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UPDATE

Between a rock and a hard place: Suspicious Activity Reports v *Norwich Pharmacal* Orders

Update prepared by Eleanor Morgan (Partner, BVI)

What action can a company take when it is served with a *Norwich Pharmacal* order, which alerts the Company to a suspicious client/transaction, triggering their duty to submit a suspicious activity report, but the *Norwich Pharmacal* order does not permit compliance with statutory obligations?

Acting for two trust companies, Mourant Ozannes made an application to the Commercial Court to clarify the position and received helpful guidance for Trust Companies who find themselves served with such orders.

Suspicious Activity Reports and Offences

This matter concerned two regulated entities, offering administration and other registered agent services (the **Trust Companies**). One of the statutory obligations applicable to regulated entities is to make certain reports to the Financial Investigations Agency (**FIA**) when alerted to any suspicious clients or transactions.

In particular, section 17 of the Anti-Money Laundering and Terrorist Financing Code of Practice, 2008 (the **Code**) requires such entities to report to the FIA *any suspicious customer or transaction* by filing a suspicious activity report (**SAR**). Where the duty to file a SAR is triggered, it must be filed urgently (paragraph 91 of the *Guidance Notes on the Prevention of Money Laundering*). Regulated entities generally have a best practice policy in place (or should consider doing so), for the time within which a SAR should be made.

Failure to comply with the Code is a criminal offence under section 27(4) of the Proceeds of Criminal Conduct Act, 1997 (**POCCA**), which carries a penalty of up to US$150,000 and/or a term not exceeding two years' imprisonment. Furthermore, failure to report suspicious transactions is a criminal offence under section 30A(1) of POCCA, which can result in a fine of up to US$150,000 and/or up to three years' imprisonment on summary conviction and US$500,000 and/or five years' imprisonment on indictment.

Once a SAR is filed, it is also a criminal offence to notify any person of that filing. Upon receipt of a SAR, section 7 of the Code enables the FIA to request documentation from the entity which filed the SAR. If requested documents are not provided, the FIA has the power to execute a search warrant in order to obtain such documentation.

Also relevant to SARs, is the criminal offence of tipping off, pursuant to section 31 of POCCA, as follows:

(i) if a person knows or expects that any member of the Reporting Authority or other person is conducting an investigation into money laundering; or

(ii) if a person suspects that a disclosure has been made to the Reporting Authority, and that person discloses to any other person information or any other matter which is likely to prejudice the investigation,

he is guilty of the offence of tipping-off.

The maximum penalty on summary conviction is a US$250,000 fine and/or two years' imprisonment and on conviction on indictment a fine of US$500,000 and imprisonment for a term not exceeding 14 years.

Norwich Pharmacal orders

A *Norwich Pharmacal* order compels a third party to provide disclosure and is generally sought to assist a claimant in need of certain information to bring a claim. In order to obtain such an order, *Al Rushaid Petroleum Investment Company et al. v TSJ Engineering Limited* establishes that applicants are required by the Court to show that (among other things):

(i) an apparent wrong was carried out, or arguably carried out, by an ultimate wrongdoer;

(ii) the order must be necessary to enable action to be brought against the ultimate wrongdoer; and

(iii) the person against whom the order is sought must: (a) be mixed up in the wrongdoing so as to have facilitated it; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

Consequently, the evidence provided in support of such applications can, and often does, alert the companies on which they are served to a potential wrongdoing by their clients, at which point the duty to file a SAR might be triggered.

Typically, *Norwich Pharmacal* orders contain clauses prohibiting the receiving party from notifying any third party of:

(i) the existence or content of the proceedings in which the order was made;

(ii) the existence or content of that order;

(iii) any documents, material or evidence filed in or in connection with the matter by any party; and/or

(iv) any documents disclosed to the applicant in accordance with such order.

Dependent on the way in which it is drafted, an order may or may not expressly permit compliance by the respondent of its statutory obligations.

The Facts

The Trust Companies were served with *Norwich Pharmacal* orders (the Orders), which required them to disclose and deliver up certain documents in their possession, relating to particular clients. On receipt of the Orders and supporting evidence, it was clear to the Trust Companies that it was being alleged that their clients may have been involved in wrong-doing, triggering their duty to file a SAR with the FIA.

The Orders contained the usual non-disclosure wording, prohibiting the Trust Companies from notifying or informing any third party of the existence or contents of the proceedings and/or the existence or contents of the Orders, without further order of the Court. However, the Orders did not permit compliance with statutory obligations by the Trust Companies; the prohibition prevented *any* disclosure to *any* third party (including the FIA).

Rock, hard place or another way?

The Trust Companies were, therefore, under an obligation of confidentiality imposed by the Orders, but also under a statutory obligation to disclose to the FIA information to which the Orders related.

Rock: Should they comply with a statutory obligation and risk being in breach of the valid Orders and ultimately found in contempt of Court?

Hard place: Should the Trust Companies comply with the Orders and not comply with their statutory obligations and risk being found guilty of a criminal offence.

Options ruled out

A number of possible solutions were analysed and the following options were rejected:

- Could the Trust Companies make a SAR without reference to the Orders, attempting to comply with the non-disclosure terms of the Orders? This would have almost certainly led to a request for documents from the FIA and a potential search warrant being executed should they not have complied with the request. The terms of the order also prohibited the Trust Companies from providing copies of the documents.

- Could the Trust Companies file an application with Court to amend the Orders? The Orders could not be amended, as this would have alerted the original applicant to the Trust Companies' application and consequently their intentions to file a SAR, which might constitute a criminal offence of tipping off.

Application made and lessons learned

Whilst the utmost care should always be taken not to disclose any information to the alleged wrongdoers (the Trust Companies' client), an order granting *Norwich Pharmacal* type relief cannot be intended to prevent parties from complying with their statutory duties. Given the options ruled out it was necessary to take a purposive approach to the problem.

Acting for the Trust Companies, Mourant Ozannes first wrote to the Court, explaining the rather unenviable position the Trust Companies found themselves in, including an explanation of the options that were not available. Once it understood the circumstances, the Court required that a formal application be made for a new order declaring that the Trust Companies could comply with their statutory obligations. The judgment was handed down in October 2015 and has recently been unsealed in order that the outcome can be made public for the benefit of entities that find themselves in this position.

In his judgment, Leon J discusses the comfort provided for under statute and common law, although the Court agreed that this did not provide a complete answer to the problem at hand.

Firstly, subsection 28(2) of POCCA provides that where a person discloses to the FIA a suspicion or belief that funds or investments are derived from or used in criminal conduct, such disclosure *shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise and shall not give rise to any civil liability.* Whilst this provided some comfort that making a SAR would not lead to contempt or other civil proceedings, it does not appear to cover any subsequent disclosure of documents requested by the FIA, once in receipt of the SAR.

Secondly, section 7 of the Code sets out general actions to be taken by the FIA on receipt of a SAR, providing some colour on what an entity can expect once it has filed. However, once a SAR is provided to the FIA, the person providing the report has no control over any further actions taken by the FIA.

Further, in *C v S and others (Money Laundering Discovery of Documents)* [1998] 1 W.L.R 1551, the Court was satisfied that the non-disclosure wording did not prevent discussion with or disclosure to the regulatory authority. Lord Woolf M.R. held that:

the order is sometimes coupled with an order not to disclose the fact than an order has been made. Such an order should not be regarded as preventing the financial institution from…complying with the requirement to give disclosure. [Complying with the relevant statutory duty] *is to be regarded as impliedly permitted despite the non-disclosure requirement*.

In light of the above, the Commercial Court granted an order that:

> *…any order made by the Court prohibiting the Applicants or either of them from disclosing:*
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> (i) the existence of proceedings before the Court;
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> (ii) the existence of content of any order or orders made in any proceedings before the court; and/or
>
> (iii) documents, material or other evidence filed in in any proceedings before the Court, including documents or other material filed or disclosed by the Applicants in any such proceedings,
>
> *shall* **not** *preclude disclosure by them where such disclosure is required by law.* [Emphasis added]

Leon J stated: *It cannot be that the Court has the power to order a person to breach the provisions of the law of the Territory of the Virgin Islands, or that in making a Norwich Pharmacal Order, this Court is intending to so order and to put the parties in the positions of the Applicants in an untenable situation.*

The Judge expressed his expectation that *applicants for Norwich Pharmacal orders draw the attention of the Court, as part of their disclosure on ex parte applications, to the need for an express exception and will prepare draft orders containing an express exception for compliance with the law of this Territory, and that Norwich Pharmacal Orders issued will expressly provide accordingly.* ***Even where they do not, such orders should not be taken as preventing any disclosure required by the law of the Territory of the Virgin Islands***.

Trust companies and other entities faced with this dilemma should now draw comfort from the decision that, even where a party has neglected to include wording exempting compliance with statutory obligation, they will not fall foul of a *Norwich Pharmacal* order when complying with those statutory obligations.

Contacts

Eleanor Morgan
Partner, Mourant Ozannes
BVI
+1 284 852 1712
eleanor.morgan@mourant.com

2021934/73136928/1