

Norwich Pharmacal relief – obtaining information relating to a BVI company from its registered agent

GUIDE

Last reviewed: December 2016

Disclosure Orders – obtaining information about a BVI company

This guide deals with the circumstances in which and methods by which non-public information about a BVI company, held by that company's registered agent, can be obtained by a third party. Most commonly, the information sought relates to the company's shareholders, but the jurisdiction of the court to grant relief extends to all forms of information, depending on the circumstances in which the application is made, and the purpose for which the information is intended to be used.

What options are available to a victim of fraud who has traced the proceeds of fraud to a BVI company? How can you prove who is behind the BVI company and/or see who is controlling it? There is very little information publicly available about BVI companies (see our guide entitled *What documents and information can a third party obtain for a BVI company* for more information) and there is no procedure for pre-action disclosure in the BVI procedure rules.

However, under BVI law, all BVI companies must have a registered agent who is physically based in the BVI and that registered agent must hold copies of the company's records. Following *JSC BTA Bank v Fidelity Corporate Services Limited and others* HCVAP 2010/025 (see below), where a BVI Business Company can be linked to a fraud, it will usually be possible to obtain a Norwich Pharmacal order (derived from the English case of *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133) against the registered agent of that company, compelling it to disclose information about the company (usually including the registers of shareholders and directors).

What is Norwich Pharmacal relief, and when will it be granted?

A Norwich Pharmacal order is an order compelling a third party to provide disclosure.

Often, an order is made to assist a claimant who needs the information sought in order to be able to bring his claim. Commonly, the respondent against whom an order is sought knows the identity of someone who has wronged the applicant but the applicant does not and cannot discover that person's identity without the court order. This means that, unless the order is made, the applicant will be left without a remedy.

The respondent must be shown to have participated in or been involved in the wrongdoing complained of.

The three conditions which need to be satisfied for the court to exercise its power to order Norwich Pharmacal relief were set out by Lady Justice Charles in *In Al-Rushaid Petroleum Investment Company et al. v TSJ Engineering Consulting Company Limited* BVIHC (Com) 2010/37:

- there must be an apparent wrong carried out, or arguably carried out, by an ultimate wrongdoer;
- the order must be necessary to enable action to be brought against the ultimate wrongdoer; and
- the person against whom the order is sought must:
 - be mixed up in the wrongdoing so as to have facilitated it; and
 - be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

Even if the three requirements set out by Charles J are satisfied, she added that:
the court has a residual discretion whether it is right that an order should be made in all the circumstances.

JSC BTA Bank

As set out above, the respondent to the application must be mixed up in the wrongdoing. In JSC BTA Bank, the Eastern Caribbean Supreme Court of Appeal granted Norwich Pharmacal relief against a registered agent, compelling them to disclose the files related to BVI Business Companies, thereby revealing the directors and shareholders of those companies. In making its order, the Court of Appeal held that:

by virtue of their very role in providing registered agent services to companies, a role which is voluntary, [registered agents] cannot on any view be considered as mere onlookers.

That case concerned companies which, it was alleged, had been created as mere vehicles for the purpose of fraud. Although no intentional wrongdoing was alleged against the registered agent, the Court was nonetheless satisfied that the three requirements set out by Charles J were met. In doing so, the Court noted that:

Registered agents and registered office service providers who are used by others to create and maintain for them corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them...

In JSC BTA Bank both the identity of the wrongdoer and the names of the BVI companies were known, but disclosure was sought to facilitate asset tracing.

Norwich Pharmacal orders against registered agents are now relatively common.

Information to be disclosed

The order must set out the information which the registered agent is ordered to disclose. As Charles J stated in Al Rushaid:

one thing is clear, the jurisdiction cannot be used as a fishing expedition to enable a claimant to decide whether or not to sue where the identity of the wrongdoer is known...the order will be limited to what is necessary to trace the funds representing the secret commissions.

Copies of the company books (including the register of members, the register of directors and any financial statements) are almost invariably included. In practice, however, fraudsters often hold assets through nominees, so the register of shareholders alone may not be enough to show who is the underlying owner of the company (although the register of directors may show who is exercising control). Where it is convinced that there is a need, the Court may also order that the registered agent disclose copies of their file opening forms and client due diligence, as this information may assist in showing the true driving force behind the company.

Gagging Order

Where there is a strong case of fraud, a claimant will often be concerned that the fraudsters will dissipate their assets quickly if they know that the claimant has identified the BVI company as involved. Where this is a concern (or where the Court can otherwise be shown that there is a need), the Court will make a 'gagging order', prohibiting the registered agent from notifying their client (or anyone else) about the order. Registered agents who receive a disclosure order should, therefore, check the terms of the order carefully (or seek legal advice), before forwarding it to their client. Generally, but not always, the gagging order will cease to have effect once the registered agent has complied with the order, and provided the required information.

Practicalities

Such applications are made without notice and can be made relatively quickly. It is often possible to get before the judge within a few days. The applicant will be responsible for the registered agents' reasonable fees of providing disclosure, and the information used may only be used for the purpose for which it was obtained (the permitted use will often be set out in the order itself). A return date will be set in the usual way, although by that date in practice disclosure has often taken place.

Conclusion

Despite the lack of publicly available information, victims of fraud will often be able to apply for Norwich Pharmacal relief in order to obtain the information they need to support a claim and/or trace particular assets, often relatively quickly.

If you have any queries about fraud or asset recovery, our BVI litigation team would be happy to discuss the options available.

Contacts

To find out more, please get in touch with your usual Mourant contact, or alternatively, a full list of contacts specialising in BVI law can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED