

## When is it appropriate to seek ex parte relief in the Cayman Islands?

Insights - 24/02/2022

### Introduction

In *Cathay Capital Holdings III, LP v Osiris International Cayman Limited*, [1] the Grand Court set out a helpful reminder of the circumstances in which it is appropriate to seek relief on an ex parte basis (ie without notice to the party against whom the relief is sought).

### Background

The plaintiff sought production of documents from the defendant in respect of a Cayman Islands incorporated company (**Company**) for which the defendant provides registered office services. The type of relief sought by the plaintiff is commonly known as Norwich Pharmacal relief. [2] The plaintiff had separately commenced proceedings in the People's Republic of China (**PRC**) relating to the dilution of the Company's interest in underlying Hong Kong and PRC companies. The defendants to the PRC proceedings contended that the plaintiff is not a shareholder in the Company and therefore had no standing to pursue the PRC proceedings. The plaintiff sought production of documents in the Cayman Islands to rebut this contention, ie to establish that the plaintiff is indeed a shareholder of the Company.

### Legal principles

The Court confirmed that it is "a basic general principle of justice and fairness" that a party should ordinarily be given an opportunity to be heard before relief is granted against that party. Proceeding without notice to the party must be "absolutely necessary" and is an "exceptional and serious step to take".

The Court further confirmed that ex parte relief may be sought:

1. if there is a genuine and exceptional urgency to the situation that requires the matter to proceed immediately, ie it is not possible to give any form of notice, even very short notice,

to the party against whom relief is sought (such circumstances are relatively rare); or

2. if giving notice would enable the person against whom relief is sought to take steps to defeat the purpose of the relief. For example, if an injunction is sought to prevent a party from dissipating assets, such relief may be sought ex parte if there is a real risk that giving notice of the application would provide an opportunity for the defendant to dissipate their assets (which would defeat the purpose of the injunction)

The Financial Services Division Guide confirms that matters which proceed in the Financial Services Division of the Grand Court should proceed on notice unless some relevant rule provides that the application should be made without notice or there are otherwise "good reasons" for making the application without notice – ie the matter falls into one of the above categories of cases. However, even if a rule or the law permits an application to be made without notice, the Court may nevertheless expect that notice is given (even if that notice is only short), absent good reasons not to do so. [3]

The Court further confirmed that when proceeding ex parte:

1. the evidence in support of the application must state the reasons why notice has not been given; and
2. the applicant must make disclosure of all matters that the defendant would have wanted the Court to know – this is known as the duty to make full and frank disclosure

## **Decision**

The Court refused to grant the relief sought by the plaintiff on an ex parte basis since it was unlikely that the defendant, who is a regulated entity in the Cayman Islands, would destroy documents if it were notified of the application. Further, if the Company responded to the application by changing its registered office service provider, the defendant would nevertheless likely keep a copy of its file (which would be available for production to the plaintiff). However, the Court was persuaded in the circumstances of the case to make an interim preservation order to guard against the possibility that others might seek to exert pressure on the defendant to remove or destroy documents.

The circumstances of this case may be contrasted with the circumstances of many other Norwich Pharmacal applications where the production of documents is sought to assist the applicant to pursue some other remedy without notice to the subject of the application. For example, where the applicant requires documents to support an injunction application. In such a case, it may also be appropriate for the Court not only to grant the Norwich Pharmacal relief on an ex parte basis but also to make a gagging order to stop the defendant from disclosing the existence of the Norwich Pharmacal application until after the intended application for the injunction has been determined.

The Cayman Court remains willing and able to grant urgent ex parte relief where the facts of the case justify it (see for example Doyle J's decision in the more recent case of *Trezevant v Trezevant* on 10 November 2021) but practitioners ought to ensure that there is sufficient urgency and evidence of risk to justify the relief sought.

---

[1] (FSD 245 of 2021 (DDJ), unreported, 30 August 2021). The Hon Justice Doyle made reference to his judgment in this matter in a series of subsequent judgments delivered ex tempore: *In the matter of Jian Ying Ourgame High Growth Investment Fund (in Provisional Liquidation)* (FSD 258 of 2021 (DDJ), 15 September 2021); *Aspect Properties Japan Godo Kaisha v ICG I* (FSD 263 of 2021 (DDJ), 20 September 2021); *Chia Hsing Wang v Credit Suisse AG* (FSD 262 of 2021 (DDJ), 27 September 2021); *In the matter of Principal Investing Fund I Limited* (FSD 268, 269 and 270 of 2021 (DDJ), 29 September 2021); *Kisha Dean Trezevant v Stanley H Trezevant III* (FSD 314 of 2021 (DDJ), 10 November 2021).

[2] Following the decision of the House of Lords in the English case of *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133.

[3] For example, in *Re Midway Resources International* (FSD 51 of 2021 (NSJ), unreported, 30 March 2021), Segal J noted that whilst it is permissible to make an application for the appointment of provisional liquidators under section 104(3) of the Companies Act on an ex parte basis, the views of creditors should be ascertained and creditors should have a proper opportunity to file representations and submissions to the Court concerning the application save in exceptional circumstances. For more information, read our briefing [Recent trends: provisional liquidation in the Cayman Islands](#).

## About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

## Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

## Meet the Author



Gemma Bellfield (nee Lardner)

Partner

Cayman Islands

E: [gemma.bellfield@ogier.com](mailto:gemma.bellfield@ogier.com)

T: +1 345 815 1880

## Key Contacts



Oliver Payne 

Partner 

Hong Kong

E: [oliver.payne@ogier.com](mailto:oliver.payne@ogier.com)

T: +852 3656 6044

## Related Services

Dispute Resolution

Banking Disputes

Corporate and Financial Services Disputes

Enforcement of Judgments and Awards

Fraud and Asset Tracing

Funds Disputes

Legal