticise the assertion put forward in Dr. Braga's First Affidavit (at para. 43) that:
- "Both the Superior Court of Brazil, as well as the first instance Court in Sao Paulo which supervises the affairs of the Petroforte Estate, have approved my investigations to discover the truth as to who is the true underlying beneficial owner of Securinvest and its controlling mind(s)."*
88. Mr. Araujo criticizes Dr. Braga's reliance (at paragraphs 14 and 43 of Dr. Braga's First Affidavit) upon the alleged "oral" Order of 27 April 2010 of Justice Andrichi in extensive terms (at paras 49-55 of his second affidavit). However Mr. Araujo's affidavits (dated 22 December 2010 and 28 January 2011) predate the 3<sup>rd</sup> and 4<sup>th</sup> of Dr. Braga's (dated 17 February and 2 March 2011) in which Dr. Braga exhibited the Orders of the 27 April 2010 and 25 June 2010 of the STJ and which confirm the existence in writing of the 60 day extension of the Suspension to allow for Dr. Braga's investigations and so Mr. Araujo does not speak to those latter Orders. I am persuaded that Mr. Araujo's criticisms are misplaced.
89. The same must ultimately be said of the evidence of Dr. De Souza on this point as his evidence does not address the reality of the existence of the written orders of

the 27 April 2010 and 25 June 2010 of the STJ. His third affidavit, sworn on 31 March 2011 ends (at paragraph 15) by treating the issue as still revolving only around the putative “verbal decision” of Justice Andrichi in these terms:

*“...Brazil is a country with a procedural tradition. Formalities and procedures are especially taken into account by the Judiciary, Governmental Authorities, Policymakers, legislators, etc. So, like I mentioned in my First Affidavit that is absolutely unusual a verbal judicial decision, it is not usual that a formal notification would be carried out by the bankrupting trustee itself, or personally by anyone. It is important to mention that there is no legal basis for any informal co-operation between Judges, bankrupting trustees and Central Bank Authorities. Otherwise, it would be impossible to control the preservation of essential constitutional rights.”*

90. Even if I accept that assertion as correct (along with Dr. De Souza’s other assertions as to the nature of the extension of bankruptcy from one corporate entity to another by the piercing of the corporate veil being a judicial construct) – both as I am inclined to do – his assertions do not provide a full explanation as to the full and true practical import of the Suspension, both as it was imposed by the STJ and as it has been continued by the exercise of judicial discretion through the person of Justice Andrichi.
91. Indeed, in this regard I conclude for the purposes of this judgment – and as Dr. Braga and Prof. Rosenn both opine – that the Suspension has not served to remove Dr. Braga from office as officeholder over Securinvest, only to suspend the full extent of his authority in that regard, especially his authority to divest with the assets of Securinvest. In other words, the Suspension has the effect of putting a provisional halt to the liquidation of the assets of Securinvest or to the winding down of its business. By the same token, the directors of Securinvest remain

precluded from transferring or selling the assets pending the outcome of the special appeal before the STJ.

92. As I understand it, and expressed in terms analogous to our common law procedure, the Suspension takes the form of an interlocutory injunction until final determination of Securinvest's appeal against the extension of the Petroforte Bankruptcy to it. The STJ has determined that on the balance of convenience, it is best to "suspend for the time being the declared bankruptcy before damages caused to the company become irreversible".
93. Thus, the point that weighed with the STJ was that if Dr. Braga continued to dispose of assets and it turned out that Securinvest was not connected to the economic group of Petroforte, the prejudice would be irreversible.
94. I also note that the final setting aside of Dr. Braga's position would have been an extraordinary decision for the STJ to take, because it would have at once reversed both the TJSP and the First Instance Court, without a final determination of the appeal.
95. Such a conclusion is inconsistent with the further extensions of the stay (for 60 days) to allow for investigations by Dr. Braga and inconsistent also with his continued management and control of Securinvest assets including Hotel Nacional, in respect of which significant income has been collected in since the Suspension was issued on 22 September 2009.
96. As Dr. Braga's 3<sup>rd</sup> Affidavit explains at para 93 (b), the net operating revenue of Hotel Nacional of some R\$3,543,200 has been paid into Court for the account of the Petroforte Estate during the period 12 September 2008 and 13 April 2010.

97. Similar considerations apply, by way of further example, to a substantial debt owed to TV Omega Ltda to Securinvest and which in recognition of Dr. Braga's continuing administrative status, the Bankruptcy Court has ordered to be paid into Court to await the outcome of the appeal before the STJ, rather than paid directly to Securinvest.
98. Having regard to all the foregoing, my conclusion is that the Suspension does not have the effect of setting aside the extension of the Bankruptcy or Dr. Braga's appointment in respect of Securinvest. I conclude that in this regard he retains his normal powers of investigation and supervision – the aspects which the STJ recognized (in its "ratification" of the 7 May 2010, 20<sup>th</sup> August and 17 December 2010) could be the ongoing subject of applications to the lower level courts. This was even while Dr. Braga has no right to liquidate the business by way of collecting in or disposing of the assets. I accept that – as he represented to the Court in the Norwich Pharmacal Application - he continues to assert a "*direct proprietary claim over the assets of Securinvest as insolvency officeholder*" even while his ability to realize those assets is suspended.
99. It follows from these findings that the complaint raised now by the Applicants that Dr. Braga misled this Court on the Norwich Pharmacal applications in representing that he was "*authorized to pursue a direct proprietary claim as the insolvency officeholder of Securinvest*" and that "*Securinvest is included in the Petroforte Bankruptcy Estate*", is not substantiated.
100. In response to those criticisms, Dr. Braga also presented an alternative argument – developed in his third and fourth affidavits – to the effect that he would, in any

event, have been entitled as officeholder over the Petroforte Bankruptcy, to investigate the alleged “economic group” connection with Securinvest and so entitled to Norwich Pharmacal relief in any event in that capacity, whether or not he remained as Administrator over Securinvest.

101. I am obliged to explain that that is not a premise that I would have accepted given the clearly different basis on which he obtained the Norwich Pharmacal relief in his capacity as officeholder over Securinvest.

**Alleged failure on the part of Dr. Braga to disclose Securinvest defences and the Revocation Suit**

102. These issues can, in my view, be dealt with shortly.
103. They arise in the context of the settled principle that the duty of full and frank disclosure includes the duty upon an ex parte application to disclose to the Courts all material facts: *Brink's Mat v Elcombe* (above). Here the applicants say that the material facts included (i) the true factual background and status of the Brazilian proceedings and (ii) the Applicants' defences and counter-arguments to Dr. Braga's own position (*Wicklow Distributors Incorp. V Air Atlantic de Honduras SRI [2004-05] CILR Note 7*) and the duty to explain those to the Court (*Siporex Trade SA v Comdel Commodities [1986] 2 Lloyd's Rep. 428*). Dr. Braga asserts that he disclosed all material facts to this Court and that those in respect of which he was criticised for not having disclosed or explained, were immaterial to his applications.
104. Specifically, Dr. Braga takes the view (explained at para 131 of his 3rd Affidavit) that the issue whether the SOBAR transaction was a fraud designed to remove



value from the Petroforte Estate is not an issue that is under review by the STJ. That the scope of review on such a Special Appeal is limited and does not include any factual defence to the factual issues which must now be regarded as settled by the decisions of the lower courts. The jurisdiction of the STJ is said to be triggered only where it is alleged that (a) a judgment of a court of second instance offends a Federal statute; or (b) courts of second instance have made different rulings in respect of the same Federal statute. As a rule the STJ only considers legal argument, not engaging in any analysis or finding regarding the underlying facts and evidence. Thus, the factual conclusion arrived at by a Court of Second Instance on the evidence submitted will not be interfered with. In this case, that means that the factual conclusions made by Judge Beethoven, and affirmed by the TJSP (per Judge Akel), are therefore unassailable.

105. While the legal opinions on the meaning and affect of the Suspension remain widely divergent (as explained above) Dr. De Souza does seem to agree with Dr. Braga (at para 58-59 of Dr. De Souza's affidavit of 4 March 2011) that *"Statement of the facts is not subject to analysis in special appeal, pursuant to Precedent 7 of the Superior Court of Justice. Thus, the "defence" to the extension is said to have been overcome in the bankruptcy extension proceedings and there is no further appeal. All that remains for the STJ to decide is whether Securinvest and Petroforte are of a common economic group. A successful appeal on that point is all that can keep Securinvest out of the Bankruptcy."*
106. If this is correctly taken as precluding Securinvest's assertion before the STJ that it has a factual defence to the allegations of fraud upon which the extension of

bankruptcy has been made to it, then Dr. Braga could have had no obligation to bring such a factual defence to the attention of this Court when making the Norwich Pharmacal application.

107. I do not consider that Dr. Braga had a duty to disclose any more than the fact of the existence of the Suspension and of the appeal before the STJ. This is for the immediately foregoing and the further and more fundamental reason that such an appeal pivoting around a factual dispute, could hardly have been relevant to this Court's determination of the Norwich Pharmacal applications. The basis for this latter reasoning will, I trust, become clear from the discussion of the law to follow below.
108. As to the failure to disclose the existence of the Revocation Suit to this Court, here too I feel obliged not only to accept Dr. Braga's explanation (as set out at paragraphs 133 -135 of his 3rd Affidavit), but also moreover to accept that the implications could not properly have been a matter for this Court.
109. Prof. Rosenn (at paragraph 42 of his Affidavit of 16th February 2011) explains why in his view it was legitimate for Dr. Braga to have elected to seek the extension of the Bankruptcy to include companies allegedly involved in the fraud, rather than simply seeking by the Revocation Suit to set aside the SOBAR transactions. On this issue it does appear from the terms of the Suspension that the STJ considers it highly relevant whether there is a link, not only as between Securinvest and the Petroforte Group but also, because of the Turvo connection, between Securinvest and Banco Rural or the Rural Group.

110. Whether, as a matter of Brazilian law and procedures, it was permissible and fair for Dr. Braga to have instituted the Revocation Suit in respect of the SOBAR transaction, then elected not to pursue those proceedings, opting instead by ex parte proceedings before the same Court to seek and obtain the extension of the Petroforte Bankruptcy to Securinvest; is not a matter upon which this Court can properly seek to pass judgment. That issue is for the Brazilian Courts to determine. It would therefore have been irrelevant to the question whether the Norwich Pharmacal relief in aid of the Bankruptcy proceedings should have been given by this Court.

**Basis for revoking orders already made and spent**

111. The Applicants were not the Defendants to the Norwich Pharmacal applications and so no orders were made directly against them. The Defendants – all Cayman Islands service providers – have complied with the Norwich Pharmacal Orders made, and have not sought to vary or discharge them on any ground that they were improperly made as against them; or that there was no basis for the making of the Orders, or that they were too wide in their scope.

112. The Applicants seek to apply for the setting aside of the Norwich Pharmacal Orders on the basis that the information disclosed ultimately relates to (whether directly or indirectly) and affects them, while at the same time maintaining that the information can have no probative bearing on the questions before the STJ whether they are of the same “economic group” as the Petroforte Group.

113. When applicants seek to set aside an order already made by the Court and executed by the party to whom it is directed, they need to establish an abuse of the

process of the Court through bad faith or material non-disclosure of information that was necessary to be taken into account by the Court when assessing whether or not to make the order in the first place. See *Wea Records v Visions Channel 4 Limited* [1983] 1 WLR 721.

114. As Purchas LJ said in that case in agreement with Sir John Donaldson M.R. and Dunn LJ:

*“For my part I doubt that on an application to set aside an ex parte order which has become entirely spent, even if made to the court which made that order let alone by way of appeal, the party against whom the order had been made can succeed save only in those very exceptional circumstances to which Sir John Donaldson M.R. held and Dunn LJ have referred [ie: where the order was obtained mala fide or by some material non-disclosure] (at p729 d- e)*

115. This is the test that the Applicants must meet if they are to succeed now to set aside the “spent” Norwich Pharmacal Orders and, as I understand their arguments, that which they have set about meeting.
116. For the reasons that follow as a matter of the application of the law and in light of the foregoing findings as to Dr. Braga’s status, I do not find that this particular test is satisfied.

### **The Norwich Pharmacal jurisdiction**

117. 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 the Norwich Pharmacal case was decided by the House of Lords some 37 years ago: [1974] A.C. 133]

118. Indeed the equitable principle itself has existed for at least 150 years as appears from the following definitive passage from the lead opinion of Lord Reid from the ***Norwich Pharmacal*** case itself (**at p 175 B**):

*“... I am particularly impressed by the views expressed by Lord Romilly M.R. and Lord Hatherley L.C. in Upmann v Elkan (1871) L.R. 12 Eq. 140; 7 Ch. App. 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”*

119. I must take it (even in the absence of written reasons) that such was found to have been the situations of the Defendants, when the Norwich Pharmacal Orders were respectively made against them by Cooke J. and Henderson J.

120. In light of what has been brought to the attention of this Court about the allegations of wrong-doing in Brazil by the use of Securinvest for the fraudulent stripping away of Petroforte Bankruptcy assets, the Defendants may be regarded as having become innocently “mixed-up” in those allegations by their arrangements with the Applicants which enabled the impugned transactions to remain concealed.
121. That premise notwithstanding, the Applicants seek, in extensive written submissions put before me now, to challenge the validity of the Norwich Pharmacal Orders on three main technical bases.
122. They say that the Plaintiff had an obligation to establish but failed to establish that
- (i) a wrong had been carried out, or at least arguably carried out, by a wrongdoer;
  - (ii) there is the need for the Norwich Pharmacal order “to enable an action to be brought” against the wrongdoer; and
  - (iii) the defendant or respondent is a person mixed up in so as to have facilitated the wrongdoing – not just as a mere witness to it – and is able to provide information necessary to enable the wrong-doing to be disclosed.
123. Having also obtained the further injunctive relief obtained as part of the Norwich Pharmacal Orders by reliance on the principles laid down in *Bankers Trust v Shapira* (above), the Applicants say that the Plaintiff needed to meet the following further requirements:

- (i) that the Plaintiff must show a real prospect that the information may lead to the location or preservation of assets to which he makes a claim; and
- (ii) that there is a risk that the ultimate determination of ownership of those assets may be frustrated by their dissipation by the wrong-doer.

124. The Applicants rely on dicta from the *Norwich Pharmacal* case itself (per Lord Cross), in which he drew the conceptual distinction between an application to acquire information necessary in order for a party to assert its legal rights and an application for the collection of evidence itself. The latter being regarded as a mere “fishing expedition” and repugnant to the true purpose of the *Norwich Pharmacal* relief (at page 199 C-D).
125. Moreover say the Applicants, the institution of *Norwich Pharmacal* proceedings in order merely to confirm one’s suspicions regarding the identity of a possible wrongdoer is wholly illegitimate.
126. They rely on the following dictum from *Lonrho plc v Fayed (No. 2) [1992] 1 W.L.R. at page 14* in which Millet J refused the plaintiff’s application against an existing defendant for discovery of the identity of another alleged wrongdoer, remarking:

*“Lonrho has been shouting the name of the person in question from the roof tops; it has even pleaded it in paragraphs 22 (f) the present statement of claim... it remains the fact that it seeks inspection, not to ascertain the identity of the source of the finance, but to confirm its belief that it already knows it. That is not a proper ground for involving the jurisdiction..., in my view it is a fishing exercise, and ought not to be allowed....”*

(Emphasis added)

127. In my view, in raising these complaints, the Applicants argue for a narrow application of the Norwich Pharmacal/Bankers Trust jurisdiction that is not in keeping with its extensive development in the more recent case law.
128. *Ashworth Hospital Authority v MGN* [2002] 1 WLR 2033 is the most recent House of Lords authority on this matter and makes it clear that the Norwich Pharmacal jurisdiction is broad, flexible and developing. This was a case in which the Ashworth Hospital Authority sought Norwich Pharmacal orders for the disclosure of the identity of a wrong-doer – (suspected to be an employee and informant who had, in breach of duty of confidentiality disclosed information about a notorious patient of the hospital to the media) – in order to be able to dismiss the employee without the need for institution of suit. MGN, the media house to which the disclosure was made, resisted the grant of the order on the basis, *inter alia*, that it was a necessary prerequisite for Norwich Pharmacal relief to be given that the party applying intended to bring legal proceedings against the informant (not as proposed, merely to take steps to dismiss him) and that there had been – “*wrong-doings*” in which MGN had become involved.
129. In rejecting those contentions in the course of giving the lead judgment, Lord Woolf stated as follows (at para 57):

*“57. The Norwich Pharmacal jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised. New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised when it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy. That new circumstances for its appropriate use will continue to arise is illustrated by the discussion of Sir Richard Scott V-C in *P v T Ltd* [1997] 1 WLR 1309 where relief*



*was granted because it was necessary in the interests of justice albeit that the claimant was not able to identify without discovery what would be the appropriate course of action and where the wrong-doing could be contractual rather than tortious.*

*58. What I have said in relation to the disclosure of the identity of the source with a view to possible criminal proceedings does not detract from the requirement that the person from whom disclosure is sought must have been involved, whether innocently or otherwise, in the wrong-doing which would in these circumstances be criminal. It is this requirement that means the Norwich Pharmacal jurisdiction does not offend the general principle that at common law there is no legal duty to provide the police with information or otherwise to assist them with their inquiries: See Rice v Connolly [1966] 2 QB 414, 419E, Per Lord Parker CJ.*

*59. One of the arguments Mr. Browne (for MGN) placed before their Lordships for not adopting the non-technical approach which I regard as being correct was that if the disclosure was not linked with proceedings which would actually be brought, there would be no means of the court protecting a defendant against misuse of the material which was disclosed.*

*60. I agree that this is a matter for concern. However, this concern will be met if an order for disclosure is not made unless a claimant has identified clearly the wrong-doing on which he relies in general terms and identified the purposes for which the disclosure will be used when it is made. The use of the material will then be restricted expressly or implicitly to the disclosed purpose unless and until the court permits it to be used for another purpose.”*

130. Lord Slynn, in his brief ascription to Lord Woolf’s main judgment summarised the principles in this helpful way (at paragraph 1-4):

*“... the jurisdiction recognized in Norwich Pharmacal Co v Customs and Excise Commrs. [1974] AC 133 to order disclosure of inter alia, the identity of a source of information or documents does not depend on whether the person against whom the order is sought has committed a tort, a breach of contract or either civil or criminal wrong. It is sufficient but, it is important to stress, also necessary that that person should be shown to have “participated” or been “involved” in the wrong-doing which is at the basis of the application for discovery.*

*This latter requirement together with the residual discretion of the court as to whether it is right that an order should be made in all the circumstances provide a safeguard against an unjustified order for discovery...*

*The second point is that it is not a necessary precondition of the exercise of the jurisdiction that the applicant should have began, or had an intention to begin, legal proceedings in respect of the allegedly wrong-doing act – in cases like these, against the source....”*

131. Applying these principles to the present case allows, in my view, for the grant of the relief that was given in the Norwich Pharmacal Orders. The Defendants are shown to have been “involved” albeit only in the as yet unproven, alleged wrongdoing of Securinvest. This is by way of being the fiduciary services providers to Arnage and Brooklands as the shareholders of Securinvest. To the extent that the concealment of the true identity of the ultimate beneficial ownership of Securinvest would prevent the allegedly fraudulent SOBAR transaction from being unraveled and any true relationships between Securinvest (on behalf of Banco Rural and the Rural Group) and the Petroforte Group from being revealed; the Defendant service providers had become unwittingly involved in what may yet be proven to be fraudulent activity.
132. Dr. Braga had already commenced legal proceedings against Securinvest and is able to point to the need, within those proceedings, to prove the link between Securinvest and the Rural Group; the link which Securinvest is alleged to have falsely denied before both the TJSP and the STJ.
133. So, while the Defendants do not (and did not at the time of being served with the Norwich Pharmacal Orders) themselves take the point that they are not innocently “mixed up” in that way (a threshold argument more appropriately to be taken by

them than by the Applicants); I am satisfied that that requirement was met. The Defendants were not “mere witnesses” whose evidence was sought merely to confirm Dr. Braga’s suspicions. Their involvement as service providers enabled the concealment of the alleged fraud and their evidence was essential to its revelation.

134. Nor is there an absolute requirement that a plaintiff must show that the Norwich Pharmacal relief is needed so that an action can be instituted. This is plain from the passage quoted above from Lord Slynn’s speech and is further explained in Ashworth (at paragraphs 41-49) where (at paragraph 44) Lord Woolf, having reviewed the history of the jurisdiction including the Norwich Pharmacal case itself stated as follows:

*“It is clear that in the Norwich Pharmacal case itself, Lord Reid was contemplating situations where the intention of the claimant, once the source had been identified, was to bring proceedings against the source. The language used by Lord Reid can be explained by the fact that in that case, it was the intention of Norwich Pharmacal to bring proceedings. It is also to be noted that in the final paragraph already cited from his speech, Lord Reid was taking a common sense non-technical approach when justifying the jurisdiction. Furthermore, the other speeches do not link the jurisdiction to any requirement that the information should be available to the individual who had been wronged only for the purpose of enabling him to vindicate that wrong by bringing*

proceedings. In particular, Viscount Dithorne in his speech says, at p.188:

*“...discovery can be granted against a person who is not a mere witness to discover, the fact of some wrongdoing being established, who was responsible for it. The “mere witness” rule has lost a great deal of its importance since the Common Law Procedure Act removed the bar to persons interested giving evidence, but it still has significance. Someone involved in the transaction is not a mere witness. If he could be sued, even though there be no intention of suing him, he is not a mere witness. In *Orr v Diaper* (1876) 4 Ch. D. 92, *Diaper* were involved, so were *Elkan* in *Upmann v Elkan* LR 12 Eq. 140, so was the *East India Company* in *Mordalay v Martin* (1785) 1 Bro. CC489 and it matters not that the involvement or participation was innocent and in ignorance of the wrongdoing. (Emphasis added.)”*

135. In the present case, the writ and the amended writ (the latter by which the 2<sup>nd</sup> to 5<sup>th</sup> Defendants were added) was framed in classic Norwich Pharmacal terms as being a claim against the Defendants for disclosure of information and for related orders. There was never an intention separately to sue the Defendants for

- substantive remedies – they were sued because they had become mixed up in the alleged wrongdoing of Securinvest through their involvement with its parents, Arnage and Brooklands.
136. The fact that proceedings were already underway in Brazil against Securinvest was no bar to the obtaining of Norwich Pharmacal relief. The disclosure required from the Defendants was necessary for the resolution of the essential question whether Securinvest belonged to an economic group involving Petroforte and Banco Rural. Lord Reid’s and Viscount Dilhorne’s dicta as quoted above and as reaffirmed in Ashworth, is directly applicable to the present case – a common sense non-technical approach should be taken when applying the Norwich Pharmacal principles.
137. Nor is the relief limited – as the Applicants argued – to cases where the identity of the wrong-doer needs to be ascertained (citing Lonrho Plc (above)). The relief can be granted where the identity of the alleged wrong-doer is well known to a plaintiff but what is needed is disclosure of information to prove the wrongdoing. A clear illustration of this appears in Gianne v Miller and Condoco Grand Cayman Resort 2007 CILR Note 10 (full written judgment delivered on 17 April 2007). This was a case in which the Cayman Islands Court of Appeal upheld Ms. Gianne’s entitlement to Norwich Pharmacal disclosure by Condoco Grand Cayman Resort (“Condoco”). This was information that revealed that her estranged husband Mr. Miller, had acquired very valuable interests in a condominium development built by Condoco. These were interests which Mr.

Miller had improperly failed to disclose in the context of divorce proceedings in California.

138. In *Mitsui v Nexen Petroleum* [2005] EWHC 625 (Ch.) Lightman J., even while refusing Norwich Pharmacal relief on the basis that an application for pre-action discovery would have been available in that case from an innocent mere witness, helpfully summarized the recent development of the jurisdiction as revealed in the case law in these terms (at paragraph 19):

*“In subsequent cases [since Norwich Pharmacal itself], the courts have extended the application of the basic principle. The jurisdiction is not confined to circumstances where there has been tortious wrongdoing and is now available where there has been contractual wrongdoing: P v T [1997] 4 All E.R. 200, [1997] 1 WLR 1309; Carlton Film Distributors Ltd. v VCI Plc [2003] EWHC 616, [2003] FSR 876 (Carlton Films); and is not limited to cases where the identity of the wrong-doer is unknown. Relief can be ordered where the identity of the wrong-doer is known, but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw: See AXA Equity & Law Life Assurance Society plc v National Westminster Bank plc [1998] CLC 1177; Aoot Kalmneft v Denton Wilde Sapte (a firm) [2002] 1 Lloyd’s Rep. 417; see also Carlton Films. Further the third party from whom information is sought need not be an innocent third*

*party: he may be a wrongdoer himself: see CHC Software Care Ltd. v Hopkins and Wood [2993] FSR 241 and Hollander, Documentary Evidence (8th Ed., 2003) p78, footnote 11.”*

139. In the present case, it may be said that the “missing piece of the jigsaw” is the evidence as to the true relationship between Securinvest, Banco Rural/the Rural Group on one side and the Petroforte Group on the other.
140. In my view, the requirements are amply met in this case. If Dr. Braga’s allegations become proven – that value has been wrongfully removed from the Petroforte estate to or through Securinvest - then there would clearly be a wrongdoing. The disputes and issues raised by the Applicant do not defeat that proposition – they render it at minimum an arguable rather than a proven wrongdoing. As already noted, this question of wrongdoing is moreover, an issue of fact for the Brazilian Courts to resolve, not this Court. Insofar as such determination has already taken place in Brazil, it has been in favour of Dr. Braga by Judge Beethoven and by the TJSP and Dr. Braga’s and the Applicants’ experts seem to agree that such an issue of fact is not capable of being reviewed by the STJ. Rather, the STJ remains especially concerned to ensure that it is not itself misled as to the true beneficial ownership of Securinvest.
141. Thus, the disclosure obtained here was and still is required for those legitimate purposes – primarily the need to ensure that the Petroforte Bankruptcy Estate is not denied access to the assets of Securinvest by reason of misleading information about the identities of its beneficial owners being put before the STJ on the special appeal that is before it.

### The Bankers Trust relief

142. Here the complaint of the Applicants is that the form and extent of the relief sought and obtained by Dr. Braga was impermissibly and unjustifiably wide. It involved the disclosure, not only of the beneficial ownership of Arnage and Brooklands (the only information necessary to identify the beneficial ownership of Securinvest) but also all other information relating to the affairs of Arnage and Brooklands, including the nature and extent of their assets.
143. In this regard the Norwich Pharmacal Orders included relief of the sort, which, in keeping with the principles of *Bankers Trust v Shapira*, can be justified only where a plaintiff is entitled to trace property of which it has been defrauded.
144. The Norwich Pharmacal Orders provided in this respect as follows:
- “(That the Defendants) ...disclose and produce to the Plaintiffs’ attorneys copies of various documents and information...which have come into existence since July 1995 [(being the earliest cut off date of the Petroforte Bankruptcy claims)] and as are in their possession, custody or control as to*
- (a) ....*
  - (b) ....*
  - (c) ....*
  - (d) All documents relating to or created by any and all of the entities listed in Schedule 4 of this Order [(which included all known Rural Group and Petroforte Group entities or individuals who could be linked to Securinvest and/or Turvo – some 34 in all)] which show a relationship between either:*
    - (i) the entities in Schedule 4 and the entities in Schedule 3 (that is: Arnage and Brooklands); and/or*
    - (ii) the entities in Schedule 4 and the removal of monies from the Petroforte Estate;*
  - (e) ...*
  - (f) all documents relating to any trust, partnership or limited liability company affiliated with, owned by, or connected to Arnage or Brooklands;*



- (g) *all documents relating to any transaction, transfer of money, exchange of value, offer, acceptance, cheque, bill of exchange, invoice, accounting record, electronic funds transfer advice or instruction, memorandum of understanding, memorandum of wishes, bargain or form of dealing with anything of value in which any of the Second to Fifth Defendants was involved in any way, whether directly or indirectly, with any of the entities listed in Schedules 3 or 4 of this Order; and*
- (h) *all instructions correspondence, invoices, payment records, including documents generated in the course of making or receiving payments, or other documents which relate to the information and/or ongoing administration of, and/or transactions of any kind involving any of the entities listed in Schedules 3 or 4 of this Order.”*

145. It is difficult to imagine a more comprehensive and pervasive form of disclosure of the financial affairs of putative defendant entities.

146. Taking the form as it did of Norwich Pharmacal relief, such a pervasive destruction of the confidentiality between bankers (as some of the Defendants are) and their clients could be justified on grounds no less than those recognised and approved in the ***Bankers Trust*** case itself, that is: only in circumstances where funds (assets) have been defrauded and there is urgent need to trace them. The principle is illustrated in ***Bankers Trust*** itself where Bankers Trust’s application for disclosure resulted from the honouring of two forged cheques in the amount of \$1 million presented by the fraudsters Shapira and Freir: (per Lord Denning MR beginning at p.1281 F-G):

*“In order to enable justice to be done – in order to enable these funds to be traced – it is a very important part of the court’s armoury to be able to order discovery. The powers in this regard and the extent to which they have gone, were exemplified in Norwich Pharmacal Co. v Customs and Excise Commissioners [1974] A.C. 133.*

*The Customs authorities were perfectly innocent: but they had to disclose the names of infringers of patents whose goods had passed through their hands. ...So here the Discount Bank incurs no*

*personal liability: but they got mixed up, through no fault of their own, in the tortious or wrongful acts of these two men: and they come under a duty to assist the Bankers Trust Company of New York by giving them and the court full information and disclosing the identity of the wrongdoers. In this case the particular point is "full information".*

*This jurisdiction must of course be carefully exercised. It is a strong thing to order a bank to disclose the state of its customers' account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money – as, for instance, when the customer has got the money by fraud – or other wrongdoing – and paid it into his account at the bank.*

*The plaintiff who has been defrauded has a right in equity to follow the money. He is entitled, in Lord Atkins' words, "to lift the latch of the bankers door": see *Banque Belge Pour L'Etranger v Hambrouck* [1921] 1 K.B. 321, 355. The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see *Initial Services Ltd. v Putterill* [1968] 1 Q.B. 396, 405. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents – for that is the only way of tracing the money or of knowing what has happened to it: See *Mediterranea Raffineria Siciliana Petroli S.p.a. v Mabanafit G.m.b.H.* (unreported).*

*So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. The plaintiff must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the discovery: and the documents once seen, must be used solely for the purpose of following and tracing the money: and not for any other purpose.*

*With those safeguards, I think the new jurisdiction – already exercised in the three unreported cases – should be affirmed by this court."*

147. This Bankers Trust jurisdiction, like that exercised in the Norwich Pharmacal case itself as derived from equity, no doubt also extends to other kinds and circumstances of fiduciary relationships – beyond that of banker/client – where

assets fraudulently obtained are held and where early disclosure is necessary in order to enable their recovery. The jurisdiction would therefore be wide enough in principle to enable the orders which were made here in respect of those defendants who were in fiduciary relationships other than that of banker/client, with any of the Applicants. Fiduciary services providers who become “mixed up”, including corporate and registered agency providers; cannot in my view be considered innocent bystanders so as to be regarded as mere witnesses who have no obligation to assist a victim of fraud. This is a view also recently taken by the British Virgin Islands Court of Appeal in JCS Bank Fidelity Corporate Services Limited and others HCVAP 2010/035, 21<sup>st</sup> February 2011. This was a case in which corporate and registered agency/services providers were held to have come under a duty to give disclosure to the plaintiff bank seeking to trace money of which it had been defrauded; on the basis that “*the companies that they had formed and maintained facilitated, although innocently, the commission of the fraud and as such were involved in the fraud perpetrated against the Bank. This renders the respondents under a duty to disclose information through Norwich Pharmacal type proceedings which may assist the bank as the injured party in discovering the true wrongdoers.*”

148. The jurisdiction has for many years been held to extend to the lawyer/client relationship: Arab Monetary Fund v Hashim and Others (No. 5) [1992] 2 All E.R. 911.
149. However, the principles laid down by Hoffman J (as he then was) in that case and which serve to emphasise the importance of the exercise of caution in the granting

of **Bankers Trust** type relief on the ex parte basis, are relied upon heavily by the Applicants here. They are most conveniently taken from the headnote:

*“A plaintiff who sought an order for discovery against a person who was not a party to the action had to demonstrate a real prospect that the information sought might lead to the location or preservation of assets to which the plaintiff was making a proprietary claim since (i) the scope of such a request which the court would permit was more restricted than a request to a party for general discovery and (ii) unless those assets could be located and secured the ultimate determination of their ownership could be frustrated by their removal or dissipation and there would be no point in calling the third party at the trial to give evidence as to their whereabouts.”*

150. The Applicants complain that the extensive disclosure allowed Dr. Braga, by which he has been given full access effectively to all information held by the Defendants that could relate to or disclose the Applicants’ financial affairs, was far too wide and wholly unwarranted in light of the narrow compass of what was required to establish the true identity of the beneficial owner of Securinvest.
151. In response Dr. Braga submits that the ambit of the disclosure is justified. That the purpose was to identify and trace the value diverted from the Petroforte Estate and there are reasonable grounds to suppose (as a requirement of the **Bankers Trust** principles) that such funds are impressed with a constructive trust in favour of the Petroforte Estate. Further, even if such assets cannot be brought back into the Estate through Securinvest’s inclusion in the bankruptcy, Dr. Braga will still be able to pursue his Revocation Suit and recover assets or the proceeds of assets by that route (“the revocation route”). Dr. Braga asserts a direct proprietary claim to such assets and there is a real prospect that the information requested will lead to the recovery, location or preservation of assets to which he intends to make a

- proprietary claim, not least by helping to build a complete picture of what has been done.
152. As being permissive of such a wider range of disclosure, Mr. Fenwick QC argued that the Norwich Pharmacal/Bankers Trust jurisdiction has moved on since the Hashim (No. 5) case (above); citing Aoot Kalmneft v Denton Wilde Sapte (“DWS”) (also above). This latter was a case in which DWS, a law firm, had become innocently mixed up in facilitating a fraud, in arranging the incorporation of a company through which monies had been fraudulently paid away and by further involvement in the execution of an agreement by which the monies, meant to be prepayments for the delivery of crude oil, had been misappropriated.
153. In requiring DWS to give full disclosure, the Court (per Judge McConigal at first instance) took “a realistic view of how frauds were conducted” leading to the conclusion that the complete picture is often only revealed when the information given to a number of people (there including DWS) is obtained so that the wider picture can be reconstructed.
154. Having carefully read and considered the Aoot Kalmneft case, I do not agree with Mr. Fenwick QC that it can be ascribed the wider meaning for which he contends. Rather, it rests firmly upon the same basic principles as laid down in Bankers Trust v Shapira itself and as further explained in Hashim (No. 5) (above) in particular the need to show that there is a real prospect that the information ordered to be disclosed may assist in the location and preservation of assets.

Judge McConigal said as much (at page 16, citing and applying Justice Hoffman's dictum from *Hashim (No. 5)*):

*"In approaching the "first principle" suggested by Mr. Justice Hoffman the Court must, in my view, take a realistic view of how frauds are conducted and be satisfied that there is a real prospect that the information sought may assist in locating and preserving assets by helping build up a complete picture of what was being done."*

155. In this case, while I am satisfied that the disclosure was properly ordered in keeping with the Norwich Pharmacal line of authorities (to establish the identity of the true beneficial ownership of Securinvest and so its alleged involvement with the alleged fraud) I am satisfied that disclosure in keeping with the related *Bankers Trust* line of authorities was premature, unjustified and impermissibly wide.
156. In my view, there simply was no basis for thinking that the information sought by those means (paragraphs 7(d) (ii), (f), (g) and (h) of the Norwich Pharmacal Orders) could assist with locating and preserving assets which had been fraudulently diverted away from the Petroforte Estate.
157. Any such allegation up to the time of the applications before this Court (27<sup>th</sup> May 2010 and 2<sup>nd</sup> July 2010) centered around the SOBAR transaction. Yet the assets involved – the ethanol plant and sugar cane plantations – had long since been under the control of Dr. Braga through the extension of the Bankruptcy to Securinvest, Turvo, Agroindustrial and Kiaparack in August 2007 (see the 1<sup>st</sup> Affidavit of Dr. Vasconcellos, para 77 (iv)). No other "assets" to which a risk of dissipation attends, have been identified.

158. The substantive disputes between the parties have been ongoing in Open Court in Brazil for several years. Accordingly, it cannot properly be maintained that there was any urgent need for the *Bankers Trust* type relief here to prevent the dissipation of assets. The fact that there has been no subsequent need for Mareva injunctive orders (to freeze assets identified) and no allegedly hidden assets disclosed, is strongly indicative of the fact that the *Bankers Trust* relief was never likely to have achieved its permissible objectives.
159. Nor is the revocation route (argued by Mr. Fenwick QC) now to be invoked as justification for Dr. Braga having obtained the *Bankers Trust* relief. In light of his having opted to come to this jurisdiction in his capacity as office holder over Securinvest, relying in that regard on the extension of the Petroforte Bankruptcy to Securinvest, it is not available to him to rely upon the revocation route (as instanced by the Revocation Suit which he has not pursued in Brazil despite having instituted it) as some basis for casting as wide a net as possible over whatever assets Securinvest (or any of the other 34 related entities or individuals named in the Norwich Pharmacal Orders) might be found to have. Such a proposition would be to admit of an *ex post facto* rationalization of an entirely different basis for the relief than that upon which it was ordered by this Court.
160. Having so concluded, I can state immediately that the *Bankers Trust* disclosure is not to be salvaged by the invocation either of the principle in *Wea Records* (above), that is: that it was obtained without bad faith or without deliberate non-disclosure by means of an order that is already spent; or that recognised in *C Corporation v P* and *Brinks Mat v Elcombe* (both above) that is: otherwise in

breach of the duties imposed when seeking ex parte relief, but that the order may be continued nonetheless for justice to be done.

161. Here I am assured by those representing Dr. Braga (and by Mr. Akiwumi on behalf of the Applicant), that although the disclosure has taken place, an order from this Court, requiring retrieval of material which has been disclosed improperly, will be recognised and enforced by the Brazilian Courts. This is therefore not a situation – like that observed by Justice Henderson of this Court in *Gianne v Miller* at first instance in respect of material already disclosed by Condoco – where the Court would be seeking in futility “to stuff the genie back into the bottle”.

162. In this context, not only was the purported necessity for the disclosure not demonstrated, nothing presented in support outweighs the inherent prejudice to the Applicants in having their confidential affairs disclosed in the manner enabled by the *Bankers Trust* relief. I am told that significant prejudice in fact has resulted by the abuse of the information (or at least reference to it) in the media and in unauthorized proceedings and that still further prejudice could result. Orders will therefore be pronounced which will be aimed at retrieval and protection of the information which can be identified as having been disclosed particularly in response to the *Bankers Trust* aspect of the relief granted to Dr. Braga.

#### **Foreign proceedings and alternative means**

163. At paragraphs 349 to 354 and 372 to 388 of their very extensive written submissions, the Applicants raise further objections.



164. In the former set of paragraphs, they argue that the Court should subject applications made for disclosure in aid of foreign proceedings to great scrutiny because of the additional risks of abuse which do not ordinarily attend disclosure in aid of local proceedings. They cite in support of this proposition dicta from this Court in *Deutsch-Südamerikanische Bank A.G. v. Codelco (Grand Ct.)*, *1996 CILR 1* (at page 8) and from *Lewis v Eliades (No. 1) [2002] CP Rep. 28 (at paragraph 9)*.
165. To the extent that that precautionary approach has been shown in retrospect to have been justified by what has happened in Brazil in this case, in relation to this matter, I will come to consider this proposition below when considering the allegations of breach by Dr. Braga of the undertakings which were required of and given by him.
166. At paragraph 372 to 388 of their written submissions, the Applicants argue that in any event there was no need for Norwich Pharmacal/Bankers Trust relief – which is “an extreme remedy which should only be utilized out of necessity” – per Lightman J. in *Mitsui v Nexen* (above) and *Ashworth* (also above at page 2049 paragraph 57). And, as Lord Cross observed in *Norwich Pharmacal* itself (at 199E-F) that, in deciding whether to grant the relief, “the Court should consider whether the information could be obtained from another source.”
167. The alternative means available and which could have been used were, of course, (and as subsequent events have demonstrated) Letters Rogatory. But while that recourse may well have been available (and enforceable by way of the **Evidence**

- (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978**, (“the Evidence Order”) it is not an exclusive or mandatory recourse.
168. Rather, it must now be taken as settled that equitable third-party discovery in the form of Norwich Pharmacal relief, can in appropriate circumstances be granted in aid of foreign proceedings. See **Gianne v Miller** in the Court of Appeal (above, at page 12) and approving the decision of the Grand Court per Henderson J. (***at 2006 CILR Note 26***). There it was further held, that the Evidence Order contained no provision which might oust the equitable jurisdiction of the court and, in the absence of any such provision, a Norwich Pharmacal order can be the appropriate remedy in a particular case.
169. The existence of the jurisdiction to grant Norwich Pharmacal relief in aid of foreign proceedings must also be taken to be a settled proposition in light of the decision of the Privy Council in **The President of the State of Equatorial Guinea et al v Royal bank of Scotland International (Jersey) et al [2006] UKPC 7**. In that case such an order made against the Bank of Scotland was ultimately upheld even while doubts were expressed on other grounds, about the nature of the action, by the Privy Council.
170. Here, as a practical matter, it is worth noting that even if the alternative means suggested by the applicants had been used, the information would likely have been extracted from the Defendants nonetheless upon the ex parte basis as happened when the Norwich Pharmacal Orders were made. And, while the Evidence Order requires that requests can be granted only in respect of “*particular documents individually and separately described*” (See **In Re**

Westinghouse [1978] AC 547, 653) – the Bankers Trust test itself also imposes the important safeguard of materiality discussed above.

171. There is therefore no reason in principle or in practice why a foreign applicant who needs early discovery of the Norwich Pharmacal type should invariably be obliged to apply by way of Letters Rogatory instead, with the different limitations that would attend that process.
172. A similar approach must be taken to the further complaint of the Applicants that Dr. Braga should instead have proceeded by way of Section 241 of Part XVII of the Companies Law (dealing with International Co-operation); on the basis that Dr. Braga, claiming to be a foreign representative of a bankrupt corporate estate, was obliged to so apply if he asserted the right to obtain information about the affairs of his bankruptcy estate within the Cayman Islands.
173. That too would have been but an alternative recourse and one, moreover, specifically more suitable to a case where a foreign representative seeks recognition of his appointment generally within the Cayman Islands; not simply to a case brought for the purpose of obtaining information from third-parties (innocently or otherwise mixed up in the affairs of the corporate debtor estate to which he may be appointed). Part XVII involves the wider purposes set out in section 241, including the right to act generally within these Islands on behalf of or in the name of the debtor estate. See: *In the matter of Bernard L. Madoff Investment Securities LLC (In Liquidation) Cause FSD 47 of 2010 in the Grand Court* (written judgment delivered on 5<sup>th</sup> February 2010) and in *Re*

**Straumar-Burduras Investment Bank Cause 188 of 2010 in the Grand Court**

(written Judgment delivered on 9<sup>th</sup> September 2010).

**Alleged breaches of undertaking**

174. As already mentioned, the Applicants allege that Dr. Braga has breached implied as well as expressed undertakings given to this court when he obtained, respectively, the Norwich Pharmacal/Bankers Trust Orders and the CR(P)L Orders.
175. Dr. Braga does not deny having given the undertakings but denies having breached any of them.
176. Undertakings not to use information obtained in court in the discovery process in litigation for purposes other than those required or allowed in the litigation are implicit in the obtaining of that information. This is a settled principle of the common law and was most recently reaffirmed by this Court in **Phoenix Meridian v Lyxor [2007] CILR 153** in these terms:

*“...by law it is implied in the discovery process that the parties to an action undertake to use documents produced on discovery only for the purposes of the action and not for any ulterior or collateral purpose. A breach of the implied undertaking is punishable as a contempt of court. This proposition of law is based on settled case authority (see Home Office v Harman (3))” (This direction was subsequently upheld on appeal: **2009 CILR 553.**)*

177. Where the Court has required an express written undertaking which is subsequently breached, the position must be *a fortiori*: the obligations to comply

with the undertakings given will be strict and will be enforced by the court as if the undertakings had been imposed by express order of the Court itself. A breach may therefore be treated as a contempt of court: *The Mileage Group* [1966] 1 WLR 1137, *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch. 190 and *Biba Ltd. v Stratford Investments Ltd.* [1973] Ch. 281. In this latter case, at page 287E, Brightman J. stated that an undertaking given by a litigant to the Court is to be treated and given the same quality as an injunction or other order of the Court. This dictum was approved by Lord Donaldson MR in the Court of Appeal in *Hussain v Hussain* [1986] 1 All. E.R. 962 where he declared:

*“...Let it be stated in the clearest possible terms that an undertaking to the court is as solemn, binding and effective as an order of the court in like terms....”*

178. To establish a contempt of court, it is sufficient to prove that a defendant's conduct was intentional and that he knew of all the facts that made the conduct a breach of the undertaking. It is not necessary to prove that he appreciated that it was a breach. See *Spectravest Inc v Aperknit Ltd.* [1988] F.S.SL. 161
179. Once undertakings had been given to the court in respect of an obligation arising under Cayman Islands law (here the CR(P)L); the only proper advice to take on whether a proposed course of action might constitute a breach of those undertakings, would be the advice of a lawyer qualified to advise on Cayman Islands law. Unless what was proposed was manifestly not and could not reasonably be thought to be a breach of the undertaking, it would not be appropriate to go ahead without first obtaining the approval of the Court, especially where the undertaking had been given upon an ex parte application and

- so the consent of the parties affected is not to be obtained before proceeding: cf *Spectravest Inc. v Aperknit Ltd.*; (where that principle was recognised but in the particular circumstances of the case not applied).
180. It is part of the criticism of his conduct in this case that Dr. Braga urged or at least acquiesced in the disclosure of the discovered information by Judge Beethoven's Court to the Brazilian Central Bank, and that he did so acting on the equivocal advice of British Virgin Islands ("BVI") lawyers, rather than obtaining Cayman Islands legal advice.
181. The obvious difficulties that can attend the enforcement of the implied undertaking against the misuse of information ordered to be disclosed for use in foreign proceedings, have led this court to recognize the importance often of requiring express written undertakings as well. See *Deutsch-Südamerikanische Bank A.G.* (above) and *Phoenix Meridian v Lyxor* (above) at paragraphs 16-26).
182. In the context of the Norwich Pharmacal Orders, Dr. Braga gave express undertakings to this Court and has acknowledged (in his fourth affidavit filed upon this application) that he was and remains able to use the documents obtained in this jurisdiction only for the purposes contemplated by the Norwich Pharmacal Orders.
183. The terms of the Undertakings, as set out in paragraph 4 of the Norwich Pharmacal Orders (as amended on 1 July 2010) are as follows:

*"...Not to use and file copies of any of the documents disclosed to his attorneys – pursuant to the order in this action made by Hon. Justice Cooke on 27<sup>th</sup> May 2010 ("the Norwich Pharmacal Order") and as further permitted by the CR(P)L by the Defendants for any purpose other than –*

- (1) *complying with the order of the Brazilian Superior Court [the STJ] made on 29<sup>th</sup> April 2010 by Judge Nancy Andrichi (referred to in the Plaintiff's affidavit sworn on 26<sup>th</sup> May 2010);*
- (2) *the institution and prosecution of any proceedings relating to the Petroforte Estate before this Court, before the Brazilian Courts, the courts of Costa Rica, or the US District Court (Southern District of Florida), or*
- (3) *Dr. Braga's investigation regarding the ultimate beneficial ownership, assets or affairs of Securinvest Holdings SA (the investigation); or*
- (4) *the institution and prosecution of any proceedings relating to the Petroforte Estate before any other Court in connection with the affairs of such insolvency estate or in connection with such investigation*

*without further leave of the Grand Court in (this Cause)."*

184. Here the Applicants allege that despite his implied and express undertakings owed and given to this Court, Dr. Braga has breached them specifically in at least three different ways. These are explained in detail in the second and fourth affidavits of Dr. Alexandre De Moraes, one of the Brazilian lawyers giving evidence upon this application on behalf of the Applicants. Especially in relation to the role and function of the Brazilian Central Bank (an area in respect of which Dr. Moraes has particular experience and expertise) his affidavit contains a detailed analysis of the alleged breaches of Undertakings by Dr. Braga in Dr. Braga's dealings with the Central Bank. In this Dr. Moraes is supported by Luiz Sturzenegger, another Brazilian lawyer of similar standing and experience and a former General Counsel of the Central Bank. It is submitted that Dr. Braga's breaches of Undertakings are deliberate and need to be understood and considered in the wider context of what is described as his "collateral objective" of wrongfully putting pressure on Banco

Rural, Katia Rabello and/or Securinvest and their affiliates, to contribute their assets to fund the Petroforte Bankruptcy.

185. By way of broad summary the alleged breaches are as follows:

**1. Dr. Braga's application to the Brazilian Bankruptcy Court dated 25 October 2010**

It is said that by way of Petition dated 25<sup>th</sup> October 2010, Dr. Braga specifically applied to the Brazilian Court (per Judge Beethoven) for an order that "official letters" be sent to the Central Bank setting out Dr. Braga's interpretation of information derived from the Cayman Islands Documents (including specifically that Katia Rabello is the ultimate beneficial owner of Securinvest). Ultimately, the Brazilian Bankruptcy Court ordered (in response to Dr. Braga's application) that a copy of its Decision (containing the same information) be provided to the Central Bank.

Dr. Braga admits to the making of this request for official letters. He asserts that that request was part of his petition to bring Ms. Rabello into the Petroforte Estate, which petition Judge Beethoven granted. The request was made so that Ms. Rabello's shares in Banco Rural in particular might be attached and collected by the Petroforte Estate. Banco Rural being an entity falling under the regulatory purview of the Central Bank, the assistance of the Central Bank was required to ensure the full execution of the bankruptcy order. The official letters of request was for the purposes of (a) the prosecution of proceedings relating to the Petroforte Estate; and (b) recovery of assets for the Petroforte Estate; since



it sought to ensure that the extension of the bankruptcy was achieved and Ms. Rabello's assets were identified, frozen and recovered for the Petroforte Estate.

The Applicants take great exception to this explanation by Dr. Braga relying on their experts' evidence to the effect that the Central Bank has no function under Brazilian law in relation to the Petroforte Bankruptcy or its extension by the Brazilian courts even to Banco Rural as a Brazilian Bank. They argue and opine the extension being a matter of judicial edict, is simply a matter with which the Central Bank must comply to the extent that it has any regulatory remit. Moreover, insofar as the extension may involve the freezing or forfeiture of assets such as bank accounts, that can be directly achieved by the Court (in this instance Judge Beethoven) placing his directive into the "Bacen Jud" online system maintained and controlled by the Central Bank and which exists specifically to allow judges throughout Brazil directly to freeze relevant bank accounts. In neither circumstance would it be necessary to make an official request of the Central Bank or to send it confidential information of the kind obtained about Securinvest or its affiliates in this jurisdiction.

2. **Dr. Braga's application to the Brazilian Bankruptcy Court dated 6 December 2010**

Dr. Braga is further criticized for having directly applied to the Brazilian Court for the Cayman Islands Documents to be supplied to the Central Bank. It is alleged that the Central Bank, having obtained the sensitive information (especially that as to Ms. Rabello's interests) in Judge

Beethoven's request and in his written Decision of the 27<sup>th</sup> October 2010 extending the Bankruptcy, itself in turn made a request to Judge Beethoven's Court for a copy of the Court file, including the Cayman Islands Documents. In this respect Dr. Braga's Petition to the Brazilian Court dated 6 December 2010 contains the following statement which the Applicants say is nothing but a subterfuge with the tendentious objective of the disclosure of the Cayman Islands Documents to the Central Bank:

*"With regard to the request by the Central Bank in the shipment [(that is, transfer)] of documents regarding this case, the Trustee [that is, Dr. Braga] cannot offer them, however, Your Honour, at your discretion, can provide them."*

As set out in the Second Affidavit of Dr. De Moraes, the information was subsequently disclosed to the Central Bank by its inspection (and perhaps copy) of the Court file. Accordingly, it is asserted that as a direct consequence of Dr. Braga's action, the Central Bank has obtained the Cayman Islands Documents in breach of the implied and express Undertakings.

Dr. Braga's response is that the Central Bank requested access to the Court's file containing all the documents he had filed with the Court in support of his 25 October 2010 petition, not just a request to see the Cayman Islands Documents. His response was that he could not deliver

them to the Central Bank himself directly but that the Court had that power. That he says, was an entirely proper and correct position to take, since he did not know the purpose for which the Central Bank required to see the Documents and could not be sure that disclosure by him, outwith the Bankruptcy Court proceedings, would be within this Undertaking given to this Court.

Having sought and obtained legal advice from lawyers in the BVI (where he had also obtained orders for disclosure of information with their assistance) his position correctly made it clear that (a) so far as he was aware, it was a matter for the Brazilian Court whether it allowed the Central Bank access to the Court file and (b) he did not wish to take a point that the Central Bank should not have access.

Had he told the Brazilian Court that it could not direct disclosure to the Central Bank he believes he would have misled the Brazilian Court. He did not consider that his Undertakings imposed any obligations upon him to seek to prevent the Central Bank from having access, the documents having been deployed in the Bankruptcy proceedings and so having become a part of the Court files, which in Brazil are in general open to public inspection. As that accords with the position under Cayman Islands law, he was entitled to assume that this Court would have expected that to be the position in Brazil as well. See **Grand Court Rules Order 24 r.22** and **Smithkline v Connought Laboratories [1979] 4 All. E.R. 498** where it was held that a document read in open court or pre-read by the court and

referred to by counsel in arguments in open court becomes a part of the public record of the Court and so, for the purposes of the rules of court, deemed to have passed into the public domain.

This policy of open justice behind the provisions of Order 24 r. 22 (as explained in *Smithkline*) applies, Dr. Braga says, equally to documents referred to or read to or by the Brazilian Court and the phrase “open Court” in the rule is not limited to the Cayman Court but especially, given the circumstances, should be taken as referring also to the Brazilian court.

Viewed properly in that light Dr. Braga says there clearly was no breach of the Undertakings and, in any event, at no time did he himself disclose any documents to the Central Bank.

3. **Disclosure of Information to the Brazilian Press**

The Applicants allege that Dr. Braga further expressly applied to the Brazilian Court (as part of his 6 December 2010 petition) for the Court file to be no longer sealed so that information therein (including the Cayman Islands Documents) would become generally publicly available. The Brazilian Court also granted that relief.

The public availability of the Court file and the Cayman Islands Documents has led to an inaccurate and misconceived campaign by the Brazilian press in respect of the matters in dispute. This campaign has resulted in adverse press comment damaging the reputations of the

Applicants, in particular those of the third to fifth Applicants (including, it is alleged, causing a massive run on Banco Rural).

Dr. Braga's response to this complaint overlaps with the second and equally lacks merit, says the Applicants. It relates to the representation to the Brazilian Court in his petition of 6<sup>th</sup> December 2010 in which he advised that Court that the gagging orders earlier put in place by this and the BVI Courts – to prevent disclosure of the fact of his Norwich Pharmacal applications in turn to prevent them from being frustrated by the Applicants – had been lifted.

Dr. Braga rejects any suggestion that by so advising the Brazilian Court he was implying that he was no longer bound by his Undertakings given to this Court.

Being aware that Court files in Brazil are, in general, open and as secrecy had been imposed in Brazil by the courts first only to protect his investigations and later to reflect the secrecy obligations imposed by the gagging orders made by this Court and elsewhere, he felt under an obligation to inform the Brazilian Bankruptcy Court that the basis upon which he had obtained the sealing orders from it had changed. As a result, the Brazilian Court file was unsealed and became open in the usual way. No restriction had been imposed upon him which required him to take steps to keep the Brazilian Court files sealed.

For the avoidance of doubt, he also confirms that at no time did he disclose any of the information to the Brazilian press. He has steadfastly refused to discuss the matter with the Brazilian press.

It must be remembered that his express Undertakings undoubtedly allowed Dr. Braga to commence proceedings in jurisdictions other than Brazil where there was no question that the court file would be sealed, or that any documents used in those proceedings would be kept secret.

This Dr. Braga also offers as a response to the further complaint, that he has allowed the Cayman Islands information to become public by the unsealed filing of documents including it, in the context of proceedings in Florida.

In Florida filings are allowed and were made by Dr. Braga by way of the Federal online filing system, filings on which are accessible by the public at large unless made under seal, which was not done by Dr. Braga. By way of contrast Dr. Braga asserts that the sealing orders in Brazil were designed to protect the Petroforte Estate, not those accused of committing frauds upon it.

In any event, says Dr. Braga, it was open to and incumbent upon the Applicants to apply to the Brazilian Courts to reseal the file and to prevent the dissemination of documents relating to them. In this regard, it is worthy of note that despite her appeal to the TSPJ against the extension of the Petroforte Bankruptcy order to herself, Ms. Rabello made no application to the TSPJ (or to the first instance Court) for Judge

Beethoven's decision to be sealed. Rather, she attached a copy of that decision to her petition to the TSPJ which was not filed under seal; a surprising step to take in view of the sensitive information which she claims is contained in Judge Beethoven's decision.

186. I accept that given the state of the law in Brazil which, like the law here, treats court files as generally being part of the public court record, it was incumbent upon the Applicants to apply there to have the court files resealed but none has sought to do so.
187. This Court must therefore be astute to prevent this application to this Court from becoming merely an attempt to discredit Dr. Braga by allegations of breach of his Undertakings and contempt of court so as to obtain orders from this court revoking the Norwich Pharmacal Orders and with that the *ex post facto* invalidation of the use of the Cayman Islands Documents in the Brazilian proceedings.

### **Analysis**

188. In respect of his petition to the Bankruptcy Court of the 25<sup>th</sup> October 2010, Dr. Braga's fundamental position is that the Central Bank's involvement has been a necessary consequence of the Bankruptcy Extension to Banco Rural and its shareholder Katia Rabello (as well as to another Banco Rural former senior official, Mr. Amaral). Dr. Braga says he was obliged to have the Central Bank notified of Judge Beethoven's decision in that regard and it was within that decision that was contained the disclosure of information complained about. Even if he had not so applied to the Brazilian Court, the decision would have been

- required by Brazilian law to be gazetted for the purpose, among others, of providing notice of it to the Central Bank (and any other relevant regulatory body).
189. The Applicants submit that these assertions simply do not match the factual history nor is Dr. Braga's explanation of the Central Bank's role accurate. Having carefully considered the competing arguments, I find myself obliged to conclude that the basis for a finding of contempt is absent in this regard.
190. In the first place, any doubt over the necessity for the involvement of the Central Bank must, in the present context, be resolved in Dr. Braga's favour: not only was his petition acceded to by the Brazilian Court, implicitly acknowledging the need to send its decision to the Central Bank; the sensitive information contained in the decision, while obtained from the Cayman Islands Documents, must be regarded as part of the decision itself and upon which the decision, insofar as it related to Katia Rabello, was based.
191. In those circumstances, where the Undertakings specifically exempt use of the documents (and implicitly also of information contained in them) for "*the institution and prosecution of any proceedings relating to the Petroforte Estate*", it would in my view, be an unwarranted application of the principles to hold that by advocating for disclosure to the Central Bank of the sensitive information contained as part of a Brazilian Court's decision Dr. Braga can be held to be in breach of his Undertakings and so found to be in contempt of this Court. Specifically, I do not regard him as being in breach of Lord Oliver's dictum from *Crest Homes PLC v Marks* [1987] 1 AC 829, 854 that



*“It has recently been held by Scott J. in Sybron Corporation v nBarclays Bank PLC [1985] Ch. 299 – and this must in my judgment clearly be right – that the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it is embodied in a copy or stored in the mind.”*

192. Contrary to the Applicants’ submissions, I do not understand that dictum as extending to cover discovered information which has become embodied in a decision of a court as a central premise of that decision in circumstances where there is no requirement that the dissemination of the decision itself is embargoed so as to protect the information – the circumstances attending the Brazilian Court’s decision under discussion here.
193. Nor can Dr. Braga’s “petition” of the 6<sup>th</sup> December 2010 be treated or regarded any differently: His Undertakings to this Court imposed no positive obligation on him to take steps to prevent disclosure to the Central Bank (or to anyone else). While he and this Court might have been better served by different legal advice than that provided by his BVI lawyers – such that he would have sought the express clarification and permission of this Court before acceding to the Brazilian Court’s intention to disclose the court file (including the Cayman Islands Documents) to the Central Bank – the fact of the matter is that there was, under Brazilian law, no impediment to the Brazilian Court itself allowing access. And, moreover, Dr. Braga was himself under no legal obligation to this Court to seek to prevent the Central Bank from having that access.

194. These being allegations of contempt inviting criminal sanctions, any such obligation can only now be imposed if it had been clearly a part of the implied or express Undertakings. No such obligation can be deemed to have arisen as a matter of implication by the law of contempt.

195. In recognizing that all the elements of the crime of contempt must be established, the Applicants are percipient in their arguments where they say in this regards (at paragraph 89 of their written submissions):

*“The Court is permitted to take into account the subject matter of the proceedings when reaching a conclusion on the clarity of the Undertakings’ provisions. The learned authors of Miller, “Contempt of Court” 2006 ..... say this:*

*“In the nature of things, the degree of clarity and specificity which is capable of being achieved will vary according to the subject matter of the proceedings....As Arlidge, Eady & Smith note of such cases, the complainant will not unreasonably wish to ensure that he is adequately protected by wording which is wide enough to meet all possible permutations of misconduct within the defendant’s ingenuity.”*

196. It must of course be accepted that the purpose behind the Undertakings was to ensure that the confidential information would only be utilized in a limited manner for the purposes that had been explained to the Court and in accordance

with the public policy of maintaining the confidentiality of business information subject to the CR(P)L. Indeed, for those reasons, the express Undertakings were drafted with a degree of precision intended to ensure that Dr. Braga understood what his restrictions were in the context of his application in circumstances where the Applicants were not present to see to their own interests. But that was not the only reason for the attempt at precision: of importance also was the need to ensure that the specificity required for the enforcement of the Undertakings in the event of breach, by way of sanction for contempt, was met.

197. In failing to impose a positive duty upon Dr. Braga to take all reasonable steps to ensure, in keeping with Brazilian law, that once filed in Court the confidential information remained sealed except only for the purposes of court proceedings absent further leave of this Court; the Undertakings are now shown to have lacked a necessary degree of specificity for which I may not now make amends simply “*by taking into account the subject matter of the proceedings when reaching a conclusion on the clarity*” of the Undertakings’ provisions.

198. Proof is required to the criminal standard that an alleged contemnor breached a clear and unambiguous court order (here undertaking to the Court) with actual knowledge of the precise terms breached. Thus, the Undertakings must contain full details of the acts mandated or prohibited without the need to refer to other documents or circumstances and so without the need to imply terms not expressed in the Undertakings: *Telesystem Intl. Wireless Inc. v CVC Opportunity Equity Partners L.P.* 2002 CILR 96 applying *Seaward v Paterson* [1989] 1 Ch. 545 and *R v City of London Magistrate’s Court; ex parte Green* [1997] 3 All. E.R. 557

(affirmed on appeal: *2002 CILR 591*) and indeed, as shown in *Spectravest Inc.* (above).

199. Those conclusions must also inform my approach to the complaint of leakage to the Brazilian press. This is tantamount to a complaint that Dr. Braga bore a responsibility for the Brazilian court file including Judge Beethoven's decision becoming publicly available in Brazil. But, as already explained, neither the implied nor express Undertakings imposed upon Dr. Braga a duty to prevent that state of affairs.
200. While it is no doubt regrettable from the Applicants' point of view that confidential information revealing the beneficial ownership of Securinvest got into the public domain, the real damage to them – and so their greater concern – must surely arise from the fact of the extension of the Bankruptcy to them becoming public knowledge in Brazil. That, from all I now understand about the legal requirements for publication of such matters in Brazil, was an inevitability.
201. And whatever view one may form as to its fairness looking at the Bankruptcy Extension through the eyes of the common law; there can be no argument entertained by me that Dr. Braga was in any way prohibited from using the confidential information for the purpose of obtaining the kind of remedy he obtained from the Bankruptcy Court.
202. In short, this Court can impose no sanction upon Dr. Braga for the consequences in circumstances where his Undertakings imposed no obligation on him to ensure that the Court file and the decisions of the Brazilian Court containing confidential information remained sealed.

203. In light of the foregoing conclusions of law, I do not consider that any different result can be reached by taking into account the contents of Dr. Braga's further petition of 7 February 2011 to the TJSP. That was a petition in which Dr. Braga opposed the granting of Ms. Rabello's interlocutory appeal and in so doing made representations – similar to those in his 6 December 2010 petition – to the effect that while he could not disclose the Cayman documents to the Central Bank, there was nothing preventing the TJSP from doing so. Here the same conclusions as were reached above in relation to the 6<sup>th</sup> December 2010 petition must be reached again.
204. That then brings me to the consideration of the alleged contempt in the context of Dr. Braga's unrestricted placement of the confidential information into the United States Federal online court filing system ("PACER") for the purposes of his applications to the Florida Court.
205. Here too, Dr. Braga's response is that no express or implied restriction was placed upon him requiring him to deploy documents only in sealed proceedings. His express Undertakings undoubtedly allowed him to commence proceedings in jurisdictions other than in Brazil where there would be no question that the court files or any documents used in such proceedings would be sealed. Indeed, proceedings have been taken not only in Brazil and Florida, but also in the BVI (as already mentioned) and Belize, where Norwich Pharmacal type orders were also obtained and where, it seems, the Court files have been in the public domain because the Applicants have not otherwise objected.

206. I am compelled to accept the correctness of that argument in response to allegations of a breach of Undertakings which would invite the imposition of severe, even criminal, sanctions.
207. While the Court must express its disappointment at Dr. Braga's failure to honour the fair spirit of his Undertakings by taking all reasonable measures available to him to protect the confidential information, I am obliged to conclude that he is not shown to have breached the terms – express or implied – of the Undertakings.
208. In reality, the circumstances of this case emphasise the need for great circumspection (already recognized in the Codelco case (above)) in the granting, on the ex parte basis, of discovery orders in aid of foreign proceedings; in particular where discovery is to be the consequence of Norwich Pharmacal type applications in aid of foreign plaintiffs.
209. In this case, neither the implied nor the express Undertakings were as comprehensive as needed to prevent disclosure by way of the discovered material making its way into public court records or information from it into the written decisions of the Brazilian Courts.
210. I would consider that the lessons learned from this case should inform the contents of undertakings to be given in the future, including as to the possible implications of foreign law and practice.
211. For all the foregoing reasons, the application for committal for contempt must be dismissed, along with the related applications.
212. I do not, however, consider that it is too late to require of Dr. Braga that he takes all reasonable steps available to him (including by way of application to the

Brazilian Courts at all levels) to prevent further misuse or further unjustified dissemination of the discovered material.

213. This will include the giving of further undertakings for the seeking of orders from Judge Beethoven's Court to the Central Bank for the return of any of the discovered material obtained from the Court file. As no related action appears to have been taken by the Central Bank by way of use or reliance on that material, I do not suppose that the imposition of such a requirement upon Dr. Braga could be seen as undue interference with the functions of the Central Bank. If I am wrong about this, no doubt the Bankruptcy Court will be so advised and respond accordingly.

At all events, the Central Bank is not a court, nor its deliberations on inquiries "proceedings" within the meaning of the CR(P)L, which is the essential prerequisite for the CR(P) L orders allowing the giving in evidence of the confidential information that was obtained. See In Re Ansbacher( Cayman) Limited 2001 CILR 214

214. As to the placing of the discovered material on PACER, I require of Dr. Braga that he seeks a directive from the Florida Court placing that material under seal in the fullest and most protective terms available as a matter of United States law. A similar requirement is imposed in respect of discovered materials now on or to be placed on the file of the Courts in the BVI and Belize or to be placed before the Courts in any other jurisdiction. As to the unduly wide terms of the Bankers Trust relief, similar recourses are to be taken. Dr. Braga shall apply to the Brazilian Court for all orders necessary for the retrieval of the confidential

information disclosed relating to the affairs of the Applicants (beyond that which specifically relates to the identity of the beneficial ownership of Securinvest) to be surrendered to the Applicants or failing that at least orders for the sealing of all such material in the files of Judge Beethoven's Court, of the TSPJ and of the STJ; to be kept sealed unless and until a further order is obtained from this Court permitting its further use. Dr. Braga is required to enter into a further express undertakings for these purposes.

### **Summary of conclusions**

1. I do not find that Dr. Braga misrepresented to the Court his status as Judicial Administrator over Securinvest at the time of his ex parte applications for Norwich Pharmacal relief. I find that he had standing to bring those applications.
2. Nor do I find that Dr. Braga then failed to make disclosure of any material fact relating to the Brazilian proceedings.
3. The Norwich Pharmacal relief granted was within the ambit of the principles that define the Court's jurisdiction in that regard.
4. However, the Bankers Trust aspect of that relief was impermissibly wide. Steps must be taken by Dr. Braga to recover the material that was disclosed impermissibly as a result of that aspect of the Orders.
5. I do not find that Dr. Braga has acted in breach either of his implied or express undertakings given to this Court. However, because there has been dissemination of the discovered material in circumstances not permitted by the Orders of this Court, steps must also be taken by Dr. Braga to prevent ongoing abuse or further abuse in the future.



In this regard, further express undertakings are required of Dr. Braga.

**Costs**

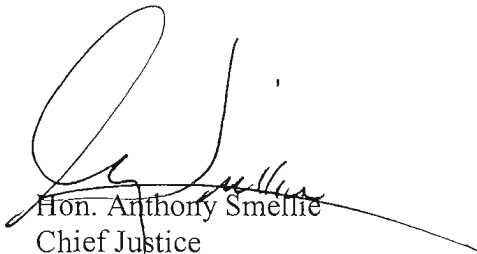
Notwithstanding their lack of substantive success in these applications, the Applicants are appropriately concerned over the unduly wide ambit of the disclosure obtained here by Dr. Braga and over the manner of dissemination of the information obtained.

Ultimately however, substantive justice for them can be obtained only in Brazil where the allegations of fraudulent asset stripping are to be resolved.

If Dr. Braga ultimately succeeds in his quest to have the Petroforte Bankruptcy extended to the Applicants, then his quest for the discovery of sensitive information in this jurisdiction will have been vindicated.

If not, his quest will have been unjustified and the implications for costs and damages will no doubt have to be faced by him (perhaps in his official capacity in the Petroforte Bankruptcy) in Brazil.

In all the circumstances of the case, I concluded that it is appropriate to make no order as to costs.



Hon. Anthony Smellie  
Chief Justice

Delivered on 20<sup>th</sup> May 2011  
and clarified by Corrigendum on 10<sup>th</sup> June 2011