

UPDATE

BVI Commercial Court confirms the availability of Norwich Pharmacal relief post-judgment in aid of enforcement

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It has, for many years, been generally accepted in the British Virgin Islands (and elsewhere throughout the Eastern Caribbean), following the English Court of Appeal decision in *Mercantile Group (Europe) AG v Aiyela* [1993] 3 WLR 1116, that the Norwich Pharmacal jurisdiction could be invoked to locate assets against which a judgment could be enforced.

However, the case of *NML Capital Ltd v Chapman Freeborn Holdings Ltd* [2013] EWCA Civ 589 cast doubt upon the availability of such a jurisdiction. In *UVW v XYZ* (Claim No. BVI HC (COM) 108 of 2016, 27 October 2016), the BVI Commercial Court has now resolved that doubt and confirmed the availability of such a jurisdiction.

Norwich Pharmacal relief¹ is available where an applicant can show that:

1. it has arguably been the victim of wrongdoing;
2. there is a real prospect that the respondent has been 'mixed up' in the wrongdoing;
3. there is a real prospect that the respondent has relevant information which can be the subject of a *Norwich Pharmacal* order; and
4. such an order is necessary and proportionate in all of the circumstances.

In the BVI, such orders are commonly sought against the registered agents of BVI incorporated companies on the basis that they are required to keep information identifying and verifying the beneficial owners of the companies that they incorporate and maintain².

The claimant company in *NML Capital* was a judgment creditor of the Republic of Argentina. Upon learning that the Republic had chartered an aircraft from the defendant aircraft chartering broker, it applied for a *Norwich Pharmacal* order against the broker with a view to obtaining details of the bank accounts from which any payment under the charter might have been made. Such an order was initially made at a without notice hearing but was subsequently set aside on an *inter partes* hearing.

The claimant's appeal was dismissed on the basis that it could not be said that the defendant broker had been mixed up in any wrongdoing. Tomlinson LJ (with whom the other members of the court agreed) held (at [26]) that '[t]here is nothing inherently wrong in chartering an aircraft, unless it be said that any trading

¹ Named after the seminal House of Lords decision in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133.

² The Eastern Caribbean Court of Appeal having confirmed in *JSC BTA Bank v Fidelity Corporate Services Limited & Ors* (Appeal No. HCVAP 2010/035, 21 February 2011), that registered agents by virtue of their role in providing registered agent services to the companies are 'mixed up' in the wrongdoing of the companies that they incorporate and maintain for these purposes.

by a judgment debtor which involves using his assets for that purpose rather than satisfying a judgment debt is in itself wrongdoing', a proposition which he emphatically rejected.

Although the English Court of Appeal's conclusion on that issue rendered it unnecessary to consider whether *Norwich Pharmacal* relief was available post-judgment in aid of enforcement, Tomlinson LJ expressed the view (at [31]) that the court's earlier decision in *Mercantile Trust v Aiyela* did not compel the conclusion that it was. He continued (at [32]):

'Whether the Norwich Pharmacal jurisdiction should be available post judgment in aid of execution is a wider question. I am not convinced ... that vindication of rights is complete when judgment is obtained and that the equitable jurisdiction is then spent. However, if Norwich Pharmacal relief is available post judgment in aid of execution it will only, I consider, be available in very particular and restricted circumstances. It could not be enough to engage the jurisdiction merely to trade with the judgment debtor ... it seems to me unlikely that the jurisdiction could be engaged short of involvement in something which in itself and necessarily amounts to what Sir Thomas Bingham MR in *Aiyela* described as "wilful evasion" by the judgment debtor. Non-satisfaction of a judgment debt is not wilful evasion of it'.

The purpose of the *Norwich Pharmacal* order sought in *UVW v XYZ* was twofold.

1. In aid of enforcement of a number of judgments of superior courts in a civil law jurisdiction; and
2. in aid of ongoing proceedings in another common law jurisdiction. In particular, the judgment debtor had failed to comply with ancillary asset disclosure orders contained in an order freezing his assets.

The applicant judgment creditor had identified a BVI registered company which appeared to be beneficially owned by the judgment debtor, which itself held at least one substantial asset. The applicant had also identified a pattern of conduct on the part of the judgment debtor which, when taken in the round, carried the unmistakable hallmarks of efforts to make himself judgment proof by way of deliberate concealment of assets. The applicant therefore sought disclosure from the company's registered agent in order to police the freezing order and to identify assets against which its judgments could be enforced.

The BVI Commercial Court's written judgment dealt specifically with a number of legal issues raised by the judgment creditor's application including, in particular, the questions raised in *NML Capital* concerning the existence of the *Norwich Pharmacal* jurisdiction post-judgment in aid of enforcement, and if such jurisdiction existed, the circumstances in which relief would be granted.

As regards the first question, Wallbank J (Ag) held that BVI Courts have jurisdiction to make Norwich Pharmacal orders post-judgement in aid of enforcement. He found (at [25]) that the English Court of Appeal had held in *Aiyela* that the court had such jurisdiction. As there is Eastern Caribbean Court of Appeal authority holding that a *Norwich Pharmacal* order is a form of injunction³ and as section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act gives the BVI Courts power to grant injunctions in all cases where it appears to the court just and convenient, he held that *Aiyela* should be treated as authoritative in the BVI in relation to this issue.

As regards the second question, Wallbank J seemed to adopt a slightly less restrictive version of the test proposed by Tomlinson LJ in *NML Capital*. He held (at [32]) that in order to obtain relief it would suffice for the applicant to show a general pattern of 'wilfully evasive conduct'. This would not require the applicant to show that a specific asset was transferred to a BVI company for no other purpose than to avoid enforcement. Indeed, Wallbank J had earlier recognised (at [31]) that the use of a company could change over time. He said that a company 'might be created for a legitimate use, but then evolve into something used wholly or partially illegitimately'. A company's registered agent would therefore be ordered to provide disclosure where there existed a reasonable suspicion that it had been mixed up in a judgment debtor's wilful evasion of a judgment debt.

Wallbank J further held (at [28]) that it was within the court's power to make a *Norwich Pharmacal* order in aid of overseas proceedings so that an applicant could police its freezing order. In doing so he relied upon

³ *A, B, C & D v E* (Appeal No. HCVAP 2011/001, 19 September 2011).

principles of comity and the BVI court's willingness to grant stand-alone freezing orders under its so called *Black Swan* jurisdiction⁴ where a foreign judgment would be amenable to enforcement against assets within the BVI.

The decision of the BVI Commercial Court in *UVW v XYZ* is a welcome reminder of the willingness of the courts of the BVI to assist those seeking to enforce foreign judgments in this jurisdiction, and more generally, to assist those who may have been the victim of wrongdoing by a wrongdoer through the use of a BVI company.

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⁴ Established in *Black Swan Investment I.S.A. v Harvest View Limited* (Claim No. BVIHCV 2009/399, 23 March 2010).

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