ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION

IN THE MATTER OF THE INSOLVENCY REGULATIONS 2015

IN THE MATTER OF NMC HEALTHCARE LTD (in administration) (subject to a deed of company arrangement) **AND THE COMPANIES LISTED IN SCHEDULE 1 TO THE ADMINISTRATION APPLICATION**

AND

IN THE MATTER OF THE INSOLVENCY REGULATIONS 2015

IN THE MATTER OF NMC HEALTH PLC (in administration)

BENJAMIN THOM CAIRNS AND RICHARD DIXON FLEMING (in their capacities as the joint administrators of **NMC HEALTHCARE LTD** (in administration) (subject to a deed of company arrangement), **NMC HOLDING LTD** (in administration) and **NMC HEALTH PLC** (in administration))

Applicants

(1) NEOPHARMA LLC

(2) NEXGEN PHARMA FZ LLC

(3) ERNST & YOUNG – MIDDLE EAST, trading as Ernst & Young Middle East (Abu Dhabi Branch)

Respondents

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2023] ADGMCFI 0022
Before:	Justice Sir Andrew Smith
Decision Date:	5 December 2023
Decision:	Orders under section 256 of the Insolvency Regulations 2022 granted against each of the Respondents
Hearing Date(s):	10 August 2023, 1 September 2023; and 12 October 2023
Date of Orders:	To be drafted by the legal representatives of the Joint Administrators to give effect to this Judgment
Catchwords:	Section 256 of the Insolvency Regulations 2022. Extra-territorial scope of the power. Relationship with section 255 of the I Insolvency Regulations 2022. Schedule 10, article 21 to Insolvency Regulations 2002, its territorial limits. Exercise of discretion under section 256 of Insolvency Regulations 2022. Relevance of prohibitions on disclosure under UAE laws. Relevance of confidentiality, and proprietary interests. Relevance of order being onerous on respondent.
Cases Cited	A C Network Holding Ltd and ors v Polymath Ekar SPV1, [2023] ADGMCA 0002 Bilta (UK) Ltd v Nazir (No 2), [2015] UKSC 23 Clark v Oceanic Contractors Inc, [1983] 2 AC 130 Cloverbay Ltd v BCCI SA, [1991] Ch 90 Gorbachev v Guriev, [2022] EWCA Civ 1270 In re Akkurate Ltd (in liquidation), [2020] EWHC 1433 (Ch) In re Atlantic Computers [1998] BCC 200 In re Bank of Credit and Commerce International SA [1997] BCC 561 In re British & Commonwealth Holdings plc (nos 1 and 2), [1993] AC 426 In re Carna Meats (UK) Ltd, [2019] EWHC 2503 (Ch) in re Chesterfield United Inc, [2012] EWHC 244 (Ch) In re Comet Group Ltd, [2014] EWHC 3477 (Ch) In re M F Global UK Ltd (No 7), [2015] EWHC 2319 (Ch) In re Mid East Trading Ltd, [1998] BCC 726 In re Omni Trustees Ltd (No 2), [2015] EWHC 2697 (Ch) In re Paramount Airways Ltd, [1993] Ch 223 In re Rolls Razor Ltd, [1968] 3 All E R 698,700 In re Rolls Razor Ltd (No 2), [1970] Ch 576 In re Seagull Co Ltd, [1993] Ch 345 In re Tucker (RC) (a bankrupt) [1990] Ch 148 In re Webinvest Ltd, [2017] EWHC 2446 (Ch) In re XL Communications Group plc, [2005] EWHC 2413 (Ch) Larsen v Navios International Inc [2011] EWHC 878

	Marcel v Commr of Police of the Metropolis, [1992] Ch 225 Masri v Consolidated Contractors Int (UK) Ltd, [2009] UKHL 43 Nix v Emerdata Ltd, [2022] EWHC 718 (Comm) NMC Healthcare Ltd and ors v Dubai Islamic Bank PJSC and ors, [2023] ADGMCFI 0013 R (KBR Inc) v Director of the Serious Fraud Office, [2021] UKSC 2 Rosewood Hotel Abu Dhabi LLC v Skelmore Hospitality Group Ltd [2020] ADGMCFI 0002 Sasea Finance Ltd v KPMG, [1998] BCC 216
Legislation Cited:	Abu Dhabi Law No. (4) of 2013 (as amended by Abu Dhabi Law No. 12 of 2020) Abu Dhabi Law No. 12 of 2020 ADGM Insolvency Regulations 2022 ADGM Application of English Law Regulations 2015 Federal Law 18/1993, the Commercial Transactions Law Federal Law 12/2014, the Regulation of the Auditing Profession Law Federal Law 14/2018, Regarding the Central Bank & Organization of Financial Institutions and Activities Federal Law 31/2021, the Issuance of Crimes and Penalties Law Federal Law 34/2021, the Law Concerning the Fight against Rumours and Cybercrime Federal Law 45/2021, the Protection of Personal Data Law Federal Law 50/2022, the Commercial Transactions Law United Nations Commission on International Trade Law (UNCITRAL) Article 15
Case Number:	ADGMCFI-2020-020; and ADGMCFI-2022-063
Parties and representation:	***Applicants*** Mr Tony Beswetherick KC and Mr Matthew McGhee Instructed by DLA Piper UK LLP ***First Respondent*** Mr. P.V. Sheheen - Baker Tilly, Solicitors and Legal Consultants ***Second Respondent*** No appearance ***Third Respondent*** Mr. James Brocklebank KC Instructed by Clyde & Co LLP

JUDGMENT

The NMC Group

1. On 27 September 2020, the applicants, Mr Benjamin Thom Cairns and Mr Richard Dixon Fleming of Alvarez & Marsal Europe LLP ("**A&M**") (the "**JAs**"), were appointed as the joint administrators of NMC Healthcare Ltd ("**NMCH**") and NMC Holding Ltd ("**Holding**"), both being companies registered in the Abu Dhabi Global Market ("**ADGM**"). By the same order, the Court also appointed them to be joint administrators of 34 other companies registered in the ADGM, which were direct or indirect operating subsidiaries of NMCH. Further, the JAs, together with Mr Mark Firmin, also of A&M, were appointed as the administrators of NMC Health PLC ("**NMC PLC**"), an English company, by order of the English High Court made on 9 April 2020 upon the application of Abu Dhabi Commercial Bank, one of its major creditors: I shall refer to the JAs and Mr Firmin as the "**PLC Administrators**".

2. NMCH, Holding and NMC PLC were companies in the NMC Group, which had companies registered in many jurisdictions, but whose centre of operations was in the United Arab Emirates ("**UAE**"). The Group was founded by Dr B R Shetty, and it grew to become a leading provider of private healthcare in the UAE. NMC PLC was the registered holding company of the Group, directly or indirectly owning all the shares in NMCH and Holding. On 2 April 2012, it made an Initial Public Offering ("**IPO**") of 33% of its shares on the London Stock Exchange, the remaining shares being retained by Dr Shetty and two other shareholders (who together are often referred to as the "**Principal Shareholders**"). Thereafter, the Group appeared to be extremely successful, and its annual accounts record profits increasing from some US$ 59.77 million in 2012 to some US$ 256.85 million in 2018. In December 2019, an American Investment firm called Muddy Waters Capital LLC published a report that raised concerns about the Group's financial statements: in particular, it questioned whether its debts were properly reported. As a result, the Group announced that it had undisclosed debts of more than US$ 4.1 billion, its reported indebtedness being about US$ 2.2 billion.

3. The companies of the NMC Group were put into administration on the basis that they were insolvent as a result of extensive fraud and substantial financial irregularities. In his evidence in support of the present applications, Mr Fleming says this:

> *"The Administrators' investigations to date suggest that the NMC Group was the victim of a substantial fraud. The fraud appears to have involved the following key elements:*
>
> *... The preparation and publication of false financial statements containing deliberate manipulation of financial results, designed to inflate the reported performance and financial position of the NMC Group and inflate the share price of NMC PLC;*
>
> *… The dissipation of substantial funds by companies within the NMC Group totaling in excess of AED 5 billion to accounts belonging to various individuals and entities, significantly to Dr Shetty (or entities connected to him) to fund acquisitions of various businesses, such as his acquisition of Travelex Holdings Limited in 2014;*
>
> *… The entry into related-party transactions, including with other entities owned by certain of the Principal Shareholders, including [the first respondent, Neopharma LLC] and UAE Exchange Centre LLC …;*
>
> *… The incurring of significant undisclosed borrowings to fund the above dissipations and payments to related parties, including through supply chain type financing … ;*

… The inflation of the NMC Group's reported revenue through the processing of falsified accounting entries in the NMC Group's financial records, which caused NMC PLC's share price to be inflated; and

… The manipulation of the NMC's financial reporting systems, including its IT and general ledger systems".

4. On 21 September 2021, NMCH and the 34 subsidiaries entered into Deeds of Company Arrangement ("**DOCAs**"). Their purpose was to enable the 34 subsidiaries to continue trading. The DOCAs were implemented on 25 March 2022. The subsidiaries were transferred to a company called NMC OpCo Ltd ("**OpCo**"), they came out of administration, and their DOCAs terminated. The arrangements involved the subsidiaries assigning to NMCH claims in respect of the losses leading to their administration, and OpCo agreed to provide NMCH with information or records held by the subsidiaries concerning the assigned claims.

5. NMCH and Holding remain in administration. By order dated 15 September 2022, the terms of the JAs' appointments as administrators of NMCH were extended to 26 September 2025, and their appointments as administrators of Holding were extended to 26 September 2024. The terms of office of the PLC Administrators have been extended to April 2025.

The Applications by the JAs

6. By notice dated 23 March 2023, the JAs, in their capacities as administrators of NMCH and Holding, and, in the case of one of the respondents, as administrators of NMC PLC, have applied for relief under sections 255 and 256 of the *ADGM Insolvency Regulations*, 2022 (the "**IR**"). Section 255 provides that "*an Office-holder … appointed to a Company … may require any of the persons identified … to (a) give to the Office-holder such information concerning the Company or its promotion, formation, business dealings, affairs or property as the Office-holder may … reasonably require; and (b) attend on the Office-holder at such times as [the Office-holder] may reasonably require*". The persons who are obliged so to co-operate with the Office-holder include "*those who are or have been at any time in the employment of the Company*". They also include, where a company is in administration, present or past directors and secretaries of the company; those who have taken part in the formation of the company; and past and present directors of any company which is or has been a director or secretary of the company to which the Office-holder is appointed. Failure to comply with section 255 without reasonable excuse is a contravention, which may be met by a fine.

7. Section 256 provides that on the application of an Office-holder, "*the Court may order any person involved with the Company to appear before it or to produce to it or to the Office-holder an account of his dealings with the Company contained in a witness statement verified by a statement of truth including any information concerning the promotion, formation, business, dealings, affairs or property of the Company or any books, papers or records in his possession or under his control relating to the Company or to any such dealings*". The persons against whom such an order may be made include "*a Director or secretary of the Company, any person known or suspected to have in his possession any property of the Company or supposed to be indebted to the Company and any person whom the Court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the Company*".

8. These sections do not only apply where a company is in administration, but also when it is subject to a deed of company arrangement, when an administrative receiver has been appointed, when it goes into liquidation and when a provisional liquidator is appointed: IR section 254(1). Accordingly, the term "*Office-holder*" means a receiver, an administrative receiver, an administrator of a company, an administrator of a deed of company arrangement, a liquidator or a provisional liquidator: IR section 298.

9. The application by the JAs as administrators of NMC PLC is made under Schedule 10 to the IR for relief such as is provided for in section 255 and 256 of the IR. Schedule 10 enacts the model law of the United Nations Commission on International Trade Law (UNCITRAL) on cross-border insolvency. Article 15 provides that "[a] *foreign representative may apply to the Court for recognition of the foreign proceedings in which the representative has been appointed*", and article 17 provides that, in specified circumstances, the foreign proceeding shall be recognised as "*a foreign main proceeding*" or "*a foreign non-main proceeding*". By order of 10 March 2022, the English administration of NMC plc was recognised in the ADGM as a foreign main proceeding.

10. Article 21 of schedule 10 provides that "*Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including the following … (d) providing for the examination of witnesses the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities*" … *(g) granting any additional relief that may be available to it under the laws of the* [ADGM]". Although article 21 refers to the Court granting relief where it is "*necessary*" to protect assets or the interests of creditors, the standard of necessity is not particularly demanding: as Newey J said of the corresponding English legislation in *In re Chesterfield United Inc, [2012] EWHC 244 (Ch)* at para 13, "*If a foreign representative 'reasonably requires' material with a view to establishing whether a company has a valuable cause of action, relief is likely to be 'necessary to protect the assets of the debtor or the interests of the creditors'*". In the same judgment, Newey J also said this (at para 11): "*It seems to me that Art. 21(1)(d) was intended to set a common minimum standard. A foreign representative is to be able to seek relief under Art.21(1)(d) regardless of whether an office-holder would be entitled to such relief under the local law. If the local law in fact provides for 'additional' relief, a foreign representative can seek that under art. 21(1)(g). As Norris J noted in Larsen v Navios International Inc [2011] EWHC 878 (Ch) …at [23(f)] 'The recognition of the foreign insolvency proceedings appears to have been intended to have in the recognising state the same effect as if the insolvency proceedings had been opened in the recognising state (subject to identified exceptions)'*".

The Respondents

11. The applications are against three respondents. The first respondent is Neopharma LLC ("**Neopharma**"), a company incorporated in Abu Dhabi, according to the evidence, in 2003 or earlier: Mr Sheheen Pulikkai Veettil, a Managing Partner of Baker Tilly Solicitors & Legal Consultants ("**Baker Tilly**"), who represents Neopharma, told me that it was incorporated in 1999. It is described in its financial statements for the year ended 31 March 2019 as "*engaged in the manufacturing, supply, import and export of pharmaceutical products*". According to Mr Fleming's evidence, Dr Shetty was a substantial shareholder in Neopharma, and senior persons in the NMC Group held senior positions in Neopharma: between about 2000 and 2011, its Chief Financial Officer ("**CFO**") was Mr Prasanth Manghat, who was the NMC Group's CFO from May 2011 to December 2014, thereafter its Deputy Chief Executive Officer, and then from February 2017 its Chief Executive Officer; although the records are incomplete, Mr Suresh Kumar, the Head of the NMC Group's Treasury from 2012 to 2020, seems to have been Neopharma's CFO from about 2011 or 2012 until 2020; and Mr Suresh Nair apparently worked for both the NMC Group and Neopharma, from about 2010 or 2011 until 2020.

12. Mr Fleming's evidence is, in summary, that the NMC Group's internal accounting records appear to show that "*extremely significant*" sums totalling more than AED 1 billion, were transferred to Neopharma from the NMC Group, principally from NMCH and Holding, and that "*very large*" sums, totalling some AED 5.5 million, were transferred from Neopharma to the NMC Group, mostly to NMCH and some to Holding; and that the NMC Group, including NMCH and Holding, provided support, such as guarantees or other security arrangements, for Neopharma and its subsidiaries for the purpose of obtaining financing facilities from banks and financial institutions: for example, NMC Group entities guaranteed over AED 2.1 billion of Neopharma's financing arrangements, with NMCH apparently guaranteeing over AED 1.9 billion. The JAs wish to investigate the extent, purpose and justification for these dealings.

13. The second respondent is Nexgen Pharma FZ LLC ("**Nexgen**"), a company registered in the Dubai Healthcare City Free Zone, and apparently incorporated in January 2011 as an equal joint venture between Dr Shetty and Hetero FZCO, which is registered in the Dubai Airport Free Zone and belongs to the Indian pharmaceutical Hetero Group. Mr Fleming's evidence indicates that Dr Shetty became a 50% shareholder in Nexgen, and on 1 January 2017, his shares were acquired by Neopharma. Nexgen's audit reports identify Mr Manghat as its "*manage*r". Other NMC Group personnel also appear to have been involved in managing and overseeing Nexgen's banking.

14. As with Neopharma, the NMC Group, and specifically NMCH and Holding, transferred sums of some AED 314 million to Nexgen. They also received large amounts of finance from financial institutions of some AED 12 billion, and the NMC Group's internal accounting records also indicate that substantial payments of over AED 12 billion were received from Nexgen, most of these funds being remitted to NMCH, with some remitted to Holding. The JAs, as Mr Fleming put it, "*lack any real understanding of the commercial factor motivating transactions which form part of the apparently close commercial relationship between Nexgen and the NMC Group*".

15. The third respondent is described in the Application Notice as "*Ernst & Young – Middle East, trading as Ernst & Young Middle East (Abu Dhabi Branch)*". Ernst & Young Middle East ("**EYME**") is a Bahraini specialised partnership company, which has two shareholder partners. EYME has four branches in the UAE. The Abu Dhabi branch of EYME, which was referred to on these applications as "*EYAD*", is an "*onshore*" entity, and is registered and licensed by the Abu Dhabi Department of Economic Development. Another branch of EYME is registered in the ADGM as a "*Branch of a foreign Partnership*". EYME's other UAE branches are in Dubai and Sharjah. The four branches are not separate legal entities, and have no legal status distinct from EYME. They are separate organisations within EYME: they have their own licences to provide specified services within their jurisdictions, and employees are employed, and have their visas issued, by the branch for which they work.

16. From 2009 until 2019, EYME was the auditor of NMCH and most of its subsidiaries, through its Abu Dhabi branch ("**EYAD**"). Ernst & Young LLP ("**EY**"), an English Limited Liability Partnership, was the statutory auditor of NMC PLC for the years ended 31 December 2012 to 31 December 2018, and its audits included the consolidated financial statements of the NMC Group. It also conducted interim reviews of the consolidated financial statements for the periods ended 30 June 2012 to 30 June 2019. EYME was not the auditor of NMC PLC or of Holding. However, it conducted local or "*component*" audits of companies in the Group, including NMCH, and also reported on those companies in relation to EY's interim reviews: the Applicants have identified some of these companies, but do not know whether there were others. Further, according to Mr Fleming, EY and EYME worked together to plan and design the audits, and EYME's work in connection with the audits would be supervised, reviewed and evaluated by EY. The JAs say that the misleading financial statements of the NMC Group, endorsed with unqualified audit opinions from EY, were an essential part of the fraud.

17. Further, EYME provided other services to the NMC Group in and after 2011. In 2011, it was engaged by NMCH in connection with the IPO in what was referred to as "*Project Nightingale*", and produced various reports: a report, as required by the Statement of Investment Reporting Standards ("**SIR**") on historic financial information for the years 2009 to 2011, that was included in the IPO prospectus; a report in accordance with SIR on unaudited pro forma financial information in the prospectus; and an opinion on the Financial Reporting Procedures of NMCH. In 2012, it was instructed by NMC PLC in relation to an investigation into allegations made by a former shareholder about the Group's finances as presented in the prospectus.

18. In a witness statement of 17 May 2023, Mr Anthony O'Sullivan, a Managing Partner for EYME, said that working papers in respect of audit and other engagements conducted by EYAD are its "*proprietary documents*", and that they are stored electronically on systems and using software that are "*proprietary to the global EY network*". (The term "*global EY network*" refers to the global organisation of member firms of Ernst & Young Global Limited, an English company which does not itself provide services to clients.) In

a further witness statement of 17 August 2023, he expanded upon this evidence, referring to a provision in EY's General Terms and Conditions for Audit and Review Engagements, which are enclosed with engagement letters to clients, that "*We retain ownership in the working papers compiled in connection with the Services*". He said that the "*proprietary documents and information prepared in the conduct of an audit or non-audit engagement belong to whichever EY entity or office was appointed to complete the work and identified in the engagement letter; and that since the NMC Group companies appointed EYAD alone to the engagements, therefore EYAD "holds the proprietary documents and information and no other branch of EYME, nor EYME itself, holds or is able to access that information or documentation*". It was not explained how EYAD, not being a legal entity, could itself (rather than EYME) have rights of ownership or other rights in property, and I cannot accept that they did.

The information and documents sought

19. When the JAs and the PLC Administrators were appointed, they found that the records of the companies in the NMC Group were incomplete, inaccurate or entirely missing: for example, the general ledger, the operational general ledger and payment system and bank statements are all incomplete; there are uninformative descriptions of payments, such as "*accounts receivables*", "*inter-company transfer*" or "*other*", or in some cases there is no description at all; and there appear to be invoices for fictitious goods or services. Although the JAs have access to the accounting software used by the NMC Group, whose main treasury function was conducted by NMCH, the electronic ledgers are insufficient to give insight into many transactions that they wished to investigate, and entries are not supported by hard-copy documents. Emails of senior executives, including Mr Manghat, Mr Prasanth Shenoy, the CFO of NMCH, Mr Deepak Gosh, a Deputy CFO, and Mr Suresh Kumar, had been deleted on about 24 February 2000, in what Mr Fleming describes as "*an apparent attempt to destroy records*". Efforts to reconstitute them had only "*limited*" success. Accordingly, the JAs and the PLC Administrators are, according to Mr Fleming and as I accept, "*reliant upon gathering information and documentation in connection with the business, affairs and dealings with the NMC Group*" from others.

20. By a letter of 18 November 2021, DLA Piper UK LLP ("**DLA**"), on behalf of the JAs, requested Neopharma and related entities to produce certain information and documents. A response was received from lawyers acting for Dr Shetty, but they were not instructed by Neopharma. On 20 December 2021, DLA wrote again to Neopharma for information and documents, and for a meeting with "*relevant members of Neopharma staff*". On 7 January 2022, BSA Ahmad Bin Hazeem & Associates LLP ("**BSA**") acknowledged DLA's letters on behalf of Neopharma. Correspondence between DLA and BSA ensued, but none of the information sought by the JAs has been provided.

21. By letters of 20 December 2021, 8 February 2022 and 28 September 2022, DLA wrote to Nexgen requesting documents, and on 14 October 2022, BSA responded on behalf of Nexgen. No response from Nexgen has been received to further correspondence.

22. DLA wrote to EYME by letter dated 31 January 2023, requesting information and documents, including copies of the audit files for the years from 2010 to 2018. They have since engaged in correspondence with Clyde & Co, who act for EYME, but EYME have not agreed to provide the information sought.

23. The JAs originally applied for orders against Neopharma and Nexgen under both section 255 and section 256 of the IR, but they do not pursue the applications under section 255. They seek an order under section 256 for the production of these documents:

    a. Copies of all contracts, commercial agreements and other documents, setting out the respondent's relationship with NMCH, NMC PLC and "*any of their direct or indirect subsidiaries*";

    b. Copies of their general ledgers ("*or such other accounting or transaction statements held by* [them]"), which relate to transactions with any entity in the NMC Group between 1 January 2011 and 31 December 2020;

c. Copies of all "*finance documents, including facility agreements (whether outstanding or satisfied) to which* [they are] *a party where any entity in the NMC Group is or was the co-borrower or guarantor or had any other obligations or benefits thereunder*";

d. Copies of bank statements for the period from 1 January 2015 to 31 December 2019; and

e. Copies of emails in the period 1 January 2015 to 9 April 2020 to and from the email accounts of Mr Manghat, Mr Shenoy, Mr Gosh and Mr Kumar. (In the orders attached to their application, the JAs sought the production of emails in the period 1 December 2019 to 9 April 2019, but that was said to be a drafting error, and they argued that emails from 1 January 2015 should be produced. This reflects Mr Fleming's evidence in support of the applications.)

24. The JAs also apply for orders against both Neopharma and Nexgen for orders that they appear before the Court by an officer for examination under oath "*in respect of the promotion, formation, business, dealings, affairs or property*" of NMCH and Holding.

25. By their application against EYME, the JAs apply under section 255 and 256 of the IR and schedule 10 to the IR for orders that EYME produce copies of five categories of documents. (The original application sought the disclosure, rather than the production of the documents, but an amended application sought production, reflecting the wording of section 256.) The categories, as set out in a revised draft order served by DLA on 10 October 2023), are the following:

a. Engagement letters or written agreements that EYME entered into with NMCH, NMC PLC, Holding and any of a list of 43 other present or former subsidiaries of NMCH;

b. EYME's "*client and matter ledger"* for any company in the NMC Group;

c. EYME's working papers and documents (including audit files) relating to audit services for the NMC Group from 2009 to 2019;

d. Documents relating to financial and operational review work for NMC Group entities in respect of engagements between 2009 and 2019; and

e. Documents relating to work done in respect of an investigation into allegations made by a former shareholder.

They also apply for a witness statement verified by a statement of truth containing a list and description of all engagements between EYME and any entity in the NMC Group between 2009 and 2019, and details of charges levied and funds received in respect of them.

26. They do not apply for an order for examination of a representative of EYME.

The Proceedings

27. Nexgen was validly served with the proceedings on 26 April 2023, in accordance with an order for alternative service made on 26 April 2023 under the ADGM Courts Procedure Rules 2016, rule 19(1). It has not responded to the JAs' application, and has taken no part in the proceedings.

28. The applications are supported by witness statements of Mr Fleming dated 22 March 2023 and 16 June 2023. In response to the application, EYME served evidence by way of the witness statements of Mr O'Sullivan to which I have referred.

29. By an application of 28 April 2023, Neopharma challenged the jurisdiction of the Court to hear the application on grounds set out in a witness statement of 27 April 2023 made by Mr Sheheen. In his witness statement, Mr Sheheen contended that, being incorporated outside the ADGM, Neopharma was not subject to the laws of ADGM, including the IR, and that it was not party to any agreement to be subject to

ADGM laws or to refer any dispute to the ADGM Courts; and therefore the application was not within any of the heads of the jurisdiction of this Court established by article 13(6) of Abu Dhabi Law No. (4) of 2013 (as amended by Abu Dhabi Law No. 12 of 2020) (the "**Founding Law**"). After a hearing on 10 July 2023, I rejected that argument for reasons set out in my order: I explained that I deferred other challenges to the JAs' application which had been raised by Neopharma in a second witness statement of Mr Sheheen dated 30 May 2023 and in submissions, but were not covered by his witness statement of 27 April 2023.

30. I heard the applications on 10 August 2023, 1 September 2023 and 12 October 2023. The JAs were represented by Mr Tony Beswetherick KC and Mr Matthew McGhee; Neopharma was represented by Mr Sheheen; EYME was represented by Mr James Brocklebank KC; and Nexgen did not appear and was not represented.

Application to amend

31. After the hearing of Neopharma's jurisdictional challenge on 10 July 2023, and in light of exchanges during it, the JAs applied by notice dated 21 July 2023 to amend their applications. I directed that the application to amend be heard together with the applications of 23 March 2023. It is supported by a witness statement of Ms Samantha Reeves of DLA Piper UK Ltd, the JAs' solicitors.

32. The application to amend was resisted by EYME for reasons set out in a letter from Clyde & Co dated 24 July 2023. First, it was said that the proposed amendment would extend the scope of the application by including documents and information relating to additional subsidiaries. I reject that complaint for the reason clearly explained in DLA's reply to the letter of 24 July 2023: the original applications related to (a) NMCH, (b) Holding, (c) any of the companies listed in Schedule A to the order, and (d) "*any other direct or indirect subsidiaries of [NMCH] and NMC PLC*". The proposed amendment merely identifies in Schedule A more of the subsidiaries: they would otherwise be covered by the general wording.

33. Secondly, EYME complain that the proposed amended application seeks relief against EYME under section 255 of the IR. (One of the proposed amendments is to abandon any application under section 255 against Neopharma or Nexgen). I shall refer to the application against EYME under section 255 later in my judgment, to the extent that it is necessary to do so. It suffices to say here that this is a criticism of the original application, and is not, to my mind, a sufficient reason to refuse the application to amend.

34. In his skeleton argument, Mr Brocklebank made other complaints about the original application, and sought to resist the amendment application on the grounds that "*they do not address problems with the order in its unamended form*". Again, these complaints do not seem to me a good reason to refuse the amendments that are sought.

35. Ms Reeves described the proposed amendments as "*relatively minor and have been made in the order to provide further clarity*". I would not myself consider the abandonment of the section 255 claims against Neopharma and Nexgen as minor, but otherwise I accept Ms Reeves' description. I also accept that the respondents will suffer no prejudice as a result of the proposed amendment. I allow it.

36. By a letter dated 10 October 2023, DLA sent Baker Tilly and Clyde & Co amended versions of the orders that the JAs sought, containing revisions reflected exchanges during the earlier hearings. I shall consider the application on the basis of the revised draft orders.

The relationship between section 255 and section 256

37. In my ruling of 12 July 2023, I identified three points made by Mr Sheheen in his second witness statement about which I deferred my decisions. First, Mr Sheheen argued that section 256 of the IR should be read harmoniously with section 255, and that therefore section 256 should be understood to be limited to a power to make orders only against persons covered by section 255. Thus, it was submitted, an order cannot be made under section 256 against Neopharma. I cannot accept that argument: of course, in the

context of an administration, the general purpose of both articles is to assist administrators to perform their functions in the interest of the company's creditors as a whole (IR section 2(2)), and to do so as quickly and efficiently as is reasonably practicable (IR section 3), but they are designed to assist in different ways. Section 256 empowers the Court to make orders, on the application of an Office-holder, against anyone *"involved with the Company*", which includes anyone whom the Court thinks capable of giving information of the kind specified. Section 255, on the other hand, provides that certain persons are under a duty to co-operate with the Office-holder if requested to do so, and to do so without any Court order; and that failure to do so without reasonable excuse is punishable with a fine. It is not surprising, therefore, that section 255 covers a narrower group of persons. I cannot accept Mr Sheheen's submission that section 255 limits the court's section 256 powers to making orders only against persons under a section 255 duty: there is no such express limitation in the IR, and none is to be implied.

38. Mr Sheheen developed another point from his submission that sections 255 and 256 are to be read harmoniously. He observed that section 255 is apparently focused, at least primarily, on natural persons rather than corporate entities, and referred to the persons required by subsection 255(2) to cooperate with the Office-holder, including (for example) directors and persons in the employment of the company. He went on to submit that section 256 is similarly directed to natural persons, and that it does not empower the Court to make an order against corporate entities. He contended that a corporate entity could not "*appear before the Court*", and could not verify a witness statement by a statement of truth.

39. I am not persuaded by this submission. Section 297(1) of the IR provides that, in the IR, "*unless a contrary intention appears, a reference to -…(b) a person includes a natural person, body corporate, or body incorporate, including a Company, unregistered company, partnership, unincorporate association, government or state*". The question, therefore, is whether this definition does not apply to the use of "*person*" in section 256 because a "*contrary intention appears*". I do not consider that the matters identified by Mr Sheheen evince a "*contrary indication*" to displace the definition: something express, or more clearly implied, is required. Specifically, in my judgment a company could properly be ordered to appear before the Court by its proper officer or other representative, or so to produce a verified witness statement.

Was Neopharma a person "involved with" NMCH and Holding?

40. Secondly, in my earlier ruling, I deferred consideration of an argument about whether there is sufficient evidence of dealings between Neopharma and NMCH or Holding for section 256 to apply to Neopharma. Section 256 provides for the Court to make an order against "*any person involved with the Company … to produce ... an account of his dealings with the Company*". Mr Fleming's evidence establishes that Neopharma was such a person and had "*dealings*" with both NMCH and Holding. The JAs have, as it appears from Mr Fleming's evidence, identified only distribution agreements between Neopharma and New Medical Centre Trading LLC ("**Trading**"), and, while the JAs were appointed its administrators by the order of 27 September 2020, Trading is no longer in administration. However, as I have said, Mr Fleming has also given evidence that the financial records held and reviewed by the JAs "*suggest that between 2012 and 2020, entities within the NMC Group (principally* [NMCH and Holding*] may have transferred over AED 1 billion directly to Neopharma. Furthermore, Neopharma appears to have received approximately AED 5.1 billion from third party financial institutions who provided trust receipt and letter of credit financing …to the NMC Group (principally* [NMCH and Trading] … *in connection with their dealings with Neopharma*". He also said that "*it would appear from the NMC Group's internal accounting records that substantial payments may also have been made to Neopharma by NMC Group companies. In particular, those records suggest that the NMC Group received approximately AED 5.5 million from Neopharma, the majority of which appears to have been remitted to* [NMCH] *and with some payments to* [Holding] …". I have seen nothing that refutes Mr Fleming's evidence, and it establishes, for the purpose of these applications, that Neopharma is a person *"involved with the Company*" within the meaning of section 256.

The Respondents' extra-territoriality arguments

41. The other contention of Neopharma that I deferred in my ruling of 17 July 2023 is that section 256 does not confer power on the Court to make orders against persons who are outside the jurisdiction.

42. EYME, for its part, advanced an argument that the IR do not permit the ADGM Court to make an order under section 255 or 256 "*in respect of entities and documents outside the ADGM*": they did not make (to adopt Mr Brocklebank's expression) a "*positive submission*" that the Court has no power to order a person outside the ADGM to produce documents that are within the ADGM. Its contention is that it does not have the power to do so when (as it contends to be the case here) both the respondent and the relevant documents are outside the ADGM.

43. This leads to the question whether EYME can be said to be a person outside the jurisdiction. In his evidence, Mr O'Sullivan explained that the work that EYME did for or in respect of the NMC Group was carried out by its office in "*on-shore*" Abu Dhabi. However, that does not mean that EYME, as a legal entity, does not have a presence within the ADGM: it does. While the location of the office that carried out the work might support an argument that the Court should decline to exercise its power to make an order against EYME, I cannot accept that the Court would be making an order against a person outside its territorial jurisdiction if it did so.

Does section 256 extend to persons outside the jurisdiction? General principles

44. The applicants submitted that the provisions of section 255 and section 256 are not subject to territorial limits, either as to the persons against whom orders can be made, or by reference to where documents are. I shall consider later the argument about the location of documents. As regards persons outside the jurisdiction, it is not necessary for the purpose of these applications to determine whether the powers might be exercised against persons outside the UAE. It suffices for the purpose of the applications against Neopharma and EYME that the Court's powers extend beyond the ADGM to elsewhere in the Emirate of Abu Dhabi, and, as regards Nexgen, to other Emirates in the UAE.

45. The question whether, and to what extent, a statutory provision applies to persons outside the jurisdiction of the Court essentially turns upon who is within what was described by Lord Wilberforce in *Clark v Oceanic Contractors Inc, [1983] 2 AC 130*, 152C as the "*legislative grasp, or intendment*". In English law, the legislative grasp is to be decided against a presumption that legislation is generally not intended to have extra-territorial effect: see *R (KBR Inc) v Director of the Serious Fraud Office, [2021] UKSC 2* at para 21 per Lord Lloyd-Jones. The presumption may be rebutted not only by the language of the legislative provision, but also by what is implied by the "*scheme, context and subject matter of the legislation*": see the *KBR Inc* case at para 29 per Lord Lloyd-Jones. The *Application of English Law Regulations 2015* (the "**English Law Regulations**") provide, at section 1, that the common law of England applies and has legal force in, and forms part of the law of, the ADGM only "*so far as is applicable to the circumstances of the* [ADGM]", and, as is exemplified by the judgment in *Rosewood Hotel Abu Dhabi LLC v Skelmore Hospitality Group Ltd [2020] ADGMCFI 0002*, to which I refer further below, this can affect whether a particular provision is to be given extra-territorial effect. However, subject to this and other specific qualifications stated in section 2, the law of the ADGM follows the same approach as English law in deciding whether legislative provisions have extra-territorial effect, and recognises the same presumption: see *A C Network Holding Limited and ors v Polymath Ekar SPV1, [2023] ADGMCA 0002*.

46. The presumption against extra-territoriality reflects, in part, "*the requirement of international law that one State should not by the claim or exercise of jurisdiction infringe that sovereignty of another State in breach of international law*", but, the rules of international law as to the defining limits of legislative jurisdiction being imprecise, a wider principle of comity becomes the more important as a basis for how the presumption against extra-territoriality is applied by the courts: see the *KBR Inc case* (cit sup) at paras 24 and 25. As HH Justice William Stone observed in the *Rosewood Hotel* case (cit sup) at para 25, the

question whether powers conferred on the ADGM Courts are to be given effect elsewhere in the UAE does not engage such questions of international law or considerations of comity in the international context.

47. In the field of insolvency, the Courts have been prepared to infer that legislative provisions designed to support Office-holders should be given extra-territorial effect so as to enable them to fulfil their duties, and to do so efficiently. Thus, *in In re Seagull Co Ltd, [1993] Ch 345*, the English Court of Appeal, held that section 133 of the Insolvency Act 1986 empowered the Court to order a former director of an insolvent company to appear for public examination notwithstanding he was outside the jurisdiction. Hirst LJ referred (at p.360G) to the "*great public importance*" of the "*efficient and thorough*" conduct of investigating responsibility for company failures and said that the "*process would be frustrated*" if a director could run a company from abroad and then be immune from public examination. In *In re Paramount Airways Ltd, [1993] Ch 223*, the Court of Appeal held that section 238 of the Insolvency Act, which deals with preferences and transactions at an undervalue, applies without territorial limitations. In *Bilta (UK) Ltd v Nazir No 2), [2015] UKSC 23*, Lord Sumption (at para 110) described as "*unanswerable"* these observations of Sir Donald Nicholls V-C in the *Paramount Airways* case*: "(i) that current patterns of cross-border business weaken the presumption against extra-territorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a United Kingdom company; (ii) that the absence in the statute of any test for what would constitute presence in the United Kingdom makes it unlikely that presence there was intended to be a condition of the exercise of the power; and (iii) that the absence of a connection with the United Kingdom would be a factor in the exercise of the discretion to permit service out of the proceedings as well in the discretion whether to grant relief, which was enough to prevent injustice*".

48. In the *Bilta (UK)* case itself, the Supreme Court decided that the powers under section 213 of the Insolvency Act 1986, which apply when a company is being wound up and its business has apparently been carried on with the intent to defraud creditors or for another fraudulent purpose, have extra-territorial effect in that they apply to individuals and corporations outside the United Kingdom. Lords Toulson and Hodge said (at para 213) that, "*It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court did not extend to people and corporate bodies resident overseas who were involved in the carrying on of the company's business*".

49. In this jurisdiction, the consideration about the need to obtain the Court's permission to serve proceedings out of the jurisdiction does not apply, but otherwise the considerations explained by Lord Sumption and by Lords Toulson and Hodge provide powerful support for the JAs' submissions.

50. Mr Brocklebank submitted that these authorities are to be distinguished because they are concerned with provisions of narrower scope than section 256 of the IR. However, the public interest in investigating the affairs of an insolvent company, that has been emphasised in these and other authorities, is still, to my mind, a powerful consideration. As Lord Mance said in *Masri v Consolidated Contractors Int (UK) Ltd,* [2009] UKHL 43 at para 23, this is what distinguishes insolvency cases of this kind from private civil litigation.

51. The authorities make clear that one relevant consideration in deciding whether a provision has effect extra-territorially is the practicality or impracticability of enforcing it: see the *Masri* case (cit sup) at para 22 (per Lord Mance) and the *KBR* case at para 29 (per Lord Lloyd-Jones). It is not a determinative consideration. In their evidence and written submissions, the JAs relied upon the Memorandum of Understanding dated 11 February 2018 between the ADGM Courts and the Abu Dhabi Judicial Department ("**ADJD**"), which was entered into so that the Courts "*can formalize the agreed procedures for reciprocal enforcement of their judgments, decisions and orders … without re-examining the substance of the dispute in which they have been issued*" (article 2). Under article 15, it is provided that, when carrying out enforcement procedures set out in the Memorandum, "*the enforcement judge of the ADJD shall apply the enforcement procedures set out in Federal Law no (11) of 1992 without re-examining the merits of the judgment of ADGM Courts*". The Memorandum was agreed and issued in 2018, before the IR was reissued (with amendments) in 2022. However, the ADGM has no comparable memorandum of understanding with the

judicial authorities in Dubai and no memorandum providing for enforcement in the Free Zone where Nexgen is incorporated.

52. I next refer to another consideration, although it is more directly relevant to whether the statutory provisions extend to documents outside the jurisdiction, than to persons outside the jurisdiction. The English authorities also make clear that the Courts are wary of giving a statutory provision extra-territorial effect if this would circumvent the limitations and safeguards on other parallel or overlapping procedures. Thus, in the *KBR* case, Lord Lloyd-Jones (loc cit at para 45) considered it inherently improbable that the legislature would have enacted a provision for obtaining evidence abroad that might operate without the protection of safeguards in place under other schemes for doing so. Similarly, in *Gorbachev v Guriev, [2022] EWCA Civ 1270*, when considering an application for third party disclosure, Males LJ said that "*The existence of the letter of request procedure and the limitations to which it is subject would be circumvented if wide-ranging disclosure of documents held by third-parties abroad could be too readily obtained by means of an application* [under the provisions for third party discourse]" (at para 82). Mr Brocklebank observed that in *In re Tucker (RC) (a bankrupt) [1990] Ch 148* (to which I refer further below) Dillon LJ thought it significant when considering the extra-territorial scope of the Bankruptcy Act 1914 that the Act provided (at s.122) a procedure for examining person resident in Scotland and Ireland or the jurisdiction of other British Courts: "*This procedure, while taking advantage of other jurisdictions of other courts, also respects those jurisdictions*" (at p.158G).

53. The Respondents argued that, accordingly, the power under section 256 to order a person to produce documents should not be given extra-territorial effect because it would cut across procedures for issuing letters of request, which would be available both in the ADGM Courts and in the Courts of England, NMC PLC's home jurisdiction. Further, it was said that, extra-territorial effect would be inconsistent with the ADGM's own restrictive approach to disclosure, reflected in the Court's Practice Direction 2: thus, it is provided at 2.66 "*Rarely, if at all, will the Court direct general disclosure of documents or disclosure by interrogation*"; at 2.76 that "*The Court discourages unfocused or disproportionate requests for further disclosure of documents*"; and at 2.77 that "*If a party seeks further or specific disclosure of documents, that party must identify what documents or classes of documents are sought and state why their provision would assist the fair and effective trial of the proceedings*".

54. Mr Brocklebank also argued that, where matters of disclosure are concerned, the courts should be particularly sensitive about considerations of comity, and lean against giving extra-territorial effect to legislative provisions. He cited this passage from the judgment of Cockerill J in *Nix v Emerdata Ltd, [2022] EWHC 718 (Comm),* when considering an application for third party disclosure: *"This application is in essence (and acknowledged to be) a way around the letter of request regime. The letter of request regime is the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party. It is a very sensitive topic in many jurisdictions; one can see this in relation to disclosure via the many, many reservations to disclosure which are appended to the Hague Convention. Many countries take a still more cautious line as to disclosure generally and third-party disclosure in particular than this jurisdiction does. In those circumstances it would be invidious for this court to attempt to impose its standards on a third party based in another jurisdiction by an assertion of direct jurisdiction over them"* (at para 27).

55. I do not find these arguments persuasive: I am concerned with a statutory regime which is far removed from disclosure and procedures for obtaining evidence in civil litigation between private parties, and which has an entirely different purpose. I do not accept that the authorities about the civil procedural regime assist in interpreting the scope of section 256. In *In re Rolls Razor (No 2), [1970] Ch 576,* 591 Megarry J said of the corresponding English legislation, *"the legislature has provided this extraordinary process so as to enable the requisite information to be obtained … The process can only be described as being sui generis*". In *Re Bank of Credit and Commerce International SA, [1997] BCC 561*, Robert Walker J considered an argument by respondents to an application under section 236 of the Insolvency Act 1986 that the requests of the applicant liquidators were "*unfocused, … part of a fishing expedition, and … going beyond the scope of the scope of discovery likely to be required in any eventual proceedings*". Robert

Walker J rejected the argument, saying this (at p. 571C): "*there is … a basic and important distinction between the procedures that the court may order under s.236, on the one hand, and discovery on the other hand. Discovery (and other procedures to which accusations of 'fishing' may be pertinent, such as interrogatories and writs of subpoena duces tecum) is naturally constrained by and limited to issues which have, by then, been raised and pleaded in adversarial proceedings. The same is not true of applications under s,236, whose whole object … is to enable the office holders to find out facts before they bring an action (and, it may be, to discover that an action would not succeed)*".

English decisions about section 236 of the Insolvency Act 1986

56. Section 236 of the Insolvency Act 1986 concerns applications by (amongst other Office-holders) administrators and liquidators, and confers on the Courts a power that broadly corresponds to the power of the ADGM Courts under section 256 of the IR. Some of the language of section 256 of the IR apparently derives from the 1986 Act, but the wording is not identical. The material parts of section 236 read as follows:

> *"(2) The court may, on the application of the office-holder, summon to appear before it: - (a) any officer of the company, (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.*
>
> *(3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection…".*

57. Subsection 237(3) of the 1986 Act provides that "*The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236 … to be examined in any part of the United Kingdom where he may for the time being be, or in a place outside the United Kingdom*".

58. The question whether the Court can make an order under section 236 against persons who were not within its territorial jurisdiction has been considered by the English courts in four first instance decisions. In two of them, *In re Omni Trustees Ltd (No 2), [2015] EWHC 2697* (Ch), and in *In re Carna Meats (UK) Ltd, [2019] EWHC 2503 (Ch)*, the Judges concluded that the section has extra-territorial effect. In *In re M F Global UK Ltd (No 7), [2015] EWHC 2319 (Ch*) and in *In re Akkurate Ltd (in liquidation), [2020] EWHC 1433 (Ch)*, the most recent decision in which Sir Geoffrey Vos C examined the authorities in detail, the Judges considered themselves bound by Court of Appeal authority to conclude that it does not. The last decision in particular is powerful authority that, in view of the rules of precedent, it is not open to an English Court of First Instance or indeed the English Court of Appeal to give extra-territorial effect over persons outside the jurisdiction to section 236, and I conclude that it represents English law as it presently stands. I must therefore consider whether this decision should be followed in the ADGM, and applied to section 256 of the IR.

59. The decision of the Court of Appeal which David Richards J and Sir Geoffrey Vos C followed was *In re Tucker*, (cit sup), a case in which a trustee in bankruptcy had applied under section 25 of the Bankruptcy Act 1914 for a summons requiring a British subject resident in Belgium to attend court and produce documents. The essential provisions of the 1914 Act are in substantially the same terms as sections 236 and 237(3) of the 1986 Act. The Court of Appeal decided that section 25 did not assert jurisdiction over British subjects resident abroad. The leading judgment was given by Dillon LJ, who, in reaching his decision, identified these considerations: first, he observed that the general practice in international law is that "*the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process"* (at p.158D), and that,

while sometimes English law permits service outside the jurisdiction, *"no general power had been conferred to serve process on British subjects resident abroad*" (at p.158E). Secondly, as I have said, he observed that the Bankruptcy Act provided for an alternative procedure to secure the examination of persons resident in Scotland or Ireland or the jurisdiction of other British courts before the bankruptcy courts of those countries (at p.158G). Thirdly, a consideration that Dillon LJ considered conclusive: that section 25(6) gives the Courts a power to order the examination out of England of "*any person who if in England would be liable to be brought before it under [section 25]*", which, in his judgment, "*carries inevitably … the connotation that if a person is not in England he is not liable to be brought before the English court under the section*" (at p.258H).

60. None of these considerations apply in the ADGM: the jurisdiction of this Court is not based on presence within the ADGM; the IR do not provide an alternative procedure such as Dillon LJ described; and the IR have no provision corresponding to section 25(6) of the Bankruptcy Act 1914 or section 237(3) of the Insolvency Act 1986. I therefore do not consider that, notwithstanding its authority in England, this Court, when determining the territorial scope of the IR, is required to follow the decisions in *In Re Tucker* and at first instance that accepted its binding authority.

61. There is a further question: whether, even if the reasoning of Dillon LJ applied to the IR, I would be obliged to follow the English authorities. In view of my conclusion about the applicability of his reasoning, I do not need to determine this question, but I should say something about it.

62. As I have said, the English Law Regulations give English law legal force in the ADGM subject to it being applicable to the circumstances of the ADGM. In the *Rosewood Hotel* case, an order was made under rule 253 of the ADGM Court Procedure Rules requiring a director of a judgment debtor, a company registered in Dubai, to attend a hearing in the ADGM for questioning to assist enforcement of the judgment, notwithstanding that the director resided in Dubai and was not present in the ADGM. The Court declined to adopt the interpretation given to the corresponding English rule in *Masri v Consolidated Contractors International SAL, [2009] UKHKL 43*, in which the House of Lords upheld an argument that the Civil Procedure Rules, r.71, whereby the officer of a corporate debtor may be ordered to attend the Court to provide information, does not allow such an order to be made against an officer who is outside the jurisdiction. In the *Rosewood* case, the respondent was resident in Dubai, and HH Justice Stone observed (at para 24) that "*all persons visiting or resident in the UAE do so by virtue of Federal and Emirate-level legislation, so that no issues of comity under international law arise, which is one of the basic principles underlying the presumption of extraterritoriality which ultimately held sway in Masri*". He also observed that anyone could easily leave ADGM territory for mainland Abu Dhabi or Dubai, and referred to the very limited number of permanent residences in ADGM, and continued, "*given the physical limits of ADGM, the drafters of Rule 253 cannot have intended that Rule 253 would have application only to relevant persons ordinarily resident within ADGM or persons within ADGM at the time such application so made and order granted, and it is clear that for rule 253 to have any practical effect at the least it must be extended to persons with the UAE*" (at para 32).

63. Mr Brocklebank criticised the judgment in *Rosewood*: first, he said that nothing in the language of rule 253 was identified that indicates that it extends to the whole of the UAE. That is true, as far as it goes, but the reasoning of the judgment is not based on the express wording of rule 253: it is that, if the scope of the rule were limited to persons within the ADGM, it would have no practical effect, and that cannot have been the intention of the draftsman. I cannot accept that, as Mr Brocklebank suggested, this reasoning is answered because the draftsman might have anticipated that the territory of the ADGM might be expanded in the future, as it has in fact been this year: the Judge was entitled to suppose that the rule was intended to have practical effect when it was made. As for the criticism that the Judge wrongly dismissed considerations of comity, as I understand the judgment, he only observed that, since he did not decide whether the scope of the rule extended beyond the UAE, there was no issue with regard to comity "*under international law*". He did not mean that this Court does not respect the jurisdiction of other UAE Courts, and recognise the importance of comity with them.

64. I therefore see force in the contention that, for this reason too, English law does not require me to conclude that persons who are not in the ADGM but elsewhere in the UAE are outside the scope of section 256. However, I need not, and do not, put my decision on that basis.

65. In my judgment, the reasoning that led to the decision in *In re Tucker* provides no guidance to the scope of section 256 of the IR. Mr Brocklebank rightly acknowledged that the decision does not "*appl[y] directly*" to the interpretation of section 256, but argued that it is significant to the interpretation of section 256 that English law has determined that the corresponding provision of the United Kingdom legislation does not apply extra-territorially. He observed that the authoritative decision in *In re Akkurate*, preceded the amended IR in 2022, and submitted that therefore it is particularly significant that nothing in the amended IR refers to sections 255 and 256 having extra-territorial effect: it is to be inferred, he argued, that these provisions therefore apply only within the ADGM jurisdiction. I am not persuaded by this argument: there is no reason to interpret the ADGM legislation as "*codifying*" the interpretation of section 236, not least because the reasoning in *In re Tucker*, the decision that drove that interpretation, had no application to the ADGM.

Does the Court have power under section 256 of the IR to make orders against persons outside the jurisdiction?

66. I therefore do not accept that the Respondents' arguments about the scope of section 256 are assisted by the English authorities about corresponding English legislation. Indeed, they seem to me to lend some support to the JAs' argument that the Courts may make orders under section 256 against persons outside the ADGM. Not only did the Judges in *In re Omni Trustees Ltd (No 2)* (loc cit) and *In re Carna Meats (UK) Ltd* (loc cit) give section 236 of the 1986 Act extra-territorial effect, but David Richards J and Sir Geoffrey Vos C followed *In re Tucker* with little enthusiasm: in the *In re M F Global Ltd* case, David Richards J said (loc cit at para 32) that: "*In the absence of authority and in the absence of what is now section 237(3), there would in my view be a good deal to be said for concluding that section 236 was intended to have extraterritorial effect, leaving it to the discretion of the court to keep its use within reasonable limits*". In the *Akkurate* case, Sir Geoffrey Vos agreed: loc cit at para 53.

67. What is the purpose of the power under section 256 of the IR? In *Re British & Commonwealth Holdings plc (nos 1 and 2), [1993] AC 426*, in which administrators sought disclosure of documents from the auditors of a company in which the insolvent company had bought shares, Lord Slynn (at p.438D) cited the judgment of Buckley J in *In re Rolls Razor Ltd, [1968] 3 All E R 698,700*, about the power under 268 of the Companies Act 1948, the position under which Lord Slynn described as "*broadly the same*" as that under section 236 of the Insolvency Act 1986: Buckley J said, "*The powers conferred by section 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances in connection with the affairs of a company, information of trading, dealings and so forth, in order that the liquidator may be able, as effectively as possible, and, I think, with as little expense as possible … to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets available in the liquidation*". Lord Slynn also cited the judgment of Megarry J in *In re Rolls Razor Ltd (No 2),* (loc cit at p.591G) "*The process under section 268 is needed because of the difficulty in which the liquidator of an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation*".

68. Section 256 has the same purpose as the English legislation on which it is modelled. It recognises that, in order to carry out their functions, Office-holders of an insolvent company (including administrators no less than liquidators) are heavily dependent for information about the company's business on what they can learn from those involved with it before their appointment; and it provides gives the Court a power to support and assist Office-holders in their investigations. If the Court could make orders under the section 256 only against persons present in the ADGM, the Court's ability to assist and support Office-holders would be unrealistically restricted. Many persons who had founded, or had served as directors of, or had been

otherwise involved with, insolvent companies would be beyond the scope of the section: indeed, anyone (or at least any natural person) who chose to avoid having an order made against him could easily do so without leaving the UAE. To adopt and adapt what was said by Lords Toulson and Hodge in the *Bilta (UK)* case (cit sup), it would seriously handicap the efficient insolvency regime for ADGM companies "*in an increasingly globalised economy*" if the jurisdiction of this Court did not extend to people and corporate bodies resident overseas who have been involved in carrying on the business. Indeed, their observation is reinforced in that the IR were issued by the Board of Directors of the Global Market under article 6(1) of the Founding Law, whereby the Board is charged with issuing regulations *"[r]elating to the organization of its work and the achievement of its objectives*", which are (see article 3) "*to promote the Emirate as a global financial center, to develop the economy of the Emirate and make it an attractive environment for financial investments and an effective contributor to the international financial services industry*".

69. I cannot accept that it would be consistent with the legislative intention to give the section a restricted scope so as to exclude from its scope persons in the position of the Respondents in this case. In my judgment, the power in section 256 extends to making orders against persons who are not present in the ADGM. As Mr Beswetherick observed, there is nothing in the wording of section 256 suggests otherwise: on its face, the section is expressed in wide terms: "*any person*". In so far as the Respondents rely upon a presumption that the scope of a legislative provision does not extend beyond the jurisdiction, the presumption is displaced by its nature and purpose of the legislative scheme, at least with regard to its application to persons within the UAE. I observe, echoing HH Justice Stone in the *Rosewood Hotel* case, that here no question of comity in the international sense arises.

70. Mr Brocklebank argued that, if the power is not limited as the Respondents contend, then there is no principled reason that it should be limited by reference to the UAE: that it could be exercised against person in any jurisdiction and in respect of documents anywhere. He cited *In re Paramount Ltd, [1993] Ch 223*, in which the Court of Appeal considered whether powers under the Insolvency Act 1986 were subject to territorial limits, and observed that Sir Donald Nicholls V-C was troubled by the difficulty of implying any limitation on the provisions if they were given extra-territorial effect at all: loc cit at p.235F et seq. However, that case was concerned with the powers under section 238 of the 1986 Act about transactions at an undervalue, and, to my mind, the point does not have the same force in relation to the power under section 236 or the power under section 256 of the IR. This consideration does not persuade me that the power under s,256 should be confined to the ADGM or that it does not cover the whole of the UAE. It might well be that it is not subject to any territorial limits and the intention of the legislation is that it can be exercised over persons in any jurisdiction, controlled by the Court's discretion; but that is not for decision in this case.

71. I add that, to my mind, the position all the clearer that the scope of the section 256 power extends to persons outside the ADGM but within the Emirate of Abu Dhabi. As I have said, the ADGM Courts are courts of the Emirate. Its judgments are issued in the name of the Ruler of Abu Dhabi. Mr Brocklebank argued that ADGM, however, has "*an independent legal personality*" (article 2 of the Founding Law) and is a separate jurisdiction, with a different legal regime. That is so, but the scope of the Court's jurisdiction is defined (in article 13(7)) not by whether persons are present within the ADGM but by the subject or nature of the proceedings.

Does the Court have power under section 256 to make an order in respect of work done outside the jurisdiction and documents outside the jurisdiction?

72. As I have said, EYME does not rely only on a contention that it has not, or no relevant, presence in ADGM. Mr Brocklebank summarised its contention as being that "*there is not a power to order [the Abu Dhabi branch of EYME], who are not in the jurisdiction and whose documents [are] not in the jurisdiction to disclose those documents*". I reject EYME's contention. They relied on the arguments and authorities about disclosure of documents in civil litigation, but, for the reason that I have explained, they have no real relevance here. EYME cited no other authorities in support of their argument.

73. Nothing in the wording of section 256 suggests that the power is limited by reference to where documents are: it refers to ""*any books, papers or records in his possession or under his control".* I see no proper basis for introducing a limitation by implication. It would be an impractical and unsatisfactory restriction. First, the power to order production of documents would be subject to a restriction without there being any comparable limitation on the power to order a person to appear before the Court or to give an account of his dealings in a witness statement. This would in any case be anomalous, and it would be particularly odd since the section contemplates that a person might be required to include in his witness statement "*information concerning the promotion, formation, business, dealings, affairs or property of the Company"*, which might derive from documents outside the jurisdiction. Secondly, at least with regard to virtual documents, in so far as they can be said to be (to use Mr Brocklebank's word) "*located*" in a particular place, it will often be a matter of chance where they are, and the test proposed by EYME would give rise to anomalies and uncertainty in this regard. Nor was it satisfactorily explained how the Court should determine the location of EYME's electronic working papers and other documents: Mr O'Sullivan gave evidence that they are "*on storers which are only accessible to authorised personnel where access is required*", but it seems to be far-fetched to think that the power under section 256 depends on where (all or any of) the "*authorised personnel*" might be at any time.

74. While the location of documents might, depending on the facts, be relevant to whether the Court should exercise its discretion to make an order under s.256, I cannot accept that there is a limitation of this kind on the power conferred by the section.

The territorial limits of Scheule 10 article 21

75. EYME had another argument with regard to the application of the JAs of NMC PLC. They submitted that schedule 10 article 21 *"is plainly intended to enable the ADGM Courts to assist a foreign insolvency process by making orders in respect of individuals, entities, or assets within the ADGM*" (and not elsewhere). The argument appeared to be that article 1 of the Schedule makes reference to assistance being sought by a foreign representative in the ADGM, and various articles in the schedule refer to assets located in the ADGM: for example, article 19(1)(b) provides that, where an application for recognition is pending, the Court may order urgent relief to protect assets of a debtor, including "*entrusting the administration or realization of all or any part of the debtor's assets to the foreign representative or another person ...*"; and article 21(1)(e) makes similar provision where a foreign proceeding has been recognised.

76. I agree with Mr Beswetherick's response to this argument: that there is nothing in the schedule that provides any real support for Mr Brocklebank's argument, and it is inconsistent with both the wording of article 21(1)(g), whereby the foreign representative may apply for any relief available to the Court under the laws of the ADGM and the purpose of the schedule to put the foreign Office-holder in a position equivalent to the of an Office-holder appointed by this Court: see the judgment in *In re Chesterfield United Inc* (cit cup) .

The Subsidiaries of the NMC Group

77. I therefore reject the Respondents' arguments that the Court should refuse the applications on the grounds that its power that under section 256 cannot be exercised extra-territorially. Before going on to consider whether to make orders under the section and if so, in what terms, I shall say something about the operating companies which were subsidiaries of the NMC Group.

78. Two points arise in relation to them. First, as Mr Sheheen emphasised, of the companies that were put into administration by this Court on 27 September 2020, only NMCH and Holding remain in administration. The other 34 companies came out of administration under the DOCA arrangements, and the JAs no longer are Office-holders of them. Accordingly, the Court cannot make an order under section 256 on the basis that Neopharma dealt with those companies. Mr Beswertherick did not dispute this: he argued, however, that documents relating directly to those companies would also provide information about dealings of NMC PLC and NMCH, and assist the JAs in their investigation of those companies: not only because NMC PLC

was the registered holding company of the NMC Group, but because NMCH had a treasury function for the Group and because, under the DOCA arrangements, it is the assignee of claims that the 34 companies might have. I accept that argument.

79. Secondly, it was suggested that documents that the JAs seek might contain information confidential to the NMC operating companies. This point has largely been answered by the JAs obtaining, and providing evidence of, the consent of many of the operating subsidiaries to production of information and documents relating to them. In his evidence, Mr O'Sullivan pointed out that the consents were not initially given under a formal Power of Attorney, and said that, in his experience of the UAE, this would be required for their consent to be "*valid and recognised 'onshore'*". I accept that in practice powers of attorney are often required, but I am not satisfied that otherwise the consents would be invalid. In any case, consents supported by powers of attorney have now been provided.

80. There is no evidence that either Neopharma or Nexgen had any dealings with any NMC Group company which has not given such consent. Mr Fleming has identified three such companies with which EYME had dealings: EYME has not suggested that there are more. The three companies, to which I shall refer as the "**Non-Consenting Subsidiaries**", are Trans Arabia Drug Store LLC, which was sold in 2020 before the administration order of 27 September 2020; Cooper Healthcare LLC, which was a subsidiary of NMC Royal Women's Hospital Ltd, but has now been sold by NMC OpCo, and is no longer in the NMC Group; and BR Medical Suites FZ LLC, which is a direct subsidiary of NMCH but is on longer active: indeed, I was told that its licence has been suspended and the company is dormant, but that is not in evidence. There is no reason to think that any of the Non-Consenting Subsidiaries has any interest in keeping confidential information in any information or document that is the subject of these applications.

Discretion

81. The appropriate approach when deciding whether to make an order of this kind was explained by Lord Slynn in *Re British & Commonwealth Holdings plc (nos 1 and 2),* (loc cit at p.439D- 440A): *"… it is plain that it is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved – on the one hand the reasonable requirements of the administrator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or 'oppressive' to the person concerned. The protection for the person called upon to produce documents lies, thus, not in a limitation by category of documents … but in the fact that the [administrator] must satisfy the court that, after balancing all the relevant factors, there is a proper case for an order to be made. The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in light of the administrator's requirements. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others*".

82. The approach of the English Courts to the exercise of discretion under section 236 of the Insolvency Act 1986 was helpfully summarised by Kitchen J in *In re XL Communications Group plc, [2005] EWHC 2413 (Ch)* at paras 27 to 30. His guidance is relevant to several of the arguments advanced by the respondents, and I shall set out this passage of his judgment at some length (and his references to a liquidator apply equally to an administrator):

> *" … It is well established that the powers conferred by s.236 are powers directed to enabling the court to help a liquidator discover the truth of the circumstances connected with the affairs of the company in order that the liquidator may be able, as effectively and cheaply as possible, to complete his function and put the affairs of the company in order, including the getting in of any assets of the company available in the liquidation. When the liquidator thinks he may be under a duty to recover something from some person connected with the affairs of the company then it is appropriate for the liquidator to*

be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim. Normally the court should seek to assist the liquidator to carry out his duties in this way.

"The scope of s.236 has always been understood to extend to reconstituting the state of the company's knowledge, however it is now well recognised that the scope of the jurisdiction also extends to all documents which the liquidator may reasonably require to see to carry out his functions ….

"Nevertheless, it is for the liquidator to establish his case under s.236. He must show that he reasonably requires the documents sought. In this connection the view of the liquidator is normally entitled to a good deal of weight … It is also recognised that the liquidator is required to establish only a 'reasonable requirement' for information, not an absolute need and that he is under no duty to make out that requirement in detail. The court ultimately has an unfettered discretion which it will seek to exercise in the interests of the winding up without being oppressive to the party the subject of the application. As Lord Slynn explained in British and Commonwealth Holdings at 439, the proper case is one where the liquidator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in light of the liquidator's requirements.

"…. Moreover, an application is not to be considered unreasonable simply because it is inconvenient to the respondent or may cause him considerable work. Finally, it is to be noted that application in issue is for documents and that such an application is much less likely to be oppressive that an order for oral examination".

83. Thus, an order of this kind is inevitably likely to put the respondent to inconvenience, and sometimes a good deal of work and corresponding expense. This does not mean the Court cannot properly make an order if, on the evidence, the Office-holder has sufficient reason for requiring documents or information. What is required in each case is a detailed and fact-specific examination as to whether an order is justified and if so in what terms.

Other points relevant to all Respondents

84. I must therefore consider the applications against the three respondents separately, but first shall deal with three matters that are relevant, or potentially relevant, to all of them. First, Mr O'Sullivan said in his evidence that EYME's engagements with the NMC Group were undertaken on the understanding that they were governed by UAE law and regulations and, if necessary, subject to the jurisdiction of the UAE Courts, and specifically the on-shore Abu Dhabi Courts; and the applications to this Court contradict "*the understanding between EYAD and the NMC Group, and creates an unfairness to EYAD*". Similarly, Mr Sheheen argued that Neopharma's only contracts with the NMC Group, those with Trading, are, by express provision, governed by and to be construed in accordance with the laws of the UAE, and the parties agreed to the exclusive jurisdiction of the "*courts of the Law in the United Arab Emirates*". I am not impressed by those arguments: the nature of the relief sought is not by way of a civil claim where the parties' agreement or understanding might determine the appropriate forum or law for resolving any dispute. The provisions of the insolvency regime under which the applications are not subject to them.

85. Next, I heard argument that the JAs had delayed in seeking this relief, and the applications should therefore be refused. The NMC companies, it was pointed out, were put into administration in 2020, and the applications were not made until March 2023. I cannot accept this criticism of the applications. According to the evidence before me, when the PLC Administrators and then the JA were appointed, the records of the NMC Group were significantly misleading and incomplete. I see no proper basis for thinking that they did not go about investigating the companies' affairs with proper diligence. In any case, from towards the end of 2021 they sensibly sought to correspond constructively with Neopharma and Nexgen to obtain documents and information that they required. They also sought to engage constructively with EYME

before bringing the applications. I add that I have seen no evidence that persuades me that any of the respondents has been significantly prejudiced because the applications were not brought earlier.

86. Thirdly, the Respondents express concern about the confidential nature of some of the documents which are covered by the applications. I shall return to this point later in my judgment, but any rights of confidentiality that third parties might have in documents or information in them would not necessarily prevent the Court exercising its discretion to order their production. It is a consideration to be brought into account and balanced against other relevant matters, but here I note that the JAs would owe a duty of confidentiality in respect of any information obtained pursuant to an order under section 256. It is a general principal that "*where documents and/or information are compulsorily obtained pursuant to a power, the person or body which obtained them owes a duty of confidence to the person from whom the material was obtained only to use the material for such purposes*": see *Marcel v Commr of Police of the Metropolis, [1992] Ch 225, 236B-237H, 261B-C, 262D, 263E-H,* and *In re Webinvest Ltd, [2017] EWHC 2446 (Ch*) at para 53. In this case, because the principle is perhaps less familiar in this jurisdiction and region, I asked the JAs whether they would give an express undertaking to this effect, and they agreed to do so.

The Applications against Neopharma: for documents: exercise of discretion

87. I accept that the JAs reasonably require information from Neopharma in order to understand the nature of and the reason for the substantial money transfers that apparently took place between place between Neopharma, on the one hand, and NMCH and Holding on the other hand. I also accept Mr Fleming's evidence the records presently available to the JAs do not explain why the payments were made. In order to investigate the affairs of NMCH and Holding, the JAs are entitled to investigate the dealings between Neopharma and the NMC Group more generally, including the circumstances in which guarantees and comparable financial assistance was apparently provided to Neopharma and its subsidiaries. The need for investigation is underlined by the apparent involvement of NMC Group executives in the Neopharma Group.

88. I was invited by Neopharma to infer that the JAs have some "*ulterior motive*" in requiring this information, and that their purpose is not simply to understand the affairs of NMCH and Holding. No potential improper motive was identified, and there is no proper basis for the inference that Neopharma suggest. I only comment that, of course, the JAs are not seeking to investigate the affairs of the NMC Group out of mere intellectual curiosity: if the suggestion be that the JAs consider that the information might lead them pursue claims against third parties, that would be a proper purpose. Equally, it would be a proper motive if the JAs wish to know whether they should decide not to pursue a possible claim.

89. Neopharma refers to the Federal Law 18/1993, the Commercial Transaction Law (the "**CTL**"). Article 30 of the Coded enacted thereby provided (according to the translation before the Court, which was not disputed) as follows: "*The merchant must keep true copies of the originals of all correspondence, telegrams and invoices sent or issued by him for the purpose of his commercial activities. He must, in addition, keep all incoming correspondence, telegrams, invoices and other documents relating to his trade. All such papers shall be kept in an orderly fashion that facilitates checking up and for a minimum period from the date of issue or receipt thereof*". As I understand it, the CTL has been replaced by Federal Law 50/2022, which came into force on 2 January 2023 and which issued a new Commercial Code, including at Book 1, Section 1, Chapter 3 provisions about what Commercial Books traders are required to keep. However, Neopharma cited the CTL because it required Neopharma to keep documents for only five years, and the JAs' application is for documents going back for more than ten years. I am not impressed by that complaint: if Neopharma has disposed of earlier documents, it is not obliged to produce them. If it has retained them, nothing in the CTL prevents an order that they be produced. The real significance of article 30 for present purposes is that, if Neopharma has complied with it, and it has suggested otherwise indicates, the documents relating to its commercial activities will have been kept in "*an orderly fashion*", which will probably make it easier for Neopharma to comply with an order for their production.

90. Neopharma also complained that the order sought by the JAs is "*vague*" and "*ambiguous*". Much of this criticism was made in general terms, and was itself somewhat vague. In exchanges with Mr Beswtherick during the hearing, I sought to identify those parts of the JA's draft order where this complaint seems to be justified, and where the proposed language might give rise to uncertainties. I am satisfied that any problems of this kind can be dealt with by appropriate refinement of the drafting, and I cannot accept that they are sufficient reason to refuse an order entirely.

91. Neopharma submitted that the JAs' application should be refused because disclosure of the documents that it seeks would compromise the rights of other customers of Neopharma to confidentiality of their dealings with Neopharma. As I have said, the rights of third parties of this kind are, of course, relevant considerations on an application of this kind, but they are no more than that. In my judgment, this concern is sufficiently met by making modifications to the order proposed in the JAs' application, as I explain below.

92. Neopharma argued that the JAs' request order for documents is too wide, and compliance would therefore put it to unwarranted inconvenience and expense. However, the criticism too was largely couched in general terms, and Neopharma has not given persuasive evidence of specific categories of documents which it would find particularly onerous to identify and produce: still less has it proposed how the disclosure that the JAs require might be modified so as to alleviate the demands. Of course, the burden is upon the JAs to justify their request, but Neopharma's objections would have been more persuasive if they had been more specific.

93. In my judgment, the various points that raised by Neopharma do not outweigh the strong case that the JAs have for seeking each of the categories of documents for which they apply. I shall therefore order their production, subject to refinements of the wording of the order, to some of which I refer below and about which I shall seek assistance from the parties' representatives when I have given this judgment.

The Applications against Neopharma for documents: terms of the order

94. I come to the specific terms of the proposed order against Neopharma, although I shall seek further assistance about them when I issued this judgment. Essentially, JA applied for an order that Neopharma "*disclose and produce*" five categories of documents, subject to a qualification that it should be ordered to do so "*to the best of its knowledge information and belief*". It goes on to provide that "*If [Neopharma] considers that some of the information or documents … is not within its control, then … [Neopharma] must specific such information and documents and having done so shall not be under any further duty to disclose the same pending further order of the Court":* section 256 empowers the Court to order a person to produce documents "*in his possession or under his control*".

95. The first category is proposed by the JAs in these terms: "*Copies of all contracts, commercial agreements and other documents setting out the relationship between [Neopharma] and [NMCH], [NMC plc] and any other their direct or indirect subsidiaries*". Neopharma described this part of as "*an excessively broad and vague demand*" which would impose a "*monumental task*" on it. Subject to one qualification, I do not agree. Neopharma submitted that the order should not include contracts, agreements and other documents relating to companies no longer in administration, but for the reasons that I have explained, I reject that submission. Nor do I accept that the JAs should be required to specify what contracts they seek: it is clear from Mr Fleming's evidence that they are not in a position to do so. However, I am concerned that the wording "*documents setting out the relationship*" is both vague and unnecessarily wide. I understand that this head of the application is directed to documents that explain the nature of arrangements that Neopharma had with the NMC Group, and to my mind, narrower wording, such as "*documents evidencing the nature of any commercial relationship*", would be more satisfactory. I shall invite further assistance from the parties' representatives about this.

96. The second category is proposed in these terms "*Copies of [Neopharma's] general ledger (or such other accounting or transaction statements held by it) which relate to transactions between [Neopharma] and any entity within the NMC Group in the period 1 January 2011 and 31 December 2020*". Neopharma

objected that documents within this category are confidential. In so far as this objection is about the confidentiality of dealings between Neopharma and companies that are or were in the NMC Group and are not, or are no longer, in administration, for reasons that I have explained, I give little weight to this consideration, even with regards to the Non-Consenting Subsidiaries. In my judgment the importance of the JAs' investigations far outweighs this concern. In so far as the objection is about dealings between Neopharma and entities unconnected with the NMC Group, Mr Beswetherick made it clear that the JAs' application was directed only to transactions between Neopharma and companies in the NMC Group, and they are content for the order to be confined to those parts of the general ledger which related thereto, other entries being redacted. The draft order sent by DLA on 10 October 2023 reflects this.

97. The JAs' next request is for "*Copies of all finance documents, including facility agreements (whether outstanding or satisfied) to which [Neopharma] is a party where any entity in the NMC Group is or was the co-borrower or guarantor or had any obligations or benefits thereunder*". Here Neopharma's criticisms were again that the category is vague (specifically, in its reference to "*all finance documents*") and that it covered confidential documents. Nothing specific was said about in relation to any confidentiality that might be compromised, and, given that the category is limited to documents under which Neopharma assumed an obligation or enjoyed a benefit, it does not seem to me either objectionably uncertain or too broad in scope.

98. Fourthly, the JAs apply for "*Copies of [Neopharma's] bank statements for the period 1 January 2015 to 31 December 2019*". Neopharma's main objection to this category of documents as formulated in the draft order was that it would involve the disclosure of confidential information about third parties who have no association with the affairs of the NMC Group or its insolvency. Mr Beswetherick did not dispute this, and accepted that, at least for present purposes, the disclosure should be limited to transactions with companies in the NMC Group. With this qualification, I consider that Neopharma should produce any bank statements in its possession. I reject Neopharma's complaint that the period of five years from 1 January 2015 to 31 December 2019 is unreasonably long: I readily understand that the JAs consider that they should investigate the movement of funds between Neopharma and the NMC Group for the whole of that period.

99. However, in the draft order of 10 October 2023, the JAs also seek an order that Neopharma provide a list of any entities whose names have been redacted from the bank statement proceeded. When I have handed down this judgment, I shall invite further submissions about that.

100. Finally, the JAs seek "*Copies of all emails to and from the email accounts of the following NMC personnel in the period 1 January 2015 to 9 April 2020: (i) Prasanth Manghat; (ii) Prasanth Shenoy; (iii) Deepak Gosh; and (iv) Suresh Kumar*". Neopharma described this as a "*demand for emails between arbitrary individuals*". However, this ignores Mr Fleming's evidence that on or around 24 February 2020, before the PLC Administrators and the JAs were appointed, emails of managers, including Mr Manghat, Mr Shenoy, Mr Gosh and Mr Kumar, were delated "*in an apparent attempt to destroy records*". The JAs properly wish to investigate what emails were deleted. However, given the rationale for seeking production of these emails, I do not accept that there is proper reason to require Neopharma to search for emails after the date that they are said to have been deleted. Given the uncertainty about when this occurred, I shall require the search to be for emails in the period from 1 January 2015 to 29 February 2020. I do not accept Mr Sheheen's (unparticularised) complaint that the order would require Neopharma to collate "*personal emails by individuals, which Neopharma have no control over and would not be available to Neopharma*": it would be required to produce documents within its possession or control. Nor am I persuaded that the request should be rejected on the grounds that it is likely to involve disclosure of documents of persons who are parties to other proceedings arising from the NMC Group: those other proceedings do not require all documents relating to parties to them to be kept confidential. I reject Neopharma's other objections to producing this category of documents.

101. I add two further points: first, on issuing this judgment, I shall invite further submissions about how long Neopharma would be allowed to produce documents. Neopharma complained that the JAs sought production within an unreasonably short period, but did not indicate what time it might require.

102. Secondly, the JAs sought an order endorsed with a penal notice. I have not been persuaded that the endorsement is appropriate before Neopharma has had an opportunity to seek to comply with the Court's order. If it fails to make *bona fide* efforts to do so, a penal notice might become appropriate, but that is for the future.

The Application that an officer of Neopharma be examined

103. The JAs also apply for an order that an officer of Neopharma be ordered to attend Court for examination on oath in respect of its "*promotion, formation, business, dealings, affairs or property*". In his submissions, Mr Beswetherick asked for an order for examination after Neopharma had produced its documents, and said that it might then prove that examination was not required. He urged, however that I should now make an order, which might later be rescinded.

104. That does not seem to me a proper approach: I do not consider that examination should be ordered when it is recognised by the applicants that it might not be required. If the suggestion be that an order might encourage proper disclosure of documents, I would refuse to make an order *in terrorem*. The proper course, in my judgment, is to adjourn this part of the application, and to give the JAs permission to restore it.

The Applications against Nexgen

105. As I have said, Nexgen has not engaged with these applications in any way. Mr Beswetherick submitted that, in broad terms, the arguments here are similar to those concerning Neopharma, Nexgen's major shareholder: its connections with the NMC Group appear similar to Neopharma's, and the JAs wish to investigate its dealings with the NMC Group for the same reasons. Nexgen has not presented evidence that an order to produce the documents requested will be onerous, but it seems likely that it will. I shall assume that compliance with an order will cause it considerable inconvenience and involve it in some expense.

106. Nexgen is registered in a Dubai free zone, and not in Abu Dhabi, and this gives rise to two particular considerations in deciding whether to make an order against it, and if so, in what terms: principles of comity, and the respect that the Courts of one Emirate properly pay to the jurisdiction of others; and secondly that it might prove more difficult for the JAs to enforce compliance with an order against Nexgen than Neopharma.

107. These considerations are not sufficient to dissuade me from granting the JAs' application, subject to making modifications to the terms of the order similar those concerning Neopharma. I do not consider that an order of this kind against a person resident in or a company registered in its territory shows disrespect for the Dubai Healthcare City Authority or the Emirate of Dubai. Nor are any difficulties of enforcement sufficient reason to refuse one.

108. As with Neopharma, I shall adjourn the JAs' application for an order to examine an officer of Nexgen.

The Applications against EYME for documents: exercise of discretion

(a) <u>Introduction</u>

109. The JAs apply against EYME for an order under section 256 in their capacity as administrators of PLC, as well as the JAs of NMCH and Holding. (EYME took no point that only two of the three Joint Administrators of NMC PLC are applicants.) As a general rule, a court will have sympathy for an application of this kind

made by Court-appointed Office-holders of an insolvent company that claims to have been the victim of a major international fraud and seeks documents from its auditors in order to investigate its affairs. Although that is not exactly EYME's position in relation to NMC PLC because of the global structure of the EY Group, it seems to me broadly comparable in that, as an entity in the EY network, they conducted "*component*" audits that contributed to the audits of NMC PLC that EY conducted.

(b) The JAs' purpose in making the application against EYME

110. In his evidence in support of the application, Mr Fleming referred to proceedings for damages (the "**English Proceedings**") brought by NMC PLC on 28 April 2022 in the English Commercial Court against EY, its statutory auditor, in which it alleges that EY was in breach of contract and duty in that it failed to plan and conduct its audits with proper skill and care and in accordance with applicable standards, estimating its loss at more than US$ 2.5 billion. Mr Fleming said that the JAs "*are therefore seeking documents from EYME*". He also said that documents relating to the so-called component audits would help the JAs to "*develop [their] understanding of the affairs of the entities over which [they] had been appointed*", and might identify *"further avenues for investigation and enquiry, support claims (for example the claim issued against Dr Shetty, Prasanth Mangat and others in England … and in the ADGM in connection with the fraud) or identify further potential claims against other respondents that could produce realisations for the benefit of creditors as a whole*". With regard to documents relating to Project Nightingale and other work undertaken by EYME for the NMC Group, Mr Fleming said that these would assist the JA to understand the following: *"[t]he conduct of the NMC plc investigation*" into the allegations with which it was concerned and the "*circumstances and involvement of EYME in the Agreed-Upon-Procedures assignment undertaken in April/May 2012*"; *"[t]he extent to which EYME supported [NMCH] in preparing for and complying with requirements of the IPO listing process in London*", and *"[t]he financial position of the NMC Group prior to the IPO and whether any issues with the NMC Group's financial affairs were identified as part of those engagements, and if so, how they were managed*". Mr Fleming continued that this material "*might identify additional avenues of investigation and enquiry, support claims that are being contemplated and/or identify further potential claims that could produce realisations for the benefit of creditors as a whole*".

111. In his second witness statement, Mr Fleming expanded on why the JAs are applying for the records of operating subsidiaries that are no longer in administration. First, he referred to NMCH carrying out the main treasury function for the Group; and he explained that it entered into many banking facilities, including as guarantors for subsidiaries, and that NMCH employees directed money movements within the Group. He also said that NMCH would have given EYME instructions; and that it would have been generally involved in the audit of operating subsidiaries and Holding, as well as its own audit. Secondly, he referred to the arrangements under the DOCAs whereby actual and prospective claims were assigned by operating subsidiaries to NMCH, and so, as the JAs of NMCH, they have an interest in records concerning the operating companies in order to investigate, and, if appropriate, pursue, those claims.

112. Mr Brocklebank submitted that NMC PLC is the "*prime mover*" behind the application for disclosure is NMC PLC, and its prime purpose is to obtain documents for the purposes of the English Proceedings. He pointed out that Mr Fleming's evidence about why EYME's audit files would assist the JAs to investigate the affairs of the NMC Group companies mirrors the pleading of NMC PLC against EY about their negligence in planning and conducting the audits; and that the JAs first sought documents from EYME shortly after pleadings in the English proceedings were closed and when a Case Management Conference in them was pending.

113. Let it be assumed that the English proceedings influenced the timing of the application against EYME and that the pleadings influenced Mr Fleming's evidence. It does not follow that, therefore, I should reject Mr Fleming's evidence that the JAs also request the documents in order to conduct other investigations, and I accept it. Further, I consider it proper for the JAs to apply for documents that they might deploy in the English proceedings. It is clearly a proper use of the procedure under section 256 of the IR (as it is of section 236 of the Insolvency Act 1986) for an Office-holder to obtain documents and information in order to assess and pursue potential claims, and I cannot accept that it necessarily ceases to be proper once

proceedings have been brought: in *In re Bank of Credit and Commerce International SA [1997] BCC 561, 570a,* Robert Walker J rejected the suggestion of a so-called "*Rubicon test*", whereby it is a determinative question on an application of this kind whether the Office-holder had commenced proceedings or taken a firm decision to do so and, if so, disclosure should not be ordered.

114. While the views of the Office-holder on an application of this kind are "*normally entitled to a good deal of weight*" (see *Sasea Finance Ltd v KPMG, [1998] BCC 216, 304F*), the applicants have the burden of establishing that documents should be provided, and EYME submitted that the JAs' evidence about the investigations that they intend does not justify their requests. It was said that Mr Fleming explains why the JAs require the documents in general terms, and does not relate his explanation in any particularity to the terms of the order sought. While in many cases office-holders cannot be expected to state with any precision what documents in the control of respondents are likely to assist their investigations, Mr Brocklebank argued that in this case, the JAs are relatively well placed to do so: they have been in office since 2020, and already have, as NMC PLC's counsel said in the English Proceedings, "*tens of millions of documents*" and access to "*more than 1,000 individual e-mail accounts*". I agree that it would have been better if the JAs had explained their requirements more specifically. That said, the Courts do not impose particularly demanding standards on office-holders on applications of this kind. In the Court of Appeal *In re British & Commonwealth PLC (cit sup),* Ralph Gibson LJ said this (at p.381E): "*The administrators can and should … be trusted by the court in their assessment of their need to see the [respondent's] documents. To require from the administrators a demonstration of an analysis of all the available material of the extent and nature which would meet the criticism advanced by [the respondent's counsel] is to confuse this stage of the investigation with the advancing of a claim in negligence against particular parties".*

115. I conclude that Mr Fleming's evidence demonstrates that the JAs have shown a sufficient case for the production of the documents that they seek. The criticisms that EYME make of it will be important when I balance the JAs' case in respect of the various categories of documents against EYME's argument against their production, but I reject Mr Brocklebank's submission that it is so deficient that no balancing exercise is required.

(c) The English Proceedings

116. I come back to the English Proceedings. Mr Brocklebank submitted that the intention that documents should be used in the English Proceedings was an "*collateral*" use which is "*obviously and significantly prejudicial*" to EYME. I identified three aspects of his criticisms.

117. First, he relied upon authority that the Court will not allow an application of this kind to be used to allow an Office-holder advantages in litigation which are not available to other parties: see, for example, *In re Atlantic Computers [1998] BCC 200,.208Fff.* That concern is readily understandable when the respondent to the application is the applicant's adversary in litigation that is already afoot, and the applicant would obtain earlier access to documents than other litigants would. But in this case the JAs will not gain an unfair advantage over EY in the English litigation by obtaining the documents. The English Proceedings are already at the stage of disclosure:. Moreover, it is a striking feature of this case that EYME is not party to the English Proceedings, and the defendants, EY, themselves, as it appears, wish to have documents of EYME available in those proceedings, and complain that EYME is wrongfully withholding them. In the defence, EY contend that they relied on work done by "*component auditors*", including EYME, who audited NMC PLC's subsidiaries: thus, they plead "*EY was not, and did not consider itself to be, directly responsible for the work of the PLC component auditors*", and avers that "*EY has not had access to all of EYME's archived working papers. It has sought general access to them from EYME, which EYME has declined*", and so it cannot plead full details of the work done by EYME. I do not overlook that the focus of the concern in the English Proceedings is, it appears, on the audit documents of EYME, but there is no reason to think that they would take a different view about documents concerning other engagements conducted by EYME.

118. On 19 May 2023, Dias J conducted a hearing in the English Proceedings about disclosure, and considered submissions about EY disclosing documents in audit files held by EYME, to which EY claimed a contractual

right but which, it was said, EYME declined to provide to them. Dias J expressed the view that they were "*important documents which should be obtained*" and that the parties to the English litigation "*should do everything they can to cooperate to obtain them as quickly as possible*". Dias J also said this: "*ADGM would be assisted to have confirmation from EY that it has a contractual right, which, so far as it is concerned, is being unreasonably resisted. It seems to me that is information which would be relevant to the ADGM court, and for that reason I am minded to order that there do be a witness statement …*". She ordered that EY serve a witness statement explaining its case that it had a contractual right to access audit files held by EYME in respect of work relating to NMC PLC and the NMC Group, and why EYME would not provide access to them to EY.

119. In a witness statement of 1 June 2023 provided pursuant to the order, Ms Clare Milner said that EYME declined to provide EY with access to their audit files, disputing EY's contractual right to access and asserting that UAE law prohibits them from providing the documents, "*including because neither [NMC PLC] nor the relevant entities in the NMC Group have provided their consent to EYME disclosing documents to [EY]*". She also said that EY was preparing "*an application in the UAE to enforce its rights of access*". I was told that such an application has now been made, and is pending in the on-shore Abu Dhabi Courts.

120. Secondly, EYME submit that it is apparently the "*target of both NMC PLC and EY*", who, in their differing ways, criticise them or attribute to them responsibility for any shortcomings in the audits; and that, since they are not party to the litigation, they are unable to defend themselves. If their documents are available in the litigation, they argue, there is a "*substantial risk*" that they will be used to the prejudice of EYME and its reputation. I am not impressed by that argument: I accept that EYME's work will likely be examined and might be criticised in the English Proceedings, but EYME advanced no convincing reason for thinking that disclosure of the documents will aggravate that risk.

121. It was also said that, if the JAs of NMC PLC want the documents for the purpose of the English Proceedings, they could seek to obtain them through other procedures, for example, a letter of request under the English procedure. To my mind, there are three answers to this point. Firstly, the availability of an alternative procedure does not, in itself, mean that an order should not be made under the IR. In the *Re Mid East Trading Ltd*, case (cit sup at p.238G/H) Evans-Lombe J rejected the suggestion an order for documents in America under section 236 of the Insolvency Act 186 should be refused because, if American documents were required, the creditors should have brought a winding-up proceedings there: "*Creditors are entitled to proceed in any appropriate jurisdiction in which they perceive an advantage to them lies*". While the position here is not exactly analogous, I consider that Office-holders too are entitled to use the procedure that they consider advantageous. Next, Mr Fleming's evidence makes clear that NMC PLC does not seek the documents only for the purpose of the litigation, and if they obtained them under letters of request, they would be open to criticism if they used them for the "*collateral purpose*" of investigating the insolvency more generally. Further, it is not open to NMCH and Holding to seek documents by an English letter of request. If they are entitled to obtain the documents under section 256 of the IR, it would be pointless, extravagant and inefficient to require NMC PLC to adopt a different procedure.

122. EYME had another point. In his evidence, Mr O'Sullivan referred to article 6 of schedule 10 of the IR, whereby it is provided that nothing in the schedule "*prevents the Court from refusing to take an action governed by [it] if the action would be manifestly contrary to the public policy of the [ADGM*]". He submitted that "*disclosure of confidential audit material for unspecified purposes (including potential use in overseas litigation) would be contrary to the provisions of UAE law and public policy*". I shall consider the argument about confidentiality and the provisions of UAE on which EYME rely below, but I reject any suggestion that an order would offend public policy because it might assist foreign proceedings brought in order to make recoveries in the interest of creditors in the UAE and elsewhere.

(d) No sufficient connection with the ADGM

123. What then are the other considerations that EYME advance against producing documents? First, they say that the documents sought and EYAD, who conducted the work to which they relate have no connection with the ADGM; and, when they carried out the relevant work, none of the NMC Group companies was registered in the ADGM. Even assuming there is power under section 256 to make an order with extra-territorial scope, Mr Brocklebank submitted that it should be exercised with caution in these circumstances, particularly since the on-shore Courts take a restrictive approach to orders for disclosure and it has not been shown that they would make an order of the kind sought. He argued that "*The only reason that the present application can be made in the ADGM Court is because of a choice (the reasons for and the circumstances of which are unknown to EYAD) to transfer [NMCH] and [Holding] to the ADGM immediately before administration*", and that it would therefore be wrong to "*confer on [them] a procedural advantage*". He went on to say that NMC PLC had even less connection with the ADGM, its only connection being that the English administration order has been recognised here as the main foreign proceeding.

124. I accept that this is a relevant consideration: if authority be needed for that, in *In re Paramount Airways [1993] Ch 223*, Sir Donald Nicholls V-C said *"if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought to against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element".* Nevertheless, I do not give this consideration the weight that Mr Brocklebank sought to attribute to it. First, EYME are present in the ADGM. Further, it was not suggested that the registration of NMC companies in the ADGM could be impugned, nor that there were grounds for criticising the decision of this Court to make the administration orders and recognise the English administration of NMC PLC. NMCH and Holding are being administered, for the benefit of their creditors, under the ADGM Insolvency regime, and the JAs are entitled, and should, deploy the powers afforded to them under it: as Mr Beswetherick observed, on an application under section 236 of the Insolvency Act 1986 in *Re Mid East Trading Ltd*, [1996] BCC 726, Evans-Lombe J (whose judgment was upheld by the Court of Appeal) rejected the suggestion that regard might be had to any possible challenge to the validity of a winding-up on the grounds that the company had insufficient connection with the jurisdiction because this would be "*to admit the possibility of gradations of winding-up proceedings against foreign companies*", Similarly here, I cannot accept that the circumstances in which the administration orders were made by this Court should inhibit the exercise of the power under section 256.

125. Moreover, while the application is for documents related to work carried out by EYME's on-shore office in Abu Dhabi, it was undertaken in an international context. EYME belong to what Mr O'Sullivan called "*the global EY network"*, and they conducted "*component"* audits of companies incorporated in different Emirates, which contributed to the English audits by EY of NMC PLC. The Nightingale project and other engagements related to the IMO on the London Stock Exchange. Professionals who undertake such work cannot expect that all proceedings relating to it will be conducted in the jurisdiction where the work is actually carried out.

(e) Prohibitions under UAE law

126. Next, EYME argued that they should not be ordered to disclose any documents because third parties have an interest in them. There are two distinct, but related, aspects to this point: that they would be at risk of breaching UAE laws and facing criminal or civil sanctions if they provided the documents to the JAs; and that in any case, the rights of third parties in the confidentiality of the documents should be respected.

127. The laws cited by Mr Brocklebank were these:

a. Federal Law 31/2021, the Issuance of Crimes and Penalties Law, which provides at article 432 that, "*Any person who by virtue of his profession, occupation, status or specialisation has access to a secret but discloses such secret in other than those circumstances permitted by Law, or who uses such*

secret for his own benefit or the benefit of another person, unless such disclosure is authorised by the concerned person" shall be liable to imprisonment or a fine;

b. Federal Law 12/2014, the Regulation of the Auditing Profession Law, article 12(1) of which provides that auditors should, before starting work, sign an undertaking, inter alia, "*not to reveal the secrets of my customers or any information entrusted to me due to my work, unless within the extent required by the laws and regulations in force*"; and

c. Federal Law 34/2021, the Law Concerning the Fight against Rumours and Cybercrime, article 44 of which provides that it is an offence to use "*information network, electronic information system or information technology method, for the purpose of breaching the privacy of a person or private or family life of individuals without consent, in other than the cases legally permitted by [inter alia] … Eavesdropping, interception, recording, communication, transmission or disclosure of conversations, communication or video or audio materials* …"; and article 45 of which provides that it is a crime for anyone to disclose "*confidential information accessed ex officio, or due to his profession or craft, by using technological method, without being authorised to reveal the same, or without permission of the party concerned with the secret to disclose or use such information*".

128. In his evidence, Mr O'Sullivan also referred to Federal Law 45/2021, the Protection of Personal Data Law, under which EYME is a "*Controller*", and article 7 of which requires Controllers to "*take appropriate technological and organisational measures and procedures to apply the necessary standards to protect and secure Personal Data, in order to maintain its confidentiality and privacy* …". The term "*Personal Data*" is widely defined, and would include, for example, email addresses. However, Federal Law 45/2021 also provides, at article 4, that the prohibition on processing Personal Data without consent is excluded and processing is lawful in specified circumstances, including "*where the processing is necessary into initiate or defend in any procedures relating to rights and legal actions or in relation to judicial or security procedures*". Mr Brocklebank submitted that this exception does not apply here because the English Proceedings are already initiated and can go ahead without disclosure from EYME, and it is speculative whether there are to be other proceedings. That does not seem to me to answer the point: if an order were made on the JAs' application, it seems to me that disclosure would be made "*in relation to judicial proceedings*".

129. In his skeleton argument, Mr Brocklebank submitted that, because of concern that disclosure of information might contravene UAE law, no order should be made against EYME. I cannot accept that: a risk of criminal or civil liability, even if established, is not in itself a complete answer to the application. It is only a factor, albeit potentially an important factor, to be brought into account together with other considerations: see *In re Mid East Trading Ltd, [1998] BCC 726, 754D per Chadwick LJ.*

130. Nor do I find the contention that there is a realistic risk of contravention compelling. Of course, an auditor or accountant carrying out a review obtains information which his client might legitimately expect not to be disclosed without his permission, unless disclosure is required by law. Here, however, apart from the Non-Consenting Subsidiaries, the clients, the relevant NMC companies, have consented to the disclosure that is the subject of the application. EYME submit that information concerning or obtained from other persons might be protected by UAE law: they refer, for example, to banks or other persons doing business with NMC companies, and their own employees or former employees. I am not persuaded that generally the legislation to which EYME refer would protect information so as to prevent an auditor or engagement accountant from providing it to administrators of the client, but accept that there might be such cases: an example given during the hearing was that document might include a telephone number or personal email address of an employee of EYME. Such cases could be dealt with by redaction.

131. Further, all the legislation to which Mr Brocklebank referred unsurprisingly excluded from the prohibitions disclosure that is required or permitted by law. On the face of it, I would expect this to exempt from the prohibitions disclosure required by any Court of the UAE, and that an order of this Court, being a Court of the Emirate of Abu Dhabi, would bring EYME within the exceptions. Certainly, other litigants in this Court

have been content that an order of this Cour would mean disclosure would be "*authorised by law*" within the meaning of section 120 of Federal Law 14 of 2018, Regarding the Central Bank & Organization of Financial Institutions and Activities: see *NMC Healthcare Ltd and ors v Dubai Islamic Bank PJSC and ors*, *[2023] ADGMCFI 0013* esp at para 5.

132. However, Mr O'Sullivan's evidence is that he understands that the exceptions apply only when disclosure is "*required by 'on-shore' UAE law or regulation, as opposed to ADGM laws or regulations*" and that orders under the statutory power under section 256 of the IR "*do not constitute a legal or regulatory obligation which would satisfy the requirements of the Penal Code and the Auditors Law*". No evidence of UAE law has been adduced about this, nor does Mr O'Sullivan, who does not, as far as the evidence goes, have legal qualifications, explain the basis of his understanding. His evidence is no more than assertion, and is an unsatisfactory basis for EYME's argument.

133. I add that I am not persuaded that article 7 of Federal Law 45/2021 gives EYME any additional argument: it appears about the measures and procedures that "*Controllers*" should have in place and the standards of protection that they should provide, rather than whether a particular disclosure was proper. Mr Brocklebank developed no argument about this provision.

134. However all this might be, the JAs have proposed a formula for dealing with these concerns, which seems to me to afford appropriate protection to EYME. They propose that, if EYME believe that provision of particular documents would involve contravention of the law of a relevant jurisdiction, EYME, while being obliged to identify and collect such documents, should not have to provide them to the JAs unless this Court makes a further order (or provision of the document would no longer involve such contravention). This will allow the Court to consider the importance of provision of the particular document, and to weigh it against any supposed risk to EYME of producing it.

135. EYME argued that it would be preferable to protect their position by deferring any decision on the JAs' application against them pending a decision by the on-shore Courts on EY's application that is pending there. It was suggested that a decision might well be relevant to EYME's concern that the provision of documents pursuant to an order of this Court would contravene UAW legislation. It was also suggested that otherwise decisions of this Court and the on-shore courts might conflict. I reject that course. I was told nothing about when a decision on the on-shore Courts is expected, and it would be a disproportionate response to defer indefinitely a decision about all the disclosure that the JAs seek in response to the perceived risk. In any case, JAs' proposal makes it unnecessary to do so. For similar reasons, I reject EYME's suggestion that any order against them should not be enforced against them until it is recognised elsewhere in Abu Dhabi.

(f) Confidentiality

136. EYME argued that, even if disclosure would not contravene UAE law, nevertheless, as Mr Brocklebank put it, "*[t]he confidentiality of much of the material of which disclosure is sought is itself a highly relevant factor and is a further reason why an order should not be made*". He said that, as well as information confidential to NMC Group companies, there is likely to be information confidential to third parties such as "*banks, engagement clients' contractual partners, regulatory authorities, other professionals*"; persons employed or formerly employed by the NMC companies, by EYME or by third parties; and information confidential to EYME.

137. I am not impressed by the expressed concerns about EYME having a real and legitimate interest in keeping confidential working papers and the software on which it is stored: as Mr Beswetherick observed, in *British & Commonwealth Holding PLC v Spicer and Oppenheim* (cit sup), the House of Lords ordered disclosure of working papers by an auditor that was not itself the company in liquidation. Nor, to my mind, is EYME's argument stronger because they claim a proprietary interest in the working papers: section 256 clearly contemplates that a respondent might be required to produce documents that he owns, and I cannot give

much weight to the consideration that EYME apparently owns the documents sought, or at least many of them.

138. Of course, third party rights of confidentiality are potentially relevant on applications of this kind, although they will be given some protection by the JAs' undertaking not to use documents and information for collateral purposes. Nevertheless, I accept that, if disclosure is ordered, inevitably persons other than the JAs will become privy to documents that have been disclosed and the information in them. For example, they will probably become known to EY when documents are deployed in the English proceedings, and possibly to others against whom further proceedings might be brought.

139. Nevertheless, I am not persuaded that this consideration is of great weight in this case. Such onward disclosure is inherent when documents are disclosed so that liquidators or administrators can investigate and potentially pursue claims for the benefit of creditors. I find it difficult to see why third parties might have an important and legitimate interest in preventing an auditor or review accountants from sharing information with the client's administrator. EYME do not give evidence of instances where personal information of employees or former employees might be revealed, but again, if there is really concern about this, the information can be redacted. That would involve EYME in work, but their evidence does not persuade me that the problem of employees' information is of a scale that would make redaction particularly onerous.

(g) Use of documents to EYME's prejudice

140. EYME srgued that it would be oppressive for them to be ordered to disclose documents because they might be used to their prejudice. This might be particularly concerning, I would suppose, if the documents show that their work was defective or provide other grounds for criticising it.

141. First, it is said that the documents might be used to formulate claims against them, and that would mean that, in effect, they will have been required to give pre-action disclosure that would not be available to other litigants in the ADGM, nor, in the circumstances of this case, in England. The documents might be so used: the JAs are entitled, and under a duty, to explore what claims might be brought for the benefit of creditors, and to acquire documents which would not be available to other potential litigants. That in itself is no reason to refuse disclosure.

142. Secondly, EYME contended that disclosure would be oppressive because documents might come into the hands of regulators, in the UAE or the England in relation to EY's work. This seems to me distinctly speculative, but even assuming that there is a real risk of this, I cannot give great weight to the risk that regulators might come by material whereby they can carry out their supervisory responsibilities.

(h) The scope of the application and the burden on EYME

143. EYME provided audit and other services over the period from 2009 and 2019 to many NMC companies which were put into administration in 2020, apparently as a result of fraudulent activities on a grand scale. The broad scope of the JAs' requests for documents reflects this. However, EYME complains both about the scope of the order, and that it does not properly specify what documents are required by the JAs and therefore an order would place an unwarranted burden on EYME. In a letter of 7 August 2023, Clyde & Co explained the work that, as EYME say, would be involved in complying with the request. By way of examples of the points made in the letter, they say that it will be difficult to collate the audit files because they are held in different formats and different places, and are password-protected, and because it will be particularly difficult to retrieve those for audits before 2015, which are held on an obsolete system; and they complain that the request appears to cover documents relating to the audits other than the audit files themselves, but it is unclear what other documents. In short, it is said that compliance with the order sought will require months of work, which will greatly be disrupt their business and put EYME to enormous expense, which they will be unable to recover.

144. Mr O'Sullivan said in his evidence that, before disclosing documents, EYME would have to review them for "*confidential and/or proprietary information*" and possibly for privileged information. In my judgment,

this concern is over-stated: it is no answer to an order for disclosure that a document includes confidential matter or that others might have a proprietary interest. It is not explained how privileged documents might be caught by the orders sought, nor why, if they would be, they could not be identified by suitable keyword searches.

145. Mr O'Sullivan also complained that the disclosure request includes documents that the JAs already have, referring by way of example to engagement letters. Mr Fleming explained in response that the JAs do indeed have some engagement letters, but not all of them; and he observed that it should be a straightforward matter for a member of the EY Group to identify them all in their systems. I accept that. More generally, I accept Mr Fleming's evidence that the task for the JAs of identifying exactly which documents they have and which they believe to be missing would be time-consuming and expensive, and, more importantly, it is unlikely, as I see it, to reduce the burden on EYME of complying with any order against them. I note that In the Court of Appeal *In re British & Commonwealth PLC (cit sup),* Ralph Gibson LJ in the Court of Appeal rejected the suggestion that, because the administrators already had documents and information, they should have to explain what was missing (and so was reasonably required from the respondents), because that would have involved an excessive amount of work (loc cit at p.381A/B).

(i) Balancing the considerations

146. Mr Brocklebank properly emphasised that weight of the matters on which he relied should be considered cumulatively, He identified powerful considerations, but in the end, despite his attractive argument, I am not persuaded that they fully answer the JAs' interest in having the documents sought. I see particular force in Mr Brocklebank's criticism that the evidence in support of the application lacks detail and his submission that it would be onerous on EYME to provide all the documents sought by the JAs. As Mr Beswertherick put it in his skeleton argument, "*oppression is to be assessed against need. Thus, it may be unduly oppressive to require a respondent to provide certain documents which are reasonably required but of relatively minor importance, whereas the same burden on the respondent may not be unduly oppressive where an officeholder's need is greater*". This, as I see it, focuses on the crucial considerations in this case, and the correct balance between need and oppression can only be struck by examining the precise terms of the application to decide what disclosure is justified.

The Applications against EYME for documents: terms of the order

147. The first paragraph of the application is for "*Copies of any engagement letters or written agreements entered into between*" EYME and NMCH, Holding, NMC PLC or any of 43 identified subsidiaries or former subsidiaries of the NMC Group "*relating to the services that [EYME] provided to such entities between 2009 and 2019, any terms and conditions of supplying such services*". EYME objected to an earlier version of this request on the grounds that it also sought letters or agreements for other unidentified subsidiaries, but that point has been resolved because the request has been reformulated. I consider this request justified, and grant it..

148. Secondly, the JAs seek a copy of EYME's "*full electronic client and matter file relating to any of the NMC Group entities*". They also request that, if the information is not otherwise provided, EYME should provide a witness statement containing a list and description of all engagements that EYME had with an entity in the NMC Group between 2009 and 2019 and details of the charges levied and funds received by EYME in respect thereof. Mr Fleming has explained that the JAs require this information in order to identify trace payments made to EYME because this would assist them "*in reconciling those payments against the records they hold to ensure they have an accurate account of all transactions*". Thus, as I understand it, their purpose is to identify legitimate payments were made by the NMC Group in order to assist them to focus their attention on payments that cannot be explained and need to be investigated further. Given the state of the Group's accounting records, this is an understandable and proper purpose. The relevant documents should be readily identifiable by EYME and their provision should not put them to unwarranted trouble. I shall consider any representations about the wording of the order to clarify the limits of what EYME are required to disclose in response to this request, but subject to that, I grant it.

149. Thirdly, the JAs request "*Copies of [EYME's] working papers and documents (whether electronic or hard copy) relating to audit services that it provided in the period from 2009 to 2019 inclusive to any of the NMC Group entities*", and specifically they say that this request covers EYME's audit files. EYME submit that this request is excessively demanding, in particular because:

    (a) The JAs seek documents relating to an excessive period. It was pointed out that the English Proceedings concern the audits only for the years 2012 to 2018;

    (b) The JAs seek documents relating to audit work for a large number of companies; and

    (c) The application is vague as to which documents are covered. EYME say that it is left to determine what are documents "relating to" audit services, and that, in any case, this formulation would capture more documents than could be justified, or than EYME could reasonably be expected to collect and review.

150. There is no reason that the period covered by the request should mirror that years in respect of which NMC PLC criticise the EY's audits in the English Proceedings. However, I refuse the request of these documents in relation to the audits for 2009 and 2010: it seems to me unlikely that they will assist the JAs: firstly, there is no compelling evidence that there was wrongdoing in the NMC Group before 2011, and secondly, since I shall direct EYME to disclose other documents relating to investigation into the finances of the NMC Group at around the time of the IPO, the chance that the audit documents for 2009 and 2010 will provide additional information of any significance is the more remote.

151. I next take EYME's third point, which I accept. The scope of the request is uncertain, but more importantly, because the request is not limited to audit files, an order in its terms would be excessively demanding on EYME. The JAs have not explained satisfactorily why their investigations require more than the audit files. If documents in an audit file indicate that further investigation of a particular matter should be pursued, it might be that the JAs would be justified in seeking an order for underlying documents in relation to it in a more focused request, but, as things stand, I shall make an order only in respect of audit files.

152. Does the request cover the audits of an excessive number of companies? Reference was made to NMC PLC's pleading in the English proceedings, which state that, for the audit of 2013, "*EYME was ... identified as component auditor for eight significant components"*, but I do not accept that that indicates that the audit files for other subsidiaries are unlikely to assist the JAs: the pleaded reference is only about the 2013 audit, and it is unclear in what sense the eight components are said to be "*significant*".

153. The evidence does not say how many audit files are covered by the request. Specifically, it is not stated that EYME audited all 43 companies listed in the schedule to the JAs' draft order (although it seems probable that they did), and I have not been told for how many years they audited each of the listed companies. It might be that the burden on EYME could and should properly be reduced by an order that EYME produce the audit files relating to a limited number of the companies, the selection being made by the JAs; and that the JAs have liberty to apply for further disclosure if that is justified by consideration of that initial disclosure. While my provisional view is that an order of this kind is likely to strike a proper balance between the requirements of the JAs and the burden on EYME, this possibility was not explored during the hearing. I shall seek further assistance about this from counsel after I have issued my judgment.

154. I come to the JAs' fourth request, which is for "*Copies of documents (whether electronic or hard copy) held by [EYME] relating to the financial and operational review work undertaken for any NMC Group entities in respect of engagements entered into I the period from 2009 through to 2012 inclusive, including records held in relation to 'Project Nightingale' and copies of all working papers in relation to the same*". (The JAs' draft order referred to the period from 2009 to 2019, but Mr Beswetherick confirmed that this was a drafting error.) Mr O'Sullivan observed in his evidence that the request does not specify the engagements about which documents are to be disclosed. As I understand Mr Fleming's evidence, the request is directed, at least principally, to investigations and reports which were conducted under an engagement agreement of

24 August 2011 and which I have described above, and I am satisfied by his evidence that documents relating to that work should be disclosed.

155. In my judgment, the order in response to this request should be confined to those investigations and reports. Mr Fleming also made passing reference to work by EYME in connection with acquisitions by NMCH of Americare LLC and Aspen Healthcare LLC, but no argument was developed for the disclosure in relation to it.

156. Finally, the JAs' fifth request is for "*Copies of documents (whether electronic or hard copy) held by [EYME] relating to work it undertook with respect to its engagement linked to the NMC PLC board's investigation into allegations that had been made by a former shareholder*". The former shareholder is H E Abdulla Humaid Al Mazrouie, who apparently complained about the presentation of the NMC Group's finances as presented in the prospectus for the IPO. In my judgment, the JAs have made out their case that disclosure of these documents would assist their investigations, and I grant this request.

157. As I have said, on issuing this judgment, I shall invite further submissions about the scope of the order upon the JAs' third request, and, as with the other Respondents, about how long EYME should be allowed to produce documents.

158. The JAs sought an order endorsed with a penal notice. I am not persuaded that the endorsement is appropriate, at least at this stage.

159. As I have already indicated, the order should include a provision along the line proposed by the JAs to allow any specific arguments that compliance with it in respect of particular documents would involve a real risk that EYME would contravene UAE law.

The Application against EYME under section 255

160. I can deal briefly with the application against EYME under section 255 of the IR. Section 255 does not confer a power on the Court, but imposes an obligation on specified persons, enforced by penal sanctions. I am prepared to accept for present purposes that the Court might, in an appropriate case, make an injunction against such a person to comply with his duty.

161. There was a difference between the parties about whether EYME are within the scope of the section. Mr Beswetherick submitted that they are covered because they are persons who have been "*in the employment of the Company*". He cited *Sealy & Milman, Annotated Guide to the Insolvency Legislation* (2023, 26th Ed), which writes of section 235 of the 1986 Act, "*The extension of 'employment' to include employment under a contract for services is wide enough to include solicitors, accountants and other who have rendered professional services to the company*". Mr Brocklebank disputed this, and submitted that there is section 255 does not apply to EYME. He also argued that section 255 is not appropriate for the relief that the JAs seek because it is concerned with the provision of information, and not documents: see *In re Comet Group Ltd, [2014] EWHC 3477 (Ch)* esp at para 21.

162. I shall not engage with these questions, because, in any case, I would not grant the application under section 255. It was only faintly pursued, and the JAs developed no convincing argument that, if EYME provide the documents that are ordered pursuant to section 256, they should be required to give information by an order to enforce a duty under section 255.

163. I add that Mr Beswetherick also argued that, because EYME are covered by section 255, the Court should more readily make an order against them under section 256. If they are covered, this submission would be supported by the judgment of Sir Nicholas Browne-Wilkinson V-C in *Cloverbay Ltd v BCCI SA, [1991] Ch 90, 102H: " ... the case for making an order against an officer or former officer of the company will usually be stronger than it would be against a third party. Officers owe the company fiduciary duties and will often be in possession of information the company is entitled to under general law. Their special*

position as officers of the company is emphasised by section 235 of the Insolvency Act 1986 which imposes on them a statutory obligation to assist the liquidator or administrator". The fact that EYME were auditor of NMC Group companies over many years, of course, is a relevant consideration in support of the application under section 256, but I am not persuaded that it would add much to JAs' argument to show that EYME are also within the scope of section 255. I have not given it any weight.

Conclusions

164. Accordingly, subject to settling its exact terms and the other matters referred to in this judgment, I shall make the orders sought against Neopharma and Nexgen. I grant the order against EYME only to the extent that I have explained.

165. I should be grateful if the JAs' representatives would draft an order to give effect to this judgment, and seek to reach agreement on it with the representatives of the other parties.

166. I propose to hold a hearing to deal with consequential matters, including any outstanding issues about the terms of the order.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
5 December 2023