BVI Disclosure and Norwich Pharmacal orders: an international problem answered

Insights - 19/03/2020

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The BVI Commercial Court has just delivered a judgment that answers the question raised in the BVI as a result of two English decisions questioning the availability of Norwich Pharmacal relief for the purposes of overseas proceedings.

In the first written judgment on the issue delivered on 10 March 2020, Wallbank J declined to follow the recent English decisions and confirmed the availability of this relief in the BVI.

The issue

In Ramilos Trading Ltd v Buyanovsky [2016] EWHC 3175 (Comm) Flaux J in the English Commercial Court found that the existence of the statutory regime to obtain evidence for foreign proceedings contained in the UK's Evidence (Proceedings in Other Jurisdictions) Act 1975 excludes the availability of Norwich Pharmacal relief for the purposes of foreign proceedings. Ramilos followed the earlier English Court of Appeal decision in R (Omar) v Secretary of State for Foreign Affairs [2013] EWCA Civ 118 that had reached the same conclusion in the context of the UK's Crime (International Co-operation) Act 2003.

Since the BVI's own Evidence (Proceedings in Foreign Jurisdictions) Act 1988 is in the same terms as the UK's 1975 Act, there arose an obvious concern that the BVI would adopt the same statutory interpretation as the English courts and find that the Court did not have jurisdiction to make Norwich Pharmacal orders for the purposes of foreign proceedings.

This is an important issue. The ownership and accounts of BVI companies are not available on public searches. These details are held by BVI registered agents and kept confidentially save for compliance with the BVI's scheme for providing assistance to specific foreign law enforcement agencies. Accordingly, adopting the English approach would have severely restricted the assistance that the BVI Courts could provide in identifying assets of defendants to foreign

proceedings.

The BVI conclusion

In K&S v Z&Z BVIHCM(COM) 2020/0016 Wallbank J delivered a detailed judgment on an ex parte application for Norwich Pharmacal relief that answered the question and declined to follow the English approach.

Analysis

In K&S the applicants were each seeking disclosure from two BVI registered agents who between them acted for a number of BVI companies that were said to be being used by an individual to hide his assets. The individual was being pursued by the applicants in separate proceedings: K had brought legal proceedings in a foreign country, and S had brought arbitral proceedings. K and S had previously been granted freezing orders by the BVI court. Those freezing orders had contained disclosure orders against the companies and individual, but no disclosure had been provided.

Accordingly, K and S sought Norwich Pharmacal relief against the registered agents of the companies on three bases: in support of the foreign proceedings; in support of the foreign arbitration; and in aid the freezing orders. As Wallbank J identified, the purpose of the application was not to obtain information to be deployed in foreign proceedings:

> "This is not a case where information is being sought which is intended to be deployed in order to obtain judgment in overseas proceedings. In the present case the information is being sought for different purposes: in aid of eventual (and reasonably likely) enforcement both overseas and in this jurisdiction, to render a freezing order effective and for deployment in proceedings before an arbitration tribunal, not (or not simply) in aid of proceedings before a foreign court."[2]

The distinction formed part of the core of the practical problem. To require an applicant to follow the route of the BVI 1988 Act (the equivalent of the UK 1975 Act) would not only entail delay but also would entail a process on notice to the respondent. That may work in some contexts but certainly does not work where the objective is to secure assets pending enforcement.

Guernsey and Cayman responses

This problem has been faced in other offshore jurisdictions, most notably in Guernsey and Cayman. Those jurisdictions came to the same conclusion as the BVI, but for different reasons.

In Guernsey, the Royal Court concluded in Equatorial Guinea (President) v Royal Bank of Scotland International[3] that Norwich Pharmacal relief was available for the purposes of English proceedings. The statutory interpretation point was not however taken in argument

before any of the Royal Court, Court of Appeal or Privy Council. Whilst the Lieutenant-Bailiff at first instance referenced the Guernsey equivalent of the 1975 Act, he simply concluded that this was an alternative route for the applicant. The Court of Appeal agreed with the Lieutenant-Bailiff's rationale for finding that there was jurisdiction, it being "essential that Guernsey does not become a safe haven for those who may wish to evade financial liabilities."[4] The Court of Appeal reversed the first instance decision on different grounds, and the Privy Council then reinstated the first instance decision but on the basis that the Court of Appeal's exercise of its discretion had been improper. The Privy Council considered an alternative jurisdictional issue but not the statutory interpretation point. Nevertheless, it did restore the first instance decision exercising the Norwich Pharmacal jurisdiction in support of English proceedings.

The English decisions in Omar and Ramilos were however considered by Kawaley J in Cayman in Arcelormittal USA LLC v Essar Global Fund Limited & ors [5]. In that case (presently under appeal) Kawaley J concluded:

> "It is true that Parliament must be deemed to have intended the Evidence Order to be applied in aid of civil justice in place of any common law or equitable remedies which might previously have applied. However, in my judgment Parliament may also be presumed not to have intended the Evidence Order to be used as a fixed barrier to civil justice, ousting this Court's equitable jurisdiction automatically whenever information or evidence is sought for use in foreign proceedings, without regard to whether or not the statutory regime is accessible in practical terms."[6]

BVI dual response

Wallbank J recognised the limitation of Equatorial Guinea (President) v Royal Bank of Scotland International in that the Privy Council was "an endorsement in general terms of the decision and reasoning of the Lieutenant Bailiff", being the demands of comity and the flexibility of the Norwich Pharmacal remedy. Wallbank J's concern was that the policy need for a power to protect and enhance an offshore jurisdiction is different from the question as to whether or not such a power exists. In the end, Wallbank J simply accepted the obiter guidance of the Privy Council and followed Equatorial Guinea.

Wallbank J also identified a separate basis for the jurisdiction. He followed the Eastern Caribbean Court of Appeal decision in A,B,C,D v E[7] that found that a Norwich Pharmacal order is a type of injunction and that the Supreme Court Act "empowers the court to grant injunctions 'in all cases in which it appears to the Court or judge to be just or convenient'".[8] He then considered the authorities as to whether Norwich Pharmacal orders are final or interlocutory. If interlocutory, then he concluded that s24(1) BVI Supreme Court Act provides a further, statutory, basis for the jurisdiction to make a standalone Norwich Pharmacal order in the BVI. Wallbank J relied on the Black Swan[9] jurisdiction as confirmed by the Eastern Caribbean Court of Appeal in Yukos CIS Investments Limited et al. v Yukos Hydrocarbons

Investments Limited et al in this regard.[10]

Wallbank J stressed that this was a further independent basis for the grant of Norwich Pharmacal relief in aid of foreign proceedings because the Black Swan jurisdiction is presently being challenged in the Eastern Caribbean Court of Appeal. Whatever the result of that challenge, the jurisdiction to grant Norwich Pharmacal relief in aid of foreign proceedings will stand.

Conclusions

There were three bases for the application in K&S: in support of foreign proceedings; arbitral proceedings; and the BVI court's freezing orders. Wallbank J did not set out his reasons for granting relief other than in support of foreign proceedings, but in setting out his conclusion to determine the applications in the applicants' favour he expressly identified all three grounds[11].

The BVI owes much to the English courts, but the BVI is a jurisdiction with different laws and a different perspective on some matters. The importance of the policy of assisting foreign courts furthered by this judgment is key to the jurisdiction. The decision not to follow the English decisions of Ramilos and Omar is an important reminder of our different perspectives.

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[2] At [86]

[3] First instance decision 53/2004; Court of Appeal at 2005-06 GLR 65 and Privy Council at 2005-06 GLR 373.

[4] President of the State of Equatorial Guinea & ors v The Royal Bank of Scotland International & ors 2005-06 GLR 65 (Guernsey Court of Appeal) at paragraph 59 (Southwell JA).

[5] Cause No. FSD 2 of 2019, (IKJ) (delivered 13th February 2019, unreported)

[6]At [68]

[7] Anguilla HCVAP 2011/001 (delivered 19th September 2011, unreported) at [10] (Pereira JA).

[8] [97] quoting A,B,C,D v E at [12]

[9] Black Swan Investment ISA v Harvest View BVIHCV2009/399 (delivered 23rd March 2010,

unreported)

[10] BVI HCVAP2010/028 (delivered 26th September 2011, unreported).

[11] At [86]

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