EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO. BVIHCM2019/0079

BETWEEN:

A

Applicant

-AND-

R

(A REGISTERED AGENT)

Respondent

Appearances:
Mr. Andrew Willins instructed by Appleby for the Applicant ex parte

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2019: July 2, 9, 30

JUDGMENT

Norwich Pharmacal Relief- Procedure – Principles- Interference with Creditors' rights - Whether applicable

[1] **Adderley, J** Ag. The Applicant applied for a Norwich Pharmacal and accompanying seal and gag order against the Respondent. I granted the order. These are my reasons for doing so.

[2] Bankruptcy proceedings are taking place against company **X** (the "**Pending Bankrupt**") in Russia. At present the Applicant, a Russian company, has submitted claims in the proceedings and is the largest creditor on the Register of Claims of the Pending Bankrupt. This means that:

(1) It will get the proportionate largest portion of the proceeds from the bankruptcy estate of the Pending Bankrupt, and

(2) It will have the majority of votes at the general meeting of creditors in the bankruptcy that has authority to exercise wide powers, including the choice of bankruptcy manager for the next bankruptcy stages, provide recommendations to the court as to the next course of the bankruptcy proceedings and formation of the creditor's committee.

[3] B **("the Company**"), a company incorporated in the British Virgin Islands ("**BVI**"), has filed claims in the bankruptcy as well, which, if admitted to the Register of Claims, would cause the Applicant, to be displaced as the largest single creditor and to lose the rights and privileges associated with that status now enjoyed by the Applicant. These privileges are valuable in a Russian bankruptcy.

[4] The Applicant claims that it has grounds to believe that the claims submitted by the Company in the bankruptcy proceedings are a sham and came about by collusion between the Company and a Russian Individual, **Mr S** ("**the Alleged Wrongdoer**") who the Applicant claims is the beneficial owner and controller of the Company. If the Company's claims are ruled as a sham in the bankruptcy proceedings they will not count for the purpose of displacing the Applicant as the largest claimant in the bankruptcy, and will rank behind all other bona fide creditors with claims in the bankruptcy.

[5] The Applicant believes that the Alleged Wrongdoer has caused the Company (as well as other companies under his control) to file sham creditor claims in the bankruptcy in order to (i) deny the Applicant its rights and entitlements as the majority creditor in the bankruptcy and (ii) dilute the claims of genuine creditors (such as the Applicant) in the Register of Creditors' of the Pending Bankrupt**.**

[6] The Applicant therefore seeks Norwich Pharmacal relief. It wishes to investigate the identity of the shareholders, directors, and beneficial owners of the Company. It seeks from the Registered Agent access to the register of members and directors, details of the beneficial owners of the Company at all pertinent times, together with copies of minutes of relevant meetings and resolutions and other documentation detailed in the draft order. It states that this is the only way in which it will be in a position to determine whether the Company is the Alleged Wrongdoer's affiliated entity.

[7] The Alleged Wrongdoer is a former business partner of another Russian individual who together owned the Pending Bankrupt 50/50 at certain times and they also had other 50/50 business interests ("**the Business Interests**"). There is an allegation that the Alleged Wrongdoer took control of the Business Interests from that person by fraud. That has spurned litigation against the Alleged Wrongdoer in a number of jurisdictions including Cyprus, Greece, Liechtenstein and Russia.

[8] As pointed out in affidavit evidence the Russian courts have ruled in multiple judgments that there is an affiliation between the Pending Bankrupt and various other creditors seeking to file claims in the bankruptcy proceedings through the Alleged Wrongdoer. For example in May 2019 the Court of Cassation relied upon the contents of affidavit evidence in proceedings in another jurisdiction concerning the Alleged Wrongdoer and concluded among other things that "…in relation to the Pending Bankrupt and the Company**,** the Alleged Wrongdoer is a person who has an actual ability to direct the actions of the legal entity." The information used in those proceedings had been obtained from disclosure orders from Belize and the Seychelles. However, the Applicant was not a party to those proceedings. Even in Russia the Arbitrazh Courts have found in 4 cases that there was that link. The applicant was not a party to those either.

[9] Although the Applicant has no documentary evidence to prove it, the Applicant believes that the Alleged Wrongdoer has acted to cause the Company (and other companies controlled by the Alleged Wrongdoer) to contrive debts relied on to petition for the bankruptcy and to file sham creditor claims in the bankruptcy proceedings. The largest of the disputed claims is for approximately RUB 590 million (approx. $9,150,000) ('**the Disputed Claim**"). From the documents filed in the Bankruptcy Proceedings it appears to be from:

(1) two promissory notes received by the Company by virtue of a Novation Agreement in 2011 whereby the Pending Bankrupt issued 25 promissory notes to one of its creditors under a supply contract which were then allegedly acquired by the Company and novated into 3 promissory notes of RUB 370 million;

(2) one promissory note acquired by the Company in 2012 in respect of which the settlement agreement was executed between the Company and the Pending Bankrupt in 2017 within the initial stage of the Bankruptcy Proceedings; and

(3) the loan agreement dated July 2010 between the Company and the Pending Bankrupt.

[10] The Applicant believes that the Disputed Claim is contrived by the Alleged Wrongdoer and that there was no genuine commercial transaction between the parties and will advance that position before the Cassation Court. It will also advance the further or alternative case that it is a sham transaction which in fact covered purely corporate investment in the capital of the Pending Bankrupt through the Company**.**

[11] An Expert Opinion dated 5 July 2019 of a Professor on Russian law states:

> "32. According to the position of the Russian supreme court, which is in fact, binding on all lower courts, if it is established that a creditor and debtor are affiliated, and the creditor claim arises from the fact of the said affiliation (for example, a transaction could not have been effected if the creditor was not affiliated to the debtor), there is a presumption of no reasonable economic basis for the transaction between the creditor and the debtor. If the creditor does not present persuasive evidence to refute the said presumption, para. 8 of Article 2 of the Bankruptcy law will apply to the claim of such creditor and its claim will not be included in the debtors' register of creditors and such creditor and its claim will not be included in the debtors' register of creditor claims."
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> 33. Similarly, if the court establishes that the creditor filed an application for its claims against the debtor to be included in the debtor's register of creditor claims solely with the illegitimate aim to decrease, in the interest of the debtor and its affiliates, the amount of votes attributed to the independent creditors, then the court may declare this activity as abuse of right and the claims of the said creditor will not be included in the debtor's register of creditor claims."

[12] There is an arguable case that the wrongdoing has taken place based on the connections already found in the five other cases previously mentioned involving companies which had filed claims and were rejected on that very ground.

[13] The Russian law professor also stated that in all likelihood the Court will admit the fresh evidence made available as a result of the Norwich Pharmacal order if the court considers it essential to proceedings and where that evidence was not and could not have been available at the dates of first hearing. The Norwich Pharmacal application was made before the completion of the first hearings but only now is dealt with. The fresh evidence cannot be accepted by the Court of Cassation but will be available for use if that court considers the appeal and decides to send it back to be heard on the merits.

[14] The Russian law professor also said in effect that a letter of Request to the BVI is practicably unavailable because the Russian courts typically refuse requests unless other means of obtaining the information have been exhausted.

THE TEST FOR GRANTING NORWICH PHARMACAL ORDERS

[15] The original principle upon which Norwich Pharmacal Relief was based in the case whose name the relief bears **Norwich Pharmacal Co. & Others v Customs and Excise Commissioners** [1974] AC 133 ("**Norwich Pharmacal")** was that the prospective claimant suspected a wrongdoing for which he had a cause of action, but did not know the identities of the wrongdoers and the only way to discover their identities was by way of discovery before intended action. Those were the facts in the Norwich case and the principles which were enunciated in it. See jurisdiction summarized at [16] in **De Sousa v Harney's Corporate Services Limited** BVIHC (COM) 182 of 2017.

[16] Since then the principles have evolved. The EC Court of Appeal drawing on the authorities reviewed the test that should guide judges in granting Norwich Pharmacal orders. Some guidance is helpfully set out by Webster JA in **A, B, C and D v E** Claim No AXAHCVAP 2011/001 at [31] where he stated that in order to succeed on an application for discovery under the Norwich Pharmacal jurisdiction the applicant must establish an arguable case that:

(a) a wrong has been committed against him;

(b) the respondent became mixed up in the wrongdoing so as to facilitate the wrongdoing;

(c) the information is necessary to establish that a wrong has been committed or to identify the wrongdoers; and

(d) the third party must be mixed up in the wrongdoing and able or likely to be able to provide the information necessary.

[17] Until recent times it was essential to show that the application would not contravene the "mere witness" rule (which the court concluded in the Norwich Pharmacal case that it did not), but recently there has been less emphasis on that. As explained by Lord Reid in **Norwich Pharmacal** at p 174 the "mere witness" rule provides that information cannot be obtained by discovery from a person who will in due course be compellable either by oral testimony or on a subpoena duces tecum unless there was a separate cause of action against the person from whom the information was sought. The foundation of the rule was that eventually the testimony would be available in an action already in progress or in an action that would be brought. However, as Lord Reid pointed out at p 174 Norwich Pharmacal, the rule could have no application to a Norwich Pharmacal application and could not be infringed because without the disclosure of the information there would be no trial possible and the applicants will never get the information. In addition to the "mere witness" rule, the old objections relating to "fishing" and 'disclosure against third parties' have been relaxed as not being strictly applicable because Norwich Pharmacal itself involves a cause of action for disclosure to which the defendants cannot be said to be third parties.

[18] On the issue of being "mixed up" with the wrongdoing the EC Court of Appeal in a carefully considered judgment has found that a Registered Agent providing services for reward will be mixed up in wrongdoing for the purpose of a Norwich Pharmacal application (per Mitchell J, in **JSC BTA Bank v Fidelity Corporate Services Limited and others** HCVAP 2016/035).

[19] Furthermore, the disclosure sought has to be a necessary and proportionate response in all the circumstances (per Lord Woolf in **Ashworth Hospital Authority v MGM ltd** [2002] 1 WLR). This test does not mean that it is a remedy of last resort. (see **Rugby Football Union v Consolidated Information Ltd** [2012] 1 WLR (paras 14-18, referring to **R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs** (No 1) [2009]).

[20] The court has the jurisdiction to make a Norwich Pharmacal order in aid of foreign proceedings **Al-Rushaid Petroleum Investment Company v TSJ Engineering consulting Company Ltd**. Claim No BVIHCV (COM) 37 of 2010). There must be a serious issue to be tied in relation to the foreign proceedings.

[21] In the appeal from **A, B, C and D v E (**Claim No AXAHCVAP 2011/001) Webster JA made reference to further developments to the Norwich Pharmacal Jurisdiction as summarized by Lightman,J in **Mitsui & Co, Limited v Nexen Petroleum UK Limited** [2005]EWCH 625 (Ch) where he states:

> "In subsequent cases, the courts have extended the application of the [Norwich Application] principle. The jurisdiction is not confined to circumstances where there has been tortious wrongdoing and is now available where there has been contractual wrongdoing; P V T Ltd [1997] 4 ALL ER 200, [1997] 1 WLR 1309; Carlton film Distributors Ltd v VCI Plc [2003] EWHC 616, [2003] FSR 876 (Carlton Films); and is not limited to cases where the identity of the wrongdoer is unknown. Relief can be given where the identity of the wrongdoer is known, but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw: see AXA Equity & Law Life Assurance Society plc v National Westminster Bank plc [1998] CLC, 1177 (AXA Equity); Aoot Kalmneft v Denton Wilde Sapte (a firm) [2002] 1 Lloyd's Rep 417; see also Carlton Films. Further the third party from whom information is sought need not be an innocent third party: he may be a wrongdoer himself: see CHC Software Care ltd v Hopkins and Wood [1993] FSR 241 and Hollander, Documentary Evidence (8th edn, p.78, footnote 11"

[22] The jurisdiction can also be used in tracing claims and a claimant with a tracing claim can usually opt to apply for relief under either or both jurisdictions (the other being the Bankers Trust jurisdiction).

THE PROCEDURE

[23] The procedure for applying for a Norwich Pharmacal Order is not expressly set out in the Civil Procedure Rules. However, the EC Court of Appeal has ruled that a Norwich Pharmacal Order is an injunction. In **A, B,C and D v E** referred to above, in the context of determining whether an appeal from a Norwich Pharmacal Order came within the exception of orders requiring leave to appeal, Pareira JA, as she then was, with whom the other judges agreed, held that a Norwich Pharmacal Order is an injunction. The learned Judge of Appeal stated this at [17]:

> "The case law and the treaties to which I have referred are of such highly persuasive authority as to be considered, for the reasons given, as binding on this court. Accordingly, I am satisfied that a Norwich Pharmacal order is an injunction."

[24] Accordingly, being an injunction, the application must follow the procedure set out in CPR 17.

[25] Under the rubric **Interim injunctions and similar orders** the relevant provisions applicable to initiating the Norwich Pharmacal application (being an interim remedy) and drafting the Order are set out below.

[26] CPR 17.3 sets out how to apply for an interim remedy. It provides that the application must be supported by evidence on affidavit unless the court otherwise orders. The application may also be made without notice, and in such case the evidence in support must state the reasons why notice has not been given.

[27] CPR 17.4 as is relevant sets out:

> "2. Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order.
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> 3. An application for an interim order under this rule may in the first instance be made on 3 days notice to the Respondent.
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> 4. The court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period) if it is satisfied that –

(a) in a case of urgency no notice is possible; or

(b) that to give notice would defeat the purpose of the application

5. On granting an order under paragraph (4) the court must-

(a) fix a date for further consideration of the application…"

[28] As to procedure reference was made by counsel to a recent ruling of Jack, J, in **AAA v TTT** (BVIHC (COM) 019/006. In that case the learned Judge stressed the undesirability of ex parte hearings unless there are exceptional circumstances and that a gaging order should be made first followed by an abridged inter partes hearing if the matter was urgent. These sentiments are entirely consistent with the relevant provisions of CPR 17 outlined above. The Norwich Pharmacal jurisdiction itself is exceptional, and the rule itself makes provision for proceeding without notice, and proceeding inter partes on the short notice of 3 days instead of the normal 7 days' notice provided for by CPR 11.11(b).

[29] It seems to me that the current procedure with the "wrap up" orders (where the gag order and the Norwich Pharmacal order are applied for and obtained at the first ex parte hearing) can fall within the proper exercise of the discretion of the Judge dealing with the case based on the circumstances of the particular case. The "wrap up" orders appear to have worked well in this jurisdiction for the last decade or so. This is no doubt so because in practice far more often than not, it works no injustice and achieves the overriding objective by reducing the number of hearings and adding to efficiency. Experience has shown that in the vast majority of cases the Registered Agent accepts the Order as appropriately made and there is no need for a short appointment date followed by a return date with the attendant costs of appearance of counsel on each occasion. The return date is usually vacated by consent. Applicable to all cases CPR 11.16(2) provides for an automatic liberty to apply not more than 14 days after a hearing without notice. However, from my personal observation the practice has been to insert a standard clause in each draft Norwich Pharmacal Order giving liberty to the Registered Agent to apply to vary or set the order aside within usually 3 to 7 days after service. Expressly placing the provision for liberty to apply to vary or set it aside brings to the attention of the Agent his right to apply to set aside or vary the order. Should the Registered Agent decide to take that course, which is rare, he can at that time apply for a stay

before the order has been complied with and argue why it should not be granted. His right is therefore not prejudiced.

DISCUSSION

[30] The facts of this case fit nicely into the legal principles upon which Norwich Pharmacal orders can be made: there is a good arguable case that the Alleged Wrongdoer has committed and is committing a wrongdoing, the basis upon which he has and is doing so is highly suspect, and there is no other practicable way to find out except by disclosure.

[31] The Applicant states that it needs the seal and gag order so that the Registered Agent may not inform the Alleged Wrongdoer about the proceedings who might cause the incriminating documentation to be destroyed or be taken outside of the jurisdiction, and in the case of the criminal complaint, alert the objects of the criminal complaint who are all his employees. It is clearly an appropriate case for a sealing and gagging order. I therefore grant the order.

[32] The information applied for is needed as it is relevant to the three separate proceedings in Russia, the bankruptcy proceedings hearing coming up in August, the pending criminal proceedings and the Cassation Court appeal proceedings which the Applicant intends to pursue after receipt of the reasons for refusal by the Arbitrazh Court of Appeal.

FULL AND FRANK DISCLOSURE

[33] The Applicant acknowledges that the Company and other creditors apparently connected with the Alleged Wrongdoer strongly oppose the suggestion of collusion. They point to the lack of documentary evidence and the fact that at a hearing in August 2018 the Applicant realizing that it lacked the necessary evidence filed a motion to request disclosure and that was denied by the Russian court.

[34] Furthermore, they say that the Applicant is not able to challenge the transactions because they have been approved by the Russian court (a kind of res judicata), the transactions were entered into long before the bankruptcy petition was filed and that there was no affiliation with the company

when the transactions were entered into because the Alleged Wrongdoer's lawyer was the shareholder at the time.

[35] The Applicant has put forward reasonable counterarguments to these which would have to be decided by the Russian court.

[36] On the expert evidence, under Article 281 of the Arbitrazh Procedural Code of the Russian Federation the Cassation Arbitrazh Court, to which the appellant is appealing, examines the lawfulness of judgments and orders by the First Instance Arbitrazh Court and the Arbitrazh Court of Appeal, and under Article 311 can review orders on new or newly discovered facts. I am unable to decide how the Court of Cassation will treat the new evidence obtained as a result of the Norwich Pharmacal Order. That is a matter for the Cassation Court.

CONCLUSION

[37] Having regard to all the facts and circumstances I regard the grant of a Norwich Pharmacal order in this case necessary and proportional, and coming within the principles laid down in the authorities above. I, therefore, grant the Norwich Pharmacal and seal and gag order as prayed.

Hon. K. Neville Adderley
Commercial Judge (Ag)

By the Court

Registrar