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Don't make a Goose out of a Black Swan: Norwich Pharmacal relief after Broad Idea No.

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The decision from the Privy Council in Broad Idea [1] (known as Broad Idea No 2) has generated incredible interest since it was handed down on 4 October 2021. This is hardly surprising, say Julie Engwirda and Phillip Kite of Harneys. The Privy Council was invited to rewrite the law on standalone injunctive relief and following a careful examination of the evolution of such relief, and the various wrong turns taken by Courts over the past 40 years, the jurisdiction is now firmly set back on the right



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primarily focuses on the jurisdiction to grant standalone freezing orders in aid of foreign proceedings, it also examines a number of ancillary issues that are equally worthy of attention. One of these ancillary issues is the availability of *Norwich Pharmacal* relief (ie, third party disclosure orders), a key tool in the fight against fraud. In the immediate aftermath of the Eastern Caribbean Court of Appeal's decision in *Broad Idea No 2* [2] there was a serious concern that the ruling had the unintentional consequence of cutting across or possibly extinguishing the BVI Court's ability to grant *Norwich Pharmacal*, *Chabra* and other standalone relief. The Court of Appeal in *Broad Idea No 2* held that the jurisdiction to grant *Black Swan* relief (BVI's answer

to standalone freezing orders) is based on there being a substantive cause of action which entitles the applicant to recognised relief in the jurisdiction granting the freezing order. Where there is no such cause of action, in the BVI or elsewhere, there is no basis to justify the grant of a freezing order or similar relief against the respondent. If correct, this would render such relief (which arguably would also extend to anti-suit injunctions and *Bankers Trust* orders) as unavailable in the BVI (and the other 12 member states of the Eastern Caribbean Supreme Court).

Two decisions from the BVI Commercial Court in the months following Broad Idea No. 2 examined the

implications of the decision. In the decision delivered on 15 June 2020 in the case of A Foreign
Representative in Foreign Insolvency Proceedings v Five Registered Agents [3], Justice Jack confirmed
that the BVI High Court retained the power to grant Norwich Pharmacal orders in support of actual or
intended foreign proceedings, and this power was not affected by the Court of Appeal's decision in Broad
Idea No 2.

Justice Jack reasoned that while freezing orders are parasitic on a substantive cause of action to enforce an

applicant's substantive right, Norwich Pharmacal relief is by its nature against a party against whom there is no substantive cause of action: the Norwich Pharmacal respondent is an innocent third party. Justice Jack further reasoned that a claim for Norwich Pharmacal relief is a procedural cause of action in its own right: one to enforce an independent duty, and is separate from any associated underlying cause of action. Thus, it was held that the Court of Appeal's ruling in Broad Idea No 2 had no application to the Norwich Pharmacal jurisdiction.

In the August 2020 decision of Great Panorama [4], Justice Jack considered the impact of Broad Idea No 2

on the BVI Court's jurisdiction to grant *Chabra* relief. In that case the applicant had obtained default judgment in Hong Kong against a resident of the PRC and sought to preserve assets in the BVI that the applicant said were owned or controlled by the defendant. In resisting the continuation of the injunction, the respondents relied on the decision in *Broad Idea No 2* to argue that the freezing injunction should be discharged because the BVI Court did not have jurisdiction to grant *Chabra* relief against the NCAD BVI company respondents. In addressing the BVI courts' ability to grant *Chabra* relief against the BVI companies, the judge distinguished this case from *Broad Idea No 2* on the basis that the defendant's ownership of the companies was such that the assets of the BVI companies would be amenable to execution when enforcing any judgment made against the defendant.

The Court held that its ability to appoint an equitable receiver over the defendant's 100 per cent shareholding in the NCADs was sufficient to support the grant of the *Chabra* jurisdiction (in *Broad Idea* the respondent held a 50.1% interest in the BVI company; so the Court of Appeal had held that neither a charging order nor appointment of an equitable receiver would give any power of sale of the underlying assets held by the company, Broad Idea [5]). In considering whether the requirement that the companies be the "money-box" of the defendant imposed a more onerous hurdle for an applicant to overcome, the judge explained that the test would be whether the companies and their assets would fall within terms of a standard freezing injunction (ie, whether they were assets owned or controlled by the defendant).

Importantly, the Judge rejected the suggestion that the "money-box" element was limited to whether there was control over a bank account that had funds deposited, noting that "[a]t the pre-judgment stage, the question is whether an asset put in the company against which Chabra relief is sought falls within the broad category of assets which are subject to a freezing order... Any company into which a putative debtor puts assets is, at the pre-judgment stage, potentially the subject of being named as a Chabra defendant. It is only at the post-judgment stage that the question arises as to whether the judgment creditor has direct enforcement powers against the assets (because they are beneficially owned by the judgment debtor) or must go down the indirect execution route of appointing an equitable receiver or seeking a charging order over the shares (because the assets are beneficially owned by the company) or has no remedy at all (because, for example, the shares or the underlying assets are held on a valid discretionary trust)" [at ¶44].

It is not only the BVI that has had a wobble over the availability of Norwich Pharmacal relief. The decision from England and Wales in R (Omar) v Foreign Secretary [2014] QB 112 and Ramilos Trading Ltd v Buyanovsky [2016] EWHC 3175 (Comm) left some practitioners in the Cayman Islands wondering if the only route to obtain evidence from a third party within its jurisdiction for the purposes of overseas litigation was the inter-court request procedure set out in the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978. The May 2021 Cayman Islands Court of Appeal decision in Essar Global Fund Limited v ArcelorMittal USA LLC (Unrep, CICA, 3 May 2021) put this issue to bed, but for anyone contemplating Norwich Pharmacal relief in the Cayman Islands, the case sets out clear guidance that warrants close attention.

The CICA dismissed an appeal by Essar Global Fund Limited (the ultimate parent of the Essar group) and Essar Capital Limited (investment manager of the group) against an order that they must disclose financial information about Essar Steel Limited (in administration) to ArcelorMittal in connection with non-payment of an arbitral award. Essar's argument was two-pronged: first, that no order for the provision of evidence in aid of foreign proceedings could be sustained unless authorised by statute, and second, the English Court of Appeal decisions in *Omar* and *Ramilos* meant that the existence of the statutory route under the Evidence Order represented an absolute bar on the use of *Norwich Pharmacal* relief.

The Court rejected both arguments. The judgment confirms that disclosure under the *Norwich Pharmacal* jurisdiction can be obtained in Cayman in support of proceedings in a foreign jurisdiction, despite the route available for the production of evidence found in the Evidence Order. In summary the Court found:

The Essar judgment was welcomed by all offshore practitioners, but particularly those who act in assettracing and enforcement matters. Had Essar's arguments found favour, the ability of private parties to obtain information needed to pursue enforcement or other actions would have been significantly limited. Similarly, the decision of the Privy Council in Broad Idea No 2 has also put to bed any residual arguments that Norwich Pharmacal, Chabra or other standalone relief requires either a statutory gateway or a substantive cause of action within the same jurisdiction that is being asked to grant the relief. In emphatic terms, the Court of Appeal was found to be wrong on both fronts. The compelling policy reasons behind this decision are summarised in the Privy Council's decision:

"59. The developments in the practice of granting injunctions... - including the expansion of freezing injunctions far beyond their original confines and the creation of other new types of injunction - illustrate the ability of courts with equitable powers to modify existing practice where to do so accords with principle and is necessary to provide an effective remedy. Such flexibility is essential if the law and its procedures are to keep abreast of changes in society. Recent decades have seen fundamental changes in commercial and financial practices, driven in large part by the revolution in information technology. The legal developments... have been forged, often explicitly, in response to such changing circumstances."

Attempts to stifle the jurisdiction of the Court, as happened in *Broad Idea No 2*, should be rejected. The Court's jurisdiction to grant standalone freezing injunctive relief in aid of foreign proceedings, and other such forms of standalone relief, exist as a matter of equity and despite legislative intervention. These recent decisions recognise the importance of the width and flexibility of equitable powers, which are essential for the law to keep abreast of societal changes, and safeguards these key cross-border asset-tracing tools.

Notes

- Convoy Collateral Ltd v Broad Idea International Limited [2021]UKPC 24
- 2. Broad Idea International Limited v Convoy Collateral Ltd BVIHCMAP 2019/0026 (29 May 2020)
- 3. Redacted citation (15 June 2020)
- 4. Great Panorama International Ltd v Qin Hui & Ors BVIHC(COM) 2019/0180 (13 August 2020)
- Which ignored the ability of the shareholder to control the composition of the board, giving him ostensible control over the entire company through his majority shareholding.

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