

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) [REDACTED]

BETWEEN:

**A FOREIGN REPRESENTATIVE
IN FOREIGN INSOLVENCY PROCEEDINGS**

Applicant

and

FIVE REGISTERED AGENTS

Respondents

Appearances:

Mr. Stuart Cullen of Harneys Westwood & Riegels LP for the applicant
The respondent registered agents did not appear

2020: June 11,
June 15

JUDGMENT

- [1] **JACK, J [Ag.]**: This is an application seeking a sealing and gagging order prior to obtaining **Norwich Pharmacal** relief¹. I granted such relief against four registered agents of BVI companies some time ago, but the applicant, who is appointed by a foreign court in insolvency proceedings in that foreign country, seeks similar relief against a fifth registered agent in order find out the names of other persons alleged to be associated with laundering monies of the insolvent estate. I shall not set out the background or details of why I have granted the relief. This judgment deals solely with one point on jurisdiction. Following the decision of the Court of

¹ See *Norwich Pharmacal Co v Commissioners of Customs & Excise* [1974] AC 133.

Appeal in **Broad Idea International Ltd v Convoy Collateral Ltd** (“**Broad Idea (No 2)**”)² a doubt has been raised as to whether this Court has jurisdiction to grant **Norwich Pharmacal** orders in support of contemplated foreign proceedings.

- [2] **Broad Idea (No 2)** concerned what is known as the **Black Swan** jurisdiction³. This was a jurisdiction exercised to freeze the assets of persons within the jurisdiction (typically companies incorporated in this Territory) in support of foreign proceedings, where no cause of action was alleged against the BVI defendant against whom the freezing order was made. It was a form of **Chabra** relief⁴, so that, as and when judgment was obtained in the foreign proceedings, there would be assets within this jurisdiction against which the foreign judgment might be enforced. Pereira CJ explained:

“[14] There is no dispute that the BVI court has personal or territorial jurisdiction over Broad Idea, since Broad Idea is a company incorporated in the BVI. This appeal is concerned with whether the court has subject matter jurisdiction to grant, in aid of foreign proceedings, a freezing order against a person resident in the BVI against whom no substantive proceedings have been pursued anywhere in the world.

[15] A useful starting point is to examine the source of the High Court’s jurisdiction to grant interlocutory injunctive relief. The High Court’s jurisdiction to grant such relief derives from section 24(1) of the **Supreme Court Act**⁵ which provides that:

‘...an injunction may be granted by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms as the court or judge thinks just.’

It is clear that the High Court’s jurisdiction to grant interlocutory injunctive relief derives from statute, and not the common law.”

² BVIHCMAP2019/0026 (delivered 29th May 2020).

³ See *Black Swan Investment I.S.A. v Harvest View Limited et al*, BVIHCV2009/0399 (delivered 23rd March 2010).

⁴ [1992] 1 WLR 231.

⁵ Eastern Caribbean Supreme Court (Virgin Islands) Act 1969, Cap 80, Revised Laws of the Virgin Islands 1991.

- [3] She, Blenman JA and Webster JA proceeded to hold that section 24(1) did not permit the grant of a freezing order in the circumstances of **Black Swan**. Blenman JA held:

“[99] This principle [that there must be a substantive cause of action] has been judicially recognised by Lord Mustill in **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd**⁶ wherein His Lordship enunciated as follows:

‘...the doctrine of **The Siskina**,⁷ put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of the substantive right, which usually although not invariably takes the shape of a cause of action...’

[100] This remains good law. It was not the law that the court has the jurisdiction to grant an injunction against a defendant merely on the basis that he is resident within the jurisdiction and irrespective of the fact that there is no cause of action or substantive claim against him. It must be remembered that the principle that was enunciated in **The Siskina** has been applied and followed for decades in our court, and to that extent represents the law.”

- [4] Does this principle bar the grant of **Norwich Pharmacal** relief in cases where no substantive proceedings are in contemplation within the jurisdiction? In my judgment, it does not.
- [5] It should be remembered that **Norwich Pharmacal** orders are only made against a person against whom no substantive cause of action lies. The basis of the claim is (reading from the headnote to the House of Lords decision):

“that where a person, albeit innocently and without incurring any personal liability, became involved in the tortious acts of others he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of

⁶ [1993] AC 33.

⁷ *Siskina* (owners of cargo lately laden on board) and others v Distos Compania Naviera SA (“The Siskina”) [1979] AC 21.

voluntary action or the consequence of the performance of a duty statutory or otherwise.”

The jurisdiction has subsequently been widened to include all manner of claims, including contractual and restitutionary claims, not just actions in tort.

- [6] In other words, the claimant’s claim against the **Norwich Pharmacal** defendant is a right to information, which was a type of claim recognised by the Courts of Equity. The claim does not give rise to a *substantive* cause of action,⁸ because it gives only procedural relief, but it is a procedural cause of action in its own right, albeit in some respects *sui generis*. It has never been suggested that **The Siskina** overruled **Norwich Pharmacal**. A **Norwich Pharmacal** order is the enforcement of an independent duty recognised in equity as owed by the **Norwich Pharmacal** defendant to the claimant. As such it is quite separate from the underlying substantive cause of action against the third party wrong-doer. By contrast a **Black Swan** injunction was (just as a **Chabra** injunction still is) parasitical on the existence against a third party of a separate substantive cause of action.
- [7] Unless **Broad Idea (No 2)** has effected a change, it is in my judgment now established that a **Norwich Pharmacal** order can be made in this jurisdiction in support of intended foreign proceedings: **K and S v Z and Z**.⁹ Wallbank J in that case had to consider **Ramilos Trading Ltd v Buyanovsk**.¹⁰ There Flaux J (as he then was) held that the English equivalent of our **Evidence (Proceedings in Foreign Jurisdictions) Act 1988**¹¹ prevented the obtaining of evidence for foreign proceedings otherwise than in accordance with the procedure under the Act. As my brother Wallbank J explained, this was unworkable. His exhaustive consideration of the authorities outside England shows that in this jurisdiction **Ramilos** is not good law.

⁸ TSJ Engineering Consulting Ltd v Al-Rushaid Petroleum Investment Co, BVI HCVAP 2010/013 (delivered 27th July 2010, unreported) at para [30] *per* Rawlins CJ.

⁹ BVIHCM 2020/0016 (delivered 10th March 2020).

¹⁰ [2016] EWHC 3175 (Comm).

¹¹ 1988 c 24, Revised Laws of the Virgin Islands 1991.

- [8] Now it is true that a **Norwich Pharmacal** order has the Janus-like characteristic of (a) being interlocutory, in that it is made in order to support further proceedings and (b) being final, in that once the defendant has provided the information ordered, that is usually the end of the proceedings. Wallbank J deals at length with the extensive case-law on the subject at paras [94]ff of **K and S v Z and Z**. There is a surprising divergence of views in the authorities.
- [9] In my judgment, however, it makes no difference if a **Norwich Pharmacal** order is treated as interlocutory or final. If it is interlocutory, the order is made to enforce the *domestic* claim which a claimant has for information from someone within the jurisdiction who has become “mixed up” in a third party’s malfeasance. Likewise, if it is final, it is an ordinary final order made in respect of the right under BVI law to information.
- [10] The order is made in order “to support a cause of action in other proceedings, and is ancillary to those other proceedings.”¹² However, this does not make the order *dependent* on the other proceedings. There often will be no existing foreign proceedings, when the order is made, and (depending on the outcome of the disclosure given pursuant to the **Norwich Pharmacal** order) there may never be. Thus, although the order will be ancillary, in the sense of supporting, foreign proceedings, it will not be parasitic on, in the sense of deriving its life-force from, the foreign proceedings. The **Norwich Pharmacal** proceedings have an independent life.
- [11] Since **Norwich Pharmacal** is itself a free-standing procedural cause of action in equity, in my judgment **The Siskina** has no application. There is no indication in **Broad Idea (No 2)**, or its immediate predecessor, **Broad Idea (No 1)**,¹³ that anything the Court of Appeal said was intended to apply to **Norwich Pharmacal** applications.

¹² TSJ Engineering Consulting Ltd, above footnote 8, at para [30].

¹³ *Convoy Collateral Ltd v Broad Idea International Ltd and another*, BVIHCP2016/0030 BVIHCP2016/0030 (delivered 30th March 2020).

[12] Accordingly, in my judgment, this Court still has the power to make **Norwich Pharmacal** orders in support of actual or intended foreign proceedings.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar