

UPDATE

The Use of Norwich Pharmacal Relief to Compel Disclosure of Customer Due Diligence from a Disgruntled Shareholder

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The decision of the Commercial Court of the British Virgin Islands in *De Sousa v Harneys Corporate Services Limited* (Claim No. BVIHC (COM) 182 of 2017, 5 July 2018) demonstrates the flexibility of the Court's *Norwich Pharmacal* jurisdiction, and is an example of the jurisdiction being exercised where it has not been exercised previously.

The Norwich Pharmacal Jurisdiction

The Norwich Pharmacal jurisdiction takes its name from the House of Lords decision in *Norwich Pharmacal Co and Others v Customs and Excise Commissioners* [1974] AC 133. In that case Lord Reid said:

... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

In the Eastern Caribbean, the two threshold requirements to be satisfied for the court to exercise its power to grant *Norwich Pharmacal* relief were set out by the Court of Appeal in *JSC BTA Bank v Fidelity Corporate Services & Ors* (Appeal No. HCVAP 2010/035, 21 February 2011). They are:

1. a wrong must have been carried out; and
2. the respondent must have *become mixed up* in the wrongdoing.

As is now well known, that case confirmed that registered agents will usually be considered sufficiently 'mixed up' in the wrongdoing of companies that they create and maintain such as to allow disclosure orders to be made against them.

Even if the threshold requirements are satisfied, the Court retains a discretion over whether to grant a *Norwich Pharmacal* order, and it will only exercise that discretion where it is *a necessary and proportionate response in all the circumstances*.

Background

The Applicant in *De Sousa v Harneys Corporate Services Limited* was the director of a BVI company that had been struck off the register of companies. The company's striking off followed the resignation of its registered agent as a result of a failure by one of its shareholders to provide customer due diligence (CDD) information. The BVI's anti-money laundering (AML) regime requires registered agents to obtain sufficient CDD at the commencement of a business relationship and to update it periodically.

The Applicant wished to restore the company to the register. In order to do so, he would need to satisfy the Registrar of Corporate Affairs that he had secured the agreement of a registered agent to act on behalf of the company. This would necessitate being able to provide any prospective registered agent with adequate CDD information.

The difficulty that the Applicant faced was that the disgruntled beneficial owner of one of the shareholders was refusing to provide CDD in respect of the BVI company through which he held his shareholding. The Applicant was therefore unable to secure the agreement to act of a registered agent (who could not agree to act unless they were to receive the CDD he was withholding), and was thereby effectively prevented from taking any steps to restore the company.

The Respondent was the registered agent of the disgruntled company shareholder. The Applicant sought *Norwich Pharmacal* relief against the Respondent requiring disclosure of the CDD held by it in relation to the shareholder.

Wrongdoing

Originally, the type of wrong was a tort as in the *Norwich Pharmacal* case itself. However, it is now clear that the wrong may be a crime, tort, breach of contract, equitable wrong or contempt of court.

In *De Sousa*, the Court noted that a company's articles of association are a contract between its shareholders. It accepted that, given the requirements of the BVI Business Companies Act 2004 and the BVI's AML regime, there was an implied term in the company's articles requiring the shareholders to provide CDD information.

In *UVW v XYZ* (Claim No. BVIHC (COM) 108 of 2016, 27 October 2016), the Court had confirmed the availability of the *Norwich Pharmacal* jurisdiction post-judgment in aid of enforcement in circumstances where the applicant was able to show a general pattern of 'wilfully evasive conduct' (see our previous update [here](#)). In *De Sousa*, the Court held that the shareholder's failure to provide CDD information demonstrated a pattern of wilful and evasive conduct that amounted to wrongdoing of the type enunciated in *UVW*.

Mixed Up

As set out above, in *JSC BTA Bank v Fidelity Corporate Services Limited & Ors* (Appeal No. HCVAP 2010/035, 21 February 2011), the Eastern Caribbean Court of Appeal confirmed that registered agents are 'mixed up' in the wrongdoing of the companies they incorporate and maintain by virtue of their role in providing registered agent services to those companies.

The Applicant in *De Sousa* had written to the Respondent prior to the issue of his application to ask if it would also act as the company's registered agent by relying on the CDD that it already held for the shareholder. However, the shareholder had refused to allow the Respondent to use its CDD for this purpose. In the circumstances, the Court readily accepted that the Respondent was mixed up, albeit innocently, in the shareholder's wrongdoing.

Necessity and Proportionality

The Court confirmed that the test of necessity does not require the remedy to be one of last resort. It also stated that the principle to be derived from the modern authorities is that there is a need for flexibility when applying discretion to increase the ambit of the jurisdiction. The Court cited with approval the House of Lords decision in *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, where Lord Woolf CJ stated: *New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously.*

As regards the scope of information that could be ordered to be disclosed, the Court cited with approval *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 WLR 2579, where Thomas LJ said:

In our view the scope of the information which the court may order be provided is not confined to the identity of the wrongdoer nor to what was described by Lightman J in Mitsui & Co Ltd v Nexen Petroleum UK Ltd [2005] 3 All ER 511, para 19 as "a missing piece of the jigsaw". It is clear from the development of the jurisdiction in relation to the tracing of assets that the courts will make orders specific to the facts of the case within the constraints made clear in Norwich Pharmacal and the cases to which we have referred.

The Respondent had contended that the Applicant had an alternative means of obtaining the CDD information available to him in the form of an action for unfair prejudice against the shareholder. However, the Court accepted that the shareholder's refusal to provide CDD documents was an act (or omission) of a shareholder acting in its private capacity which did not in any way concern the way in which the company's affairs were being conducted. It therefore agreed with the Applicant that an action for unfair prejudice was not an alternative practicable means of obtaining the CDD information. It also held that, even if an action for unfair prejudice was available, it would not be proportionate to put the Applicant to the expense of pursuing such a claim.

The Court was therefore satisfied that granting the relief sought was a necessary and proportionate response in all of the circumstances.

Conclusion

In recent years we have increasingly seen BVI companies being struck off due to their registered agents resigning as a result of companies being unable to provide CDD for all shareholders. This case provides a helpful option to the directors of companies in this position, and may serve as a deterrent to shareholders seeking to use the withholding of CDD as some form of bargaining chip.

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