

UPDATE

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

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The Cayman Islands Court of Appeal's recent decision in *Essar Global Fund Ltd and Essar Capital Limited v Arcelormittal USA LLC*¹ confirms that Norwich Pharmacal orders for third party disclosure are available in support of foreign proceedings. The decision will be welcomed by parties who seek documents and information from third parties in the Cayman Islands that are mixed up in the wrongdoing of another.

Norwich Pharmacal Orders

A Norwich Pharmacal order (NPO) is an order for disclosure to be provided by a third party that has, through no fault of his own, been mixed up in the wrong-doing of another. The jurisdiction for the courts to grant NPOs arose from the House of Lords decision in *Norwich Pharmacal Co. v Customs and Excise Commissioners*.²

A NPO may be sought where:³

1. a wrong has been carried out or arguably carried out, by an ultimate wrongdoer;
2. there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
3. the person against whom the order is sought must (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

NPOs are an invaluable tool when more information (for example the identity of the wrongdoer) is required to commence proceedings.

Background

Essar Global Fund Limited (EGFL) is the principal holding company for the Essar group of companies, including its subsidiary Essar Capital Limited (ECL). The Essar group are a conglomerate with interests across a wide range of industrial sectors including steel production. Both EGFL and ECL are Cayman companies.

Arcelormittal USA LLC (AMUSA) is part of the Arcelormittal group of companies, one of the world's leading steel and mining businesses. The Arcelormittal group and the Essar group are substantial commercial competitors.

¹ *Essar Global Fund Ltd and Essar Capital Limited v Arcelormittal USA LLC* (CICA, unreported, 3 May 2021).

² *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

³ *Essar Global Fund Ltd and Essar Capital Limited v Arcelormittal USA LLC* (CICA, unreported, 3 May 2021) at para 16 citing *Mitcui & Co Limited v Nexen Petroleum UK Limited* [2005] EWHC 625 (Ch) at para 21, Lightman J.

In August 2016, AMUSA commenced arbitration proceedings against ESL in relation to an agreement for the sale and purchase of iron ore pellets. In December 2017, an ICC arbitral tribunal made an award (the **Award**) in AMUSA's favour against ESL for US\$1.38 billion plus interest.

AMUSA alleged that EGFL and ECL actively controlled the Essar Group and had, before the Award had been obtained, demonstrated a propensity for directing the affairs of the Essar group to evade debts. Since the granting of the Award, ESL had not made any attempts to pay off even one cent of the debt.

AMUSA obtained judgments recognising the Award in the state of Minnesota (the seat of the arbitration), in England and Wales and (subsequent to the Grand Court hearing) in the Cayman Islands. A worldwide freezing order was obtained in England and Wales in respect of ESL's assets. AMUSA has also obtained a provisional order enforcing the Award in Mauritius (where ESL is incorporated) but it is subject to a challenge by ESL.⁴

AMUSA commenced proceedings in the Cayman Islands for NPOs requiring EGFL and ECL to provide information and documents in relation to ESL's financial affairs. AMUSA contended that it required such information in order to assist it in enforcing the Award and in identifying assets against which it could take enforcement action.

Grand Court Decision

EGFL and ECL opposed the application for an NPO on grounds that, *inter alia*, the Grand Court had no jurisdiction to make a NPO in support of potential foreign proceedings. EGFL and ECL argued that the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1987 (the **Evidence Order**) displaced the court's equitable jurisdiction to grant NPOs. According to EGFL and ECL, the Evidence Order provided the exclusive means by which a party could obtain information and documents for use in overseas litigation and, as such, the Norwich Pharmacal jurisdiction was ousted.

The Grand Court carefully considered two prior decisions of the English Court of Appeal in *R (Omar) v Foreign Secretary*⁵ and *Ramilos Trading Limited v Buyanovsky*⁶ which both concluded that the Norwich Pharmacal jurisdiction is excluded where a statutory regime is available that covers the same ground. Parliament could not have intended to create a parallel procedure by allowing the Norwich Pharmacal jurisdiction to survive the introduction of a statutory regime.

However, the Grand Court considered that whether the statutory jurisdiction displaced the court's equitable Norwich Pharmacal jurisdiction could not be determined in a simple formulaic fashion. The Grand Court held that there was no inflexible legal principle that debarred litigants from seeking to obtain information solely because the information will be likely to be deployed in overseas proceedings. The key question is whether or not, on the facts of a particular case, the Norwich Pharmacal jurisdiction is displaced by the availability of the Evidence Order.

The Grand Court held that, in this case, the Evidence Order was not engaged. AMUSA did not yet have sufficient information to commence substantive remedial proceedings abroad and the Evidence Order was a world away from being an available, effective alternative remedy which AMUSA should be left to pursue. Accordingly, the Grand Court held that the jurisdiction to grant a NPO had not been displaced by the availability of the statutory regime under the Evidence Order.

In addition, EGFL and ECL argued that the alleged wrongdoing, being deliberate evasion by the judgment debtor, is not an actionable wrong, particularly where the Award was only being enforced in proceedings abroad. The Grand Court held that deliberate steps to avoid enforcement of the Award by ECL constituted an arguable case of wrongdoing for the purposes of satisfying this requirement for obtaining Norwich Pharmacal relief. It did not matter that no domestic proceedings had, at that time, been instituted against ESL and that the NPO was sought in aid of the processes of foreign courts.

⁴ A decision on the challenge had not been given prior to the Court of Appeal's decision.

⁵ *R (Omar) v Foreign Secretary* [2014] QB 112.

⁶ *Ramilos Trading Limited v Buyanovsky* [2016] EWHC 3175.

The Grand Court granted a NPO prohibiting the destruction or alternation of documents relating to certain matters concerning the whereabouts of ESL's assets and required EGFL and ESL to provide to AMUSA documentation and information relating to the identity of, and disposal of, ESL's assets.

Court of Appeal Decision

EGFL and ECL appealed the Grand Court's order on, *inter alia*, grounds that:

- 1) a NPO could not properly be granted to support a foreign award which was not enforceable in the Cayman Islands (the **Enforcement Point**); and
- 2) there was no arguable case of wrongdoing by ESL (the **Wrongdoing Point**); and
- 3) the Grand Court had no jurisdiction to make a NPO in support of potential foreign proceedings (the **Jurisdiction Point**).

Enforcement

At the time of the Grand Court hearing, leave had not yet been given to enforce the Award in the Cayman Islands. EGFL and ECL argued that the Grand Court had no discretion to make a NPO in aid of enforcement of an award which was not itself enforceable in the Cayman Islands. The Grand Court disagreed with this contention.

By the time the case had reached the Court of Appeal, leave had been given to enforce the Award in Cayman. Despite this fact, EGFL and ECL still urged the Court of Appeal to deal with the point as an important one of principal. The Court of Appeal declined to do so, observing that in the majority of cases obtaining leave to enforce an award is a straightforward matter.

Wrongdoing

The wrong asserted by AMUSA was the concealing and/or stripping of assets by ESL with the effect of frustrating or evading enforcement of the Award.

On appeal, EGFL and ECL argued that there was no arguable case of wrongdoing by ESL and that, at its highest, the evidence showed merely that ESL had a propensity to dissipate assets for the purpose of avoiding liabilities, but that there was no evidence that assets had been dissipated for the purpose of avoiding enforcement of the Award. They argued that AMUSA's burden, which it had failed to discharge, was not only to show a good arguable case on the facts of dissipation, but also as to the ground on which such dissipation is said to be unlawful.

The Court of Appeal agreed that in order to obtain a NPO, an applicant does not need to establish a real risk of dissipation of assets. Rather, it has to show an arguable case of wrongdoing. To justify the making of a NPO, AMUSA needed to show that the failure to satisfy the Award was a consequence of some further or different wrongdoing and not, for example, merely that ESL simply has no assets to satisfy the Award. In the absence of an injunction, steps taken to dispose of assets or shield them from execution are not sufficient to establish wrongdoing, as ESL is entitled to dispose of its own property as it wishes.

It is important to note that, in reaching its decision, the Court of Appeal departed from the approach of the BVI courts in *UVX v XYZ*⁷ where it was held that the purpose of the Norwich Pharmacal jurisdiction is to do equity and that strategies to obstruct and delay enforcement are wrong because they frustrate enforcement and thereby work against the very purpose of the courts and legal system.

Having reached this conclusion, the Cayman Islands Court of Appeal went on to find that AMUSA *had* demonstrated an arguable case of wrongdoing. This was on the basis that AMUSA had set out facts sufficient to lead the Grand Court to consider that, if those facts were not explained, they would suggest that the failure by ESL to pay the Award amounted to a *deliberate* evasion of the liability.

⁷ *UVX v XYZ* BVI HC (Com) 108 of 2016.

Having established such an arguable case on the facts, the Court of Appeal held that AMUSA had also demonstrated an arguable case that ESL's conduct would bring it within the relevant insolvency avoidance provisions of whichever jurisdiction in which such claims would ultimately be justiciable. In doing so, the Court of Appeal concluded that AMUSA was not required to identify which jurisdiction and which insolvency avoidance provisions would apply. That would impose too high a burden on an applicant, given that the whole point of a NPO application is that it commonly comes at a stage where the applicant does not have sufficient information to enable it to identify whom it might wish to pursue or where it might wish to pursue them.

The Court of Appeal concluded that it was sufficient for AMUSA to establish a good arguable case of wilful evasion of the Award, since most jurisdictions recognise that such conduct is wrongful and afford a legal remedy against it.

Accordingly, AMUSA's case on wrongdoing succeeded.

Jurisdiction

EGFL and ECL contented that, as a matter of principle, Norwich Pharmacal relief could never be granted if the information or disclosure sought is for the purpose of enabling the applicant to pursue foreign proceedings, as the Evidence Order provides exclusive means of obtaining information or documents for use in foreign proceedings. The Evidence Order showed a clear legislative intention to provide an exclusive regime relating to evidence in foreign proceedings with which the NPO could not stand. In making this argument EGFL and ECL relied on the English authorities of *R (Omar) v Foreign Secretary*⁸ and *Ramilos Trading Ltd v Buyanovsky*.⁹

The Court of Appeal considered these authorities and upheld the Grand Court's decision that the Norwich Pharmacal jurisdiction was available for three principle reasons:

1. The Court of Appeal distinguished the provision of evidence (whether oral or documentary) and information. The Evidence Order only concerns the provision of evidence for the purposes of foreign proceedings. By contrast, the Norwich Pharmacal jurisdiction cannot relate to the giving of evidence but only to the provision of information. As long as care is taken to confine the Norwich Pharmacal jurisdiction to its proper scope, there can be in principle no overlap between the Norwich Pharmacal jurisdiction and the statutory regime relating to evidence in foreign proceedings.
2. The Court of Appeal accepted that the courts of the Cayman Islands have no inherent jurisdiction to order evidence to be provided for the purposes of foreign proceedings. Where provision in a statute is made for the production of evidence, there will be an implied exclusion of any overlapping jurisdiction that might otherwise exist. However, the court's Norwich Pharmacal jurisdiction is based on a duty to provide information about wrongdoing and there is no obvious reason why that duty should be confined to domestic wrongdoing. Nor is there any reason why it 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 information about the identity of the wrongdoer. The Evidence Order is to be treated as impliedly excluding Norwich Pharmacal relief in support of foreign proceedings only, if at all, where those proceedings are already on foot or where the applicant has available to him in the relevant foreign jurisdiction procedures for pre-action disclosure or the provision of non-documentary evidence. The Court of Appeal noted that similar reasoning had been adopted by the English High Court in the case of *Shlaimoun v Mining Technologies International Inc*¹⁰ and that the English Court of Appeal in *Omar* did not disapprove of the reasoning in that case.
3. Finally, the Court of Appeal observed that section 11A of the Grand Court Act (2015 Revision), which gives the court power to grant interim relief in relation to foreign proceedings, provides a basis for the grant of Norwich Pharmacal relief in support of foreign proceedings. In the Court of Appeal's view, this made it

⁸ *R (Omar) v Foreign Secretary* [2014] QC 112.

⁹ *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm).

¹⁰ *Shlaimoun v Mining Technologies International Inc* [2012] 1 WLR 1276.

impossible to assert that the overall intention of parliament was to exclude Norwich Pharmacal relief in support of foreign proceedings.

The Court of Appeal therefore upheld the flexible approach adopted by the Grand Court and, indeed, in the earlier (pre-*Omar*) decisions of the Cayman Islands Grand Court in *Braga v Equity Trust company (Cayman) Limited*¹¹ and the Cayman Islands Court of Appeal in *Gianne v Miller*.¹²

Leave to Appeal

In a subsequent judgment,¹³ the Court of Appeal refused an application for leave to appeal to the Privy Council. EGFL and ECL had no appeal as of right as the relevant statutory threshold was to be strictly construed and was not passed. Permission to appeal was also rejected as the case did not raise an arguable point of law of general public importance. EGFL and ECL may now make an application for special leave to the Judicial Committee of the Privy Council.

Comment

The Cayman Islands Court of Appeal's decision confirms that NPOs for third party disclosure are available in support of foreign proceedings. The Evidence Order only concerns the giving of evidence and does not oust the court's Norwich Pharmacal jurisdiction, which gives rise to a duty to provide information about wrongdoing.

Wilful evasion of an arbitral award may meet the test for an actionable wrongdoing since most jurisdictions recognise that such conduct is wrongful and grant a remedy.

The Court of Appeal's decision is a welcome clarification of the position following the English Court of Appeal decisions in *Ramilos* and *Omar*. The decision confirms that the position in the Cayman Islands remains close to, albeit distinct from, that in the British Virgin Islands. The British Virgin Islands courts initially permitted Norwich Pharmacal relief to obtain information in support of foreign proceedings.¹⁴ Subsequently, the obstacles to the granting of Norwich Pharmacal relief in aid of foreign proceedings identified in the decisions in *Ramilos* and *Omar* were addressed by the BVI legislature.¹⁵

The Cayman Islands Court of Appeal's decision will be welcomed by parties who seek documents and information for use in foreign proceedings from third parties in the Cayman Islands that are mixed up in the wrongdoing of another. The availability of Norwich Pharmacal relief in support of foreign proceedings is highly desirable in an offshore financial centre like the Cayman Islands.

¹¹ *Braga v Equity Trust company (Cayman) Limited* [2011 (1) CILR 402].

¹² *Gianne v Miller* (CICA, unreported, 20 July 2007).

¹³ *Essar Global Fund Limited and Essar Capital Limited v Arcelormittal USA LLC* (CICA, unreported, 6 May 2021).

¹⁴ *UVW v XYZ* BVI HC (Com) 108 of 2016 and *K&S v Z&Z* BVIHCM (COM) 2020/20016.

¹⁵ Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020, s 3(5).

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