

## Disclosure orders – A weapon to track and recover assets

Disclosure orders constitute a very important weapon for the tracking down and recovery of assets. As such, they are an important area in both the Commercial Court and the High Court, in the latter case because there seems to be an increase in the number of applications for interim relief in support of high value divorce petitions in various European courts. As they are divorce proceedings they do not come within the criteria for a claim in the Commercial Court and are therefore dealt with by the High Court judges, who tended to deal with commercial matters before the founding of the Commercial Court. Accordingly the judges are very familiar with the relevant principles.

### Norwich Pharmacal

1. The jurisdiction based on the English case of *Norwich Pharmacal Co v Customs and Excise Commissioners*<sup>1</sup> is well established, allowing relief to be obtained against an innocent third party who has become innocently mixed up, through no fault of their own, in some wrongdoing.<sup>2</sup> In an offshore context this is most usually in the form of an application against licensed trust companies and registered agents where the wrongdoer is a company or the principals standing behind the company.

### The Test

2. Under traditional *Norwich Pharmacal* principles the applicant will need to show the following:
  - (a) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
  - (b) there must be a need for an order to enable an action to be brought against the ultimate wrongdoer, usually to identify them. It must be just and convenient to make the order and usually the Court will want to be satisfied that there is no other practical way of obtaining the information ; and,
  - (c) the person against whom the order is sought must:
    - (i) be mixed up in so as to have facilitated the wrongdoing; and
    - (ii) be likely to be able to provide the information necessary for the wrongdoer to be sued.<sup>3</sup>

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<sup>1</sup> [1974] AC 133

<sup>2</sup> *Ibid.*, per Lord Reid in *Norwich* at 175

<sup>3</sup> *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] 3 All ER 511

3. The High Court and Court of Appeal have frequently, as in other common law jurisdictions, recognised that once the “threshold” requirements are met, it still remains a matter for the court’s discretion as to whether or not to grant the relief. In the words of Mitchell JA in the Court of Appeal in *JSC BTA Bank v Fidelity Corporate Services Limited*<sup>4</sup> ‘the jurisdiction is an exceptional one which is only to be exercised by the court when it is satisfied that it is necessary it should be exercised. The disclosure has to be a necessary and proportionate response in all the circumstances. The necessity requirement will however vary in its impact according to all the circumstances in which the application is being made.... It is clear therefore that the “necessity” factor comes into play only as a requirement in the exercise of the judicial discretion, after the threshold requirements have been satisfied’.

## The Jurisdiction in the British Virgin Islands

- (i) **A wrong must have been carried out, or arguably carried out**
4. The British Virgin Islands jurisdiction extends to a large variety of ultimate wrongs, including wrongs actionable in civil proceedings, alleged breaches of contract and crimes.<sup>5</sup> For example:
  - (a) claims at both law and in equity were advanced in *JSC BTA Bank*,<sup>6</sup> being proprietary claims in respect of the sums advanced by the claimant and claims for compensation against the ultimate wrongdoers’ officers for breach of duty;
  - (b) in *TSJ Engineering Consulting Limited v Al-Rushaid Petroleum Investment Company*<sup>7</sup> the claims were based on allegations of receipt of secret profits in breach of fiduciary duties; and,
  - (c) in *Morgan & Morgan Trust Corporation Limited v Fiona Trust & Holding Corporation*<sup>8</sup> (the leading case in the BVI and which is discussed in greater detail below) the claims were based on allegations of fraud.
5. The jurisdiction includes cases where there is only evidence that a wrong might have occurred and assistance is needed precisely to see whether an actionable wrong has been committed.<sup>9</sup> In *TSJ Engineering* for example, there was only a “strong suspicion” that the English defendants were diverting the profits and opportunities otherwise due to the relevant company.

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<sup>4</sup> HCVAP 2010/035, at [20]

<sup>5</sup> Gee on Injunctions at 22.048)

<sup>6</sup> See fn. 4, at [7]

<sup>7</sup> HCVAP 2010/0013, at [3]

<sup>8</sup> BVIHCV 2006/003 and HCVAP 2005/24

<sup>9</sup> *P v T Ltd* [1997] 1 WLR 1309 and *Gee* at 22.048

(ii) **Order needed to enable an action to be brought against the ultimate wrongdoer**

6. The leading case on this point in the British Virgin Islands is *Morgan & Morgan Trust Corporation Limited v Fiona Trust & Holding Corporation*,<sup>10</sup> which adheres very closely to the traditional origins of the *Norwich Pharmacal* jurisdiction. It stresses in particular the need for relief to be granted in order for an action to be brought, usually to identify the wrongdoer.
7. As made clear by the courts in *Fiona*, the jurisdiction is “a special one to be used only where no other procedure will achieve the ends of justice”. The British Virgin Islands court is likely to apply strictly the principle that if a party already knows the identity of the wrongdoer and the location of the assets, it will not permit an application to be used merely in order for the claimant to bolster his case. The applicant cannot use the procedure to seek information which would become available at the disclosure stage of proceedings.
8. On appeal in *Fiona* this traditional approach of the British Virgin Islands court was supported by the Court of Appeal which stressed the need for production of information to enable a party to put forward his case.
9. This approach has largely been followed in subsequent cases in the British Virgin Islands but each case will be looked at on its own facts. For example in *TSJ Engineering* the applicant knew the name of the suspected wrongdoer (Shandong) but required information from TSJ (the respondent) relating to payments between the two. This was a legitimate use of the jurisdiction.

(iii) (a) **The Respondent: Mixed up in the Wrongdoing**

10. The nature of the respondent’s behaviour and what suffices to show that he has become mixed up in the wrongdoing has now been clarified by *JSC BTA Bank v Fidelity Corporate Services Limited*.<sup>11</sup> At first instance the Commercial Court refused to grant *Norwich Pharmacal* relief against a registered agent, saying that day-to-day activities of a registered agent such as offering corporate services did not meet the threshold test for the granting of relief. Otherwise, an applicant ‘had only to allege that he had been wronged...to be entitled as of right to obtain the widest disclosure from its registered agent.’

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<sup>10</sup> BVI HCV Case No. 3/2006 and Civil Appeal No. 24/2005

<sup>11</sup> BVI HC (Com) 137/2010 and HCVAP 2010/035

11. However the Court of Appeal<sup>12</sup> disagreed with the Commercial Court's view, holding that a registered agent cannot be considered to be a mere onlooker. By forming and maintaining companies, the registered agent facilitated (albeit innocently) the commission of the fraud. The Court of Appeal held that this involvement was sufficient to impose upon the registered agent a duty to disclose information which could assist the victim in discovering the true wrongdoers (see [27]).

**(iii)(b) Likely to Be Able to Provide Information Necessary to Enable the Wrongdoer to be Sued**

12. In *Norwich* itself, Lord Reid expressly stated that the jurisdiction could be used to obtain "full information" as well as to disclose the identity of a wrongdoer in order to assist the claimant (see 175). Orders can be made directed at a variety of kinds of information, including information to enable a wronged individual to identify a mole within an organisation<sup>13</sup>, to locate assets upon which a judgment could be enforced<sup>14</sup> and to identify information which is central to a contemplated claim and which will show whether the applicant does have a good cause of action against a named person.<sup>15</sup>

**Information likely to be obtained**

13. Before making an application in the British Virgin Islands the applicant will need to consider carefully whether and what useful information might be available to him. Within the British Virgin Islands applications are almost always against third parties who have been passively, rather than actively, involved in wrongdoing such as registered agents, trust companies and/or bankers of the ultimate wrongdoer.
14. In terms of the information available, pursuant to section 96 of the BVI Business Companies Act a company "must" maintain the following documents at the office of its registered agent:
  - (a) the memorandum and articles of the company;
  - (b) the register of members maintained in accordance with section 41 or a copy of the register of members;
  - (c) the register of directors maintained under section 118 or a copy of the register of directors; and,
  - (d) copies of all notices and other documents filed by the company in the previous ten years.<sup>16</sup>

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<sup>12</sup> HCVAP 2010/035

<sup>13</sup> *British Steel Corporation v Granada Television* [1981] AC 1096.

<sup>14</sup> *Mercantile Group (Europe) Limited v Aiyela* [1994] QB 366.

<sup>15</sup> *Carlton Film Distributors Limited v VCI Plc* [2003] FSR 47. See also *Gee on Injunctions* at 22.048)

<sup>16</sup> See generally para 2.099 above

15. By section 97 of the BVI Business Companies Act a company “may” keep (and is in practice will often do so) the following records at the office of its registered agent:
  - (a) minutes of meetings and resolutions of members and of classes of members; and,
  - (b) minutes of meetings and resolutions of directors and committees of directors maintained in accordance with section 102.
  
16. Registered agents may also maintain “know-your-client” anti-money laundering documentation, which identify and establish the identity of their clients (which will usually, although not invariably, be the ultimate beneficial owner of the company). However, registered agents are also permitted to enter into “qualified introducer” arrangements whereby intermediaries who refer business to them undertake to maintain such “know-your-client” anti-money laundering documentation on behalf of the ultimate clients. In such cases the relevant documentation will not be within the possession of the registered agent to deliver.

### ***Norwich Pharmacal* orders in support of foreign proceedings**

17. There have been some reservations in the British Virgin Islands as to whether or not a *Norwich Pharmacal* order can be granted in support of foreign proceedings where no British Virgin Islands proceedings are commenced (see for example the dicta of Olivetti J in *Pacific International Sport Clubs Limited v Comerco Commercial Limited*<sup>17</sup>).
  
18. In *Fiona* itself though, the Court of Appeal did recognise the Gibraltar case of *Secilpar SL v Fiduciary Trust Limited*<sup>18</sup> which sets out the principles applicable to the grant of *Norwich Pharmacal* relief in support of foreign proceedings, although the Court of Appeal did not itself decide the question as the appeal was struck out for failure to obtain leave. In practice the High Court does grant relief in these cases.

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<sup>17</sup> , BVIHCV 2005/070. ‘Without deciding the point, for it does not fall for determination, I also understand that the law governing *Norwich Pharmacal* orders is such that it does not permit an order to be made requiring anyone to disclose information for use in foreign proceedings (a different regime covers this).’ The different regime referred to is the procedure for letters of request under the Hague Convention.

<sup>18</sup> Civil Appeal No. 5 of 2004

## Bankers Trust

19. The court's equitable jurisdiction to grant relief to enable funds to be traced and as set out in *Bankers Trust v Shapira*,<sup>19</sup> applies equally in the British Virgin Islands and is often coupled with *Norwich Pharmacal* relief. There are no particular British Virgin Islands-specific considerations under this head of relief, and the position is the same as under the common law.<sup>20</sup>
20. Where a person has become involved (albeit innocently) in the disposal of particular assets to which the applicant is making a proprietary claim, and is likely to have information about what has happened to these assets, the court is prepared to grant an interlocutory order requiring that person to disclose all information which will assist in discovering the location of assets. In *Bankers Trust* itself the order was granted in relation to bank records and was ancillary to the applicant's right to trace the missing monies. The applicant had no right against the bank itself.
21. There must be:
  - (a) strong evidence of fraud. As noted by Waller LJ in *Bankers Trust*,<sup>21</sup> the order should not be made lightly. There was "very strong evidence" of fraud which justified the grant of the relief. It is this evidence of fraud which disentitles the wrongdoer from relying on the confidential relationship between himself and his bank;
  - (b) a "good ground" for thinking the money is the plaintiff's money; and
  - (c) a need for urgent action. If steps are going to be taken, it is important that they should be taken at the earliest possible moment (per Waller LJ in *Bankers Trust*).Applications should, so far as possible, define the missing assets and the information sought.<sup>22</sup>
22. The court will balance the interests of the intrusion into the privacy of the respondent against the potential detriment to the applicant if the information is not provided. Once a suitable case is demonstrated courts are willing to grant wide orders. As noted by Waller LJ in *Bankers Trust* unless there is the fullest possible information the tracing of funds may be impossible

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<sup>19</sup> [1980] 1 WLR 1274

<sup>20</sup> As to which, see *Gee on Commercial Injunctions*, 5<sup>th</sup> ed, at 22.053.

<sup>21</sup> At 1283

<sup>22</sup> *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911

## Evidence Act 2006

23. The Evidence Act, 1876 and the Bankers Books (Evidence) Act, 1881 have now been repealed by the Evidence Act, 2006. Section 135 is of particular relevance in this context and provides that:  
'(7)On the application of any party to legal or administrative proceedings, the court may order that that party be at liberty to inspect and take copies of any entries in the records of any financial institution for the purposes of the legal or administrative proceeding.'
24. Pursuant to section 135(8) the person whose account is to be inspected shall be notified of the application at least two clear days before the hearing, and if it is shown to the satisfaction of the court that he cannot be notified personally, the notice may be given by addressing it to the financial institution.

## Procedure

25. The application procedure is governed by Parts 11 and 17 of the Civil Procedure Rules. The Applicant will file a notice of application in accordance with Rule 11.6 in Form 6, which must include the matters set out in Rule 11.7.

## Notice

26. The question of whether or not to give notice is a fact-specific one. Although the general rule for applications<sup>23</sup> is that the applicant must give notice,<sup>24</sup> sets out that the court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice. The giving of notice is usually only appropriate where the respondent is an "innocent" facilitator. If the respondent is suspected to have been non-innocently mixed up in the wrongdoing such that there is a risk of, for example, destruction of documents tipping off of the ultimate wrongdoer, then the application should be brought *ex parte*.
27. Often a large amount of secrecy is required in the making of the application and applicants frequently need to ask the court to make an order sealing the record and "gagging" the respondent, preventing it from tipping off the ultimate wrongdoer(s). If so, an application with two stages can be extremely useful: one application is brought seeking both the seal/gag and the substantive relief. However, the applicant asks the court to consider first, on a without-notice and urgent basis, the order to

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<sup>23</sup> Rule 11.8(1)

<sup>24</sup> Rule 17.3(2)

seal the record and to prevent the respondent from disclosing the fact of the proceedings. The applicant seeks an adjournment of the determination of the substantive relief, ie. the *Norwich Pharmacal* order itself, until after the seal and gag is granted and notice of the substantive application has been given to the respondent (subject to what is said above about the risk of a non-innocent respondent).

28. The applicant will almost always have to give an undertaking, both to pay the reasonable costs of the respondent and to abide by any order as to damages caused by the granting or extension of the order.

## Further Information

*The foregoing is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.*

*For more information on the subject please contact For more information on the subject please contact Phillip Kite ([phillip.kite@harneys.com](mailto:phillip.kite@harneys.com)) or your usual Harneys contact.*

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