

## The Cayman Islands Court of Appeal finds that Norwich Pharmacal relief is available in aid of foreign proceedings

Cases - 12/05/2021

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#### Introduction

The Court of Appeal of the Cayman Islands (**CICA**) has found that the Cayman courts have jurisdiction to grant a *Norwich Pharmacal* Order (**NPO**) in support of potential proceedings before a foreign court, even where alternative statutory remedies may be available (in this instance, the provisions of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (the **Evidence Order**)).

An NPO is a third-party discovery order, which can be granted where a third-party has been innocently mixed up in the wrongdoing of another, whereby the third-party is forced to disclose documents or information to the applicant in order to allow the applicant to bring legal proceedings against the wrongdoer. An NPO was first granted by the House of Lords in the English case of *Norwich Pharmacal Co. v Customs and Excise Commissioners*<sup>[1]</sup>, and has proved to be an invaluable tool for parties who have suffered at the hands of others, but lack certain information needed to bring proceedings to address those wrongs (often including the identity of the wrongdoers, as was the case in the *Norwich Pharmacal* proceeding itself).

#### Background

The NPO application arose in the context of a long-running, multi-jurisdictional dispute between steel and mining company ArcelorMittal USA LLC (**AMUSA**) and various parties related to Essar Global Fund Limited (**EGFL**) and Essar Capital Limited (collectively with EGFL, the **Essar Parties**).

AMUSA sought an NPO for the disclosure of information and documents by the Essar Parties to assist with the enforcement of an ICC Arbitral Award obtained against Essar Steel Limited, a subsidiary of EGFL incorporated under the laws of Mauritius.

The Essar Parties opposed the grant of an NPO on the basis that (among other grounds) such relief cannot be granted if the information or disclosure is for the purpose of enabling AMUSA to pursue foreign proceedings. The Essar Parties argued that the Evidence Order, which confers statutory jurisdiction on the Grand Court to respond to requests from foreign courts for oral and documentary evidence to be used in foreign proceedings which are pending or contemplated, provides the exclusive means of obtaining information or documents for overseas litigation.

At first instance, the Grand Court considered the reasoning of the English courts in *Ramilos Trading Ltd v Buyanovsky*<sup>[2]</sup> and *R (Omar) v Secretary of State for Foreign Affairs*<sup>[3]</sup> which both concluded that common law remedies, such as the *Norwich Pharmacal* jurisdiction, were precluded once concurrent legislation was engaged. The rationale for this approach was that Parliament could not have intended to create a parallel procedure whereby a *Norwich Pharmacal* application could be used to "subvert the carefully calibrated statutory scheme"<sup>[4]</sup>.

The Grand Court accepted that where an applicant for an NPO can obtain adequate relief via the statutory route of obtaining evidence for use in foreign proceedings, the Court's equitable jurisdiction to grant corresponding relief falls away and is no longer available<sup>[5]</sup>. However, in determining whether or not the statutory regime was engaged, the Grand Court adopted a more flexible approach and emphasised that such a question requires a careful assessment depending on the particular facts and circumstances of each case.

In granting the NPO, the Grand Court found that "to my mind it makes no sense and it is not fairly possible to imply that Parliament must have intended to eliminate the Court's equitable jurisdiction in each and every case where the information sought was likely to be used in foreign proceedings"<sup>[6]</sup> and indicated that while "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...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"<sup>[7]</sup>.

### **The CICA decision**

On appeal, the Essar Parties again contended that where foreign proceedings are either on foot or sufficiently in contemplation, the Evidence Order applies and there is no room for the Court to exercise a parallel *Norwich Pharmacal* jurisdiction. However, this argument was rejected.

In its decision, the CICA sought to draw a distinction between the *Norwich Pharmacal* jurisdiction and the grant of relief under the Evidence Order (the former being relief for the provision of information about wrongdoing and the latter imposing an obligation for the provision of evidence). In doing so, the CICA accepted that:

1. The courts of the Cayman Islands have no inherent jurisdiction to order evidence to be provided for the purpose of foreign proceedings; and
2. Where provision in the statute was made for the production of evidence, there will be an implied exclusion of any overlapping jurisdiction that might otherwise exist<sup>[8]</sup>

However, the CICA ultimately upheld the flexible approach adopted by the Grand Court, concluding that "so long as care is taken to confine the *Norwich Pharmacal* jurisdiction to its proper scope, there can in principle be no overlap between that jurisdiction and the statutory regime relating to evidence in foreign proceedings, and accordingly no reason to regard the former as excluded by the latter"<sup>[9]</sup>. In this respect, the CICA stated that it failed to see "why legislation dealing with the giving of evidence in foreign proceedings should be treated as impliedly excluding jurisdiction to order the provision of information necessary to enable foreign proceedings to come into existence at all – such as, in *Norwich Pharmacal* itself, information about the identity of the wrongdoer"<sup>[10]</sup>.

### **Relevance of the decision**

The decision of the CICA confirms a departure in Cayman Islands law from the law in England and Wales, which is perhaps surprising in circumstances where the *Norwich Pharmacal* jurisdiction itself derives from a decision of the English House of Lords (now the Supreme Court). The decision is, however, in keeping with recent decisions in other offshore jurisdictions which have similarly adopted a more flexible approach than the English courts to the grant of *Norwich Pharmacal* relief, including the British Virgin Islands (**BVI**) which also declined to follow *Ramilos* and *Omar*<sup>[11]</sup>. The BVI legislature has, however, now addressed the issue by statute <sup>[12]</sup>, which may be seen as a recognition of the unusual departure between the courts in England and its overseas territories.

On 25 March 2021, the Essar Parties sought leave to appeal the CICA's decision to the Judicial Committee of the Privy Council (**JCPC**) (the Cayman Islands' highest appellate court, which predominantly consists of Justices of the Supreme Court of the United Kingdom). On 6 May 2021, the CICA refused to grant the Essar Parties leave to appeal to the JCPC, concluding that the Essar Parties did not have an appeal as of right and that the matters raised in the appeal did not raise questions of great general or public importance. In order to pursue the appeal, the Essar Parties will now be required to bring an application for permission to appeal to the JCPC itself, and the CICA ordered a stay of the NPO pending the determination of that application. Should the Essar Parties successfully obtain permission to appeal, it will be interesting to see whether the JCPC decides to follow the English approach in *Ramilos* and *Omar* or to approve the

approach of the offshore courts.

Ogier, together with Vernon Flynn QC of Brick Court Chambers and David Peters of Essex Court Chambers, acted on behalf of the Essar Parties before the Grand Court and the CICA.

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[1] [1974] A.C. 133

[2] [2016] EWHC 3175 (Comm)

[3] [2013] EWCA Civ 118

[4] Maurice Kay LJ in *Omar* at [25]

[5] Unreported Ruling of Kawaley J dated 29 March 2019 at [64]

[6] Ibid at [56]

[7] Ibid at [68]

[8] Unreported Judgment of Martin JA dated 3 May 2021 at [57]

[9] Ibid at [56]

[10] Ibid at [57]

[11] <https://www.ogier.com/publications/bvi-norwich-pharmacal-relief-an-international-problem-resolved>

[12] <https://www.ogier.com/publications/bvi-norwich-pharmacal-relief-an-international-problem-now-addressed-by-statute>

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