

# Norwich Pharmacal orders in support of foreign proceedings

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**One of the key weapons for any asset recovery specialist is an ability to use the courts to discover critical facts necessary to make out a case against suspected fraudsters or to track down the location of misappropriated assets.**

Orders against the putative fraudster are often ignored and so information may instead have to be secured from third parties. It is in this context that the English courts have made so called *Norwich Pharmacal* orders.

Such orders can ordinarily only be made against a third party within the jurisdiction of the court, but the information may be needed for contemplated or actual proceedings against the putative fraudster before a foreign court. Recent caselaw shows a divergence between the approach taken by the English courts to such a situation and that taken by courts in certain offshore jurisdictions. Practitioners considering available international asset recovery options would be well advised to bear these differences in mind.

## Norwich Pharmacal orders

In the seminal *Norwich Pharmacal* case<sup>1</sup>, Lord Reid observed the “very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers”.

1. *Norwich Pharmacal v Customs & Excise* [1974] AC 133 at page 175.

This equitable jurisdiction has since been expanded and a claimant may rely on it to obtain information or documents concerning a wrongdoer’s assets and do so pre-action or post-judgment in aid of enforcement. *Norwich Pharmacal* relief is also available in major common-law offshore jurisdictions, such as the Cayman Islands and the BVI. It can be of especial importance when it comes to asset tracing in those jurisdictions where information regarding beneficial ownership of companies is not (yet) publicly available because the relief may be granted against a registered agent or other corporate services provider.

## Foreign proceedings

It was originally assumed that *Norwich Pharmacal* orders could be made to obtain information or evidence to be used in foreign court proceedings. However, in 2016, the English High Court held in *Ramilos* that this was not correct.<sup>2</sup>

The court’s reasoning was that, in England, the jurisdiction to order persons to provide information or evidence in aid of foreign court proceedings is statutory under the Evidence (Proceedings in Other Jurisdictions) Act 1975 and Parliament could not have intended that the *Norwich Pharmacal* jurisdiction and the statutory scheme in the 1975 Act should co-exist. It follows that where the contemplated or actual proceedings against the wrongdoer will be before a foreign court, an applicant can only pursue the “letters of

2. *Ramilos Trading Ltd v Buyanovsky* [2016] 2 CLC 896.

request” process set out in the statute, and not the *Norwich Pharmacal* route.

This decision threatened to diminish the usefulness of *Norwich Pharmacal* relief to asset recovery specialists. The statutory process is a lengthy one and will mean the wrongdoer is alerted to the application well before the application is heard. *Norwich Pharmacal* relief, by contrast, may be granted *ex parte*. Likewise, given the use by fraudsters of complex offshore corporate structures, it will rarely be the case that the third party is located in the same jurisdiction where the underlying substantive claim is to be pursued.

## Differing solutions to the Ramilos problem

The recent *Arcelormittal* litigation has shown a divergence in the way the English and offshore courts have dealt with this problem.

*Arcelormittal* secured a very substantial ICC award against *Essar Steel*, which it enforced in various jurisdictions including England. As part of the enforcement process, *Arcelormittal* applied for *Norwich Pharmacal* relief from the English court and from the Grand Court of the Cayman Islands. It was argued before both courts that no order could be made because the information was being sought for use in foreign proceedings.

In the English proceedings,<sup>3</sup> the judge held it would not be “appropriate” to make such an order where the “sole purpose was to facilitate enforcement

3. *Arcelormittal USA LLC v Essar Steel Limited* [2019] 2 All E.R. (Comm) 414, [Jacobs].

proceedings abroad”.<sup>4</sup> However, in this case, the court did have power to make the order because it was in support of, and to make effective, the worldwide freezing order that had also been granted by the English court. There is, therefore, an exception to *Ramilos* but a relatively limited one i.e. where an application can also be made against the would-be defendant for a freezing injunction.

A different approach was taken in *Cayman*.<sup>5</sup> The court held the mere fact information was sought for use in foreign proceedings did not automatically render *Norwich Pharmacal* relief unavailable.<sup>6</sup> Rather, the key question was “whether or not on the facts of a particular case the need for equitable relief [was] displaced by the availability of the statutory regime”.<sup>7</sup> On the facts, the Cayman statutory regime was not available in practical terms, particularly “having regard to the risk of information being destroyed, deploying the statutory regime for obtaining the information is a world away from being an available effective alternative remedy”.<sup>8</sup> Those reasons are likely to apply in many fraud cases.

#### Further developments

The offshore position has potentially<sup>9</sup> developed further following the 2020 decision of the BVI High Court in *K et al v Z et al*.<sup>10</sup> *Wallbank J* held *Norwich Pharmacal* relief was available where the information was to be used in foreign proceedings despite the existence in the BVI of a statutory

“letters of request” procedure. His reasoning again highlighted the practical advantages of the *Norwich Pharmacal* jurisdiction.<sup>11</sup> However, he also went further, holding that the BVI courts have a statutory jurisdiction to make *Norwich Pharmacal* orders under s. 24(1) of the Supreme Court Act and this was another reason for not following *Ramilos*. As he put it, “whatever may be the position under English law and in the context specifically of the United Kingdom statutory landscape, the position has developed differently in the Anglo-Saxon offshore world”.<sup>12</sup> This decision was followed by *Jack J* in another very recent BVI High Court case, *Foreign Representative v Five Registered Agents*.<sup>13</sup>

These differences are significant. When formulating recovery strategies, practitioners should have a close eye on the nuances applicable in the various courts which they might use.

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11. See para [59] “This is that the *Norwich Pharmacal* jurisdiction can be exercised to help preserve assets by requiring secrecy on the part of the registered agent respondents; and the letter of request procedure is entirely inter partes and therefore vulnerable to an unscrupulous substantive defendant taking steps to evade court process whilst the letter of request procedure is completed”.

12. At [94].

13. Unreported, 15 June 2020. *Jack J* considered an argument that the BVI Court of Appeal’s decision in *Broad Ideas* (No 2), which had held that the BVI court does not have jurisdiction to make a freezing order against third party resident within the jurisdiction in aid of foreign proceedings against a wrong-doer, affected the court’s jurisdiction to make *Norwich Pharmacal* orders in aid of foreign proceedings. He held that it did not.



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4. At [159].

5. *Arcelormittal USA LLC v Essar Global Fund Limited* (unreported, 29 March 2019) *Kawaley J*. The decision is under appeal, with judgment pending.

6. At [65].

7. At [69].

8. At [72].

9. The judgment was given on an ex parte application and so without the benefit of adversarial argument.

10. Unreported, 10 March 2020.