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IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

(IN THE COMMERCIAL COURT)

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 0104 of 2019

BETWEEN

AN APPLICANT

Claimant/Applicant

And

A RESPONDENT

Defendant/Respondent

Appearances:

Mr. Christopher Bromilow for the Claimant/Applicant

2019: September 19;
October 11.

Ex parte application for Norwich Pharmacal Relief- Procedural requirements under CPR Part 17 when proceeding without notice- Applicable principles for granting relief

JUDGMENT

[1] **Farara, J (Ag.)** On 16th July 2019 the Claimant, a German trading company, commenced a claim before this court seeking *Norwich Pharmacal* relief and related orders, including a non-disclosure order, against the Defendant, a licensed trust company in the British Virgin Islands, in its capacity as registered agent of [REDACTED], a company incorporated in the British Virgin Islands ("BVI") [REDACTED] ("the Company")

[2] The Claim is supported by the affidavit of [REDACTED], the Chief Executive Officer of the Claimant [REDACTED] filed 16th July 2019 ("the [REDACTED] Affidavit"). The only document exhibited as [REDACTED] to the [REDACTED] Affidavit, was a copy of a search report dated 17th June 2019 in relation to [REDACTED] the Company. The application was heard on 19th September 2019 and the court reserved its decision.

[3] On 27th September 2019, at the request of counsel for the Claimant, I gave directions for the filing by the Claimant of a supplemental affidavit by 4:00pm on Monday 7th October 2019. This was to address the obvious documentary deficiencies in the evidence, by enabling the Claimant to put before the court copies of the various agreements and documents referred to, in some detail, in the [REDACTED] Affidavit. In compliance with this order, the Claimant, on 7th October 2019, filed the affidavit of Stuart Anderson Bruce ("the Bruce Affidavit") together with exhibit "SAB-1". [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

Ex parte Applications for Interim Relief

[17] It is well established that Norwich Pharmacal orders are injunctions **A, B, C and D v E**¹ . This brings applications for Norwich Pharmacal relief squarely within the ambit of rule 17.4, Civil

¹ AXAHCVP 2011/001, per (Pereira JA)

Procedure Rules 2000 ('CPR'), which sets out the procedure when applying for interim injunctive relief. CPR 17.4(4) specifically permits such applications to be made without notice, in circumstances where the court is satisfied that there is either (a) a case of urgency and no notice is possible; or (b) to give notice would defeat the purpose of the application. These provisions require an applicant proceeding without notice to the respondent, to satisfy the court as to one of these exceptions to the normal rule that such applications are made on 3 days notice to the respondent –CPR 17.4(3).

- [18] In deciding whether to proceed without notice, a court will have due regard to the nature of the application and the reliefs being sought, and to any factual matters which the applicant has put before the court in support of its application. The usual practice in this court has been for the applicant's lawyers to file a 'certificate of urgency' or other document, summarizing for the judge, the reasons why the applicant contends that one or the other of the two limbs of CPR17.4(4) have been satisfied, and the court ought to proceed without notice to the respondent. The matters summarized in such certificates, are usually taken from the salient matters averred in the supporting affidavit or affidavits, which demonstrate either, urgency, or the reasons why, to give notice, would defeat the purpose of the application.
- [19] No such 'certificate' or document advancing the reasons why the court ought to proceed without notice to the Defendant has been filed by the Claimant's lawyers in this matter, nor was any such reasons addressed directly in the [REDACTED] Affidavit or the Bruce Affidavit, or in counsel's written submissions filed 16th September 2019.
- [20] In response to questions from the court about the propriety of it proceeding without service of the Fixed Date Claim Form on the Defendant, or notice of the hearing being given to the Defendant, learned counsel for the Claimant referred the Court to two prior decisions of this court, where the procedure to be followed in relation to applications for Norwich Pharmacal relief against registered agents of BVI companies, was addressed.
- [21] In **AAA v TTT**², Jack J was concerned with an application for Norwich Pharmacal relief and companion non-disclosure order. The learned judge was referred by counsel to what are called 'wrap up' orders which, it was said, this Court has previously granted on *ex parte* applications against registered agents in this jurisdiction. In that matter, it was pointed out to the learned

² BVIHCM 2019/0066

judge that the usual terms of these orders provide for the registered agent to have 14 days within which to apply to vary or discharge the order (CPR 11.16 and 11.18), should they wish to do so. It was also stated by counsel for the applicant in that matter that registered agents usually adopt a 'neutral attitude' to such orders and would produce the documents ordered, or certain of them, as they were advised by their lawyers.

- [22] However, in that matter, the learned judge adopted a two-step process in deciding the *ex parte* application before him. He allowed the application for non-disclosure order preventing the registered agent from disclosing the application and documents to its client (para.6), and deferred the application for Norwich Pharmacal relief for an abridged *inter partes* hearing, on the basis that there were no exceptional or special circumstances which would justify making such an order *ex parte* (paras. 9 & 10). At paragraph [5] Jack J opines-

“In the ordinary way, all applications must be heard *inter partes*. The Court will not entertain applications for *ex parte* orders without good reason. In the current case, there is a good reason to hear the application for non-disclosure order *ex parte*. If the defendant was told of the application, it would be under a duty to discuss the matter with the clients for whom it acts as registered agent. Hearing the initial application for the non-disclosure order *inter partes* would defeat the object of the order.”

- [23] The second case, to which I was referred, is a decision of Adderley J in **A v R (A Registered Agent)**³ delivered 30th July 2019. Again this concerned an application for Norwich Pharmacal relief, and accompanying seal and gagging orders, against a BVI registered agent. These orders were granted by the learned judge at the *ex parte* hearing, with his reasons for decision following.

- [24] In considering the proper procedure to be followed under the CPR, the learned judge referred to the dicta of Jack J in **AAA v TTT**, in particular at paragraph [9] of the judgment, to the effect that unless there are exceptional or special circumstances, a gagging order should first be made against the registered agent, to be followed by an abridged *inter partes* hearing where the matter was urgent. However, Adderley J was of the certain view that the usual practice before this Court of making 'wrap up' orders, combining both the Norwich Pharmacal order and the gagging order at the *ex parte* hearing, was a sensible approach to dealing with such matters involving registered agents as defendants/respondents. In the learned judge's view,

³ BVIHCM 2019/0079

such orders "work(s) no injustice and achieves the overriding objective by reducing the number of hearings and adding to efficiency".

[25] He opined that, "in the vast majority of cases the Registered Agent accepts the Order as appropriately made, and there is no need for a short appointment date followed by a return date with the attendant costs of appearance of counsel on each occasion." In this regard, the learned judge made reference to CPR 11.16(2), which permits of an application within 14 days to vary or discharge an order made on a without notice application, and the practice of inserting in such orders a standard provision giving liberty to the registered agent to apply to set aside or vary the order, usually within 3 to 7 days after service. Accordingly, Justice Adderley concluded that the rights of the registered agents are in no way prejudiced by the making of a 'wrap up' order, without notice to them.

[26] In my view, CPR 17.4(4) is clear and mandatory. It sets out, in the alternative, the matters upon which the Court must be satisfied when an applicant for interim injunctive relief seeks to proceed without notice to the respondent. This procedure is applicable to all applications to which CPR 17.4(1) applies, including Norwich Pharmacal applications. Consequently, the procedure in 17.4(4) governing applications without notice applies whether the respondent thereto is a registered agent or some other party. Furthermore, it applies irrespective of the perceived impracticality, inconvenience or costs attendant to having two hearings, one without notice, and the other upon notice. It also applies notwithstanding the quite sensible provisions of CPR 11.16(2), which applies to all orders obtained on a without notice application. Moreover, considerations of the overriding objective at CPR 1.1(2) for a court to deal with matters justly cannot override the mandatory provisions of CPR 17.4(4). Indeed, it may be said that the requirements of CPR 17.4(4) are there to ensure that applications for interim relief are dealt with justly, and a respondent is not unfairly treated by having the order made without notice to him, in circumstances where to do so is clearly not justified.

[27] The matter of whether it is rare or infrequent for registered agents to apply to vary or to set aside such an order made without notice speaks only to the usual, and perhaps practical, attitude adopted by registered agents in this jurisdiction to matters in which they do not have a direct 'stake'. However, in my respectful view, such considerations are not relevant when a court is deciding, pursuant to CPR 17.4(4), whether it is satisfied that it ought to proceed to hear an application *ex parte*. The position adopted by a registered agent on whom such an order has been served may have the effect of shortening the hearing on the return date, or

there may be significant issues raised by or on behalf of the registered agent (as there are at times), which can and ought properly to occupy the court's consideration, in deciding whether to continue or vary the terms of the order.

- [28] In brief, any applicant for interim relief caught by the provisions of CPR 17.4, who wishes to proceed without notice to the defendant/respondent, must comply with CPR 17.4(4), and must satisfy the judge, in accordance with sub-paragraphs (a) or (b) of that Rule, that the Court is justified in proceeding without notice to the defendant/respondent. Once the court is so satisfied, the matter ought to proceed without notice, unless there are special or peculiar aspects which would justify a court taking a two-step approach, such as that adopted by Jack J in **AAA v TTT**.
- [29] In satisfying a court as to one or both of the requirements for proceedings without notice, an applicant for interim relief may produce factual matters which demonstrate arguably that the matter is either one of urgency and notice is not possible, or to give notice to the respondent would defeat the purpose of the application. As to the former, while an application for Norwich Pharmacal relief against a registered agent in BVI may, in certain circumstances, be one of genuine urgency, it is difficult to conceive of situations where it is not practical for notice of the application be given to the registered agent. Both aspects of this first limb must be satisfied.
- [30] As to the second basis for proceeding without notice, I accept, as a matter of practicality within this jurisdiction, that to give notice of an application for Norwich Pharmacal relief to the registered agent would likely defeat the purpose of the application. The reason for this is that registered agents, in the absence of a 'gagging' or non-disclosure order, would be obliged to inform their client of record for the company, the target of the application, and to provide the documents to them. Indeed, this was the position adopted by Jack J at paragraph [5] of his judgment in **AAA v TTT** quoted above, albeit only in relation to the non-disclosure relief. The position may be different where the registered agent has resigned as such, and is not or does not consider itself bound or obligated to tip-off its previous client.
- [31] As previously mentioned, the Claimant/Applicant in this matter has not directly addressed in its affidavit evidence or in written submissions the reasons for proceeding *ex parte*. Furthermore, the usual practice before this Court, where the applicant's lawyers provide the court with a

certificate of urgency or reasons justifying why they intend to proceed without notice, has not been complied with.

[32] However, I am not convinced that the Court ought to adopt, as a standard practice, the two step process of making a non-disclosure order first, followed by an abridged *inter partes* hearing. While I am certain there are circumstances in which such an approach would be warranted, or even prudent, once an applicant has met the requirements under CPR 17.4(4) for proceeding without notice, a court ought to so proceed to hear and determine the application, unless there are good and substantial reasons not to do so. In my view, this is not such a situation, and no special or peculiar circumstances arise which would justify adopting such a two-step approach.

[33] That said, having regard to the nature of the relief sought in this matter, I accept that to give notice to the Defendant, in the absence of a 'gagging' or non-disclosure order, would defeat the purpose of the application, as the Defendant would be obliged to disclose the application and documents to its client of record. This is a matter of obvious practicality in the way registered agents function, not requiring much, if any, evidential basis. It is for this reason and this reason only, that I was satisfied to proceed with the application *ex parte* for Norwich Pharmacal relief and non-disclosure orders.

The Application

[34] By its Fixed date Claim Form, the Claimant seeks (i) Norwich Pharmacal relief by way of copies of all documents and information, including email correspondence and banking information, which the Defendant, as registered agent, may have in its possession, in relation to the identity of the owners, beneficial owners, controllers, funders, directors and/or shadow or *de facto* directors and/or bank signatories of the Company [REDACTED]; (ii) an order that the Defendant not dispose or conceal any such documents or information; (iii) an affidavit from a director or compliance officer of the Defendant exhibiting the documents disclosed, and stating the steps taken to search for and to produce them; (iv) an order preventing the Defendant from informing anyone else of the order sought or the claim (essentially a gagging order or non-disclosure order); (v) an order sealing the court file in this claim; and (vi) an order that the Claimant be relieved of its implied undertaking to keep the document and information disclosed confidential and not to use them elsewhere without the permission of this court.

The Law

- [35] The jurisdiction of the Court to grant Norwich Pharmacal relief has been evolving. It is settled law that for Norwich Pharmacal relief to be granted, an applicant must satisfy three conditions: (1) that a wrong must have been carried out, or is 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 facilitate the wrongdoing, (whether innocently or not), and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued. See **Norwich Pharmacal Co. and Others v Customs and Excise Commissioners**⁴; **Gee on Commercial Injunctions (6th Ed.)**⁵; **Mitsui & Co Ltd v Nexen Petroleum UK Ltd**⁶; and **A, B, C and D v E**⁷.
- [36] The jurisdiction is a discretionary one. It has been described as a "flexible remedy capable of adaptation to new circumstances".⁸ It is available where the applicant has good reason to believe that an actionable wrong has been committed against it, whether within or outside of the jurisdiction, and in circumstances where it has commenced or is contemplating the commencement of legal proceedings, and the only way to discover who the wrongdoers are, or are likely to be, or the true nature of the wrongdoing committed against it, is to discover the information from the respondent. The respondent must be a person that has become mixed up in the wrongdoing, whether innocently or intentionally, and is likely to have documents or information necessary for the applicant to determine either, the identity of the wrongdoers, or the nature of its claims against the wrongdoers.
- [37] Such an application is not limited to cases where the identity of the wrongdoer is unknown. Relief can be granted where the identity of the wrongdoer is known, and the information sought to be disclosed is necessary to bringing a claim or claims or to supply a missing piece of the jigsaw. **Axa Equity & Law Assurance Society Plc v National Westminster Bank (CA)**⁹. The jurisdiction now extends to claims in contract see **P v T Limited**¹⁰.

⁴ [1974] AC 113

⁵ para.23-049

⁶ [2005] EWHC (Ch) 625 per (Lightman J) at paras.19, 20 and 21

⁷ AXAHCVP 2011/001 per (Webster JA) at [31]

⁸ per (Lightman J) in Mitsui & Co. Limited v Nexen Petroleum UK Limited at para. 20

⁹ [1998] CLC 1177

¹⁰ [1997] 1 WLR 1309

[38] An applicant does not have to prove that a wrong has actually been committed against it, but that it is arguable that such a wrong has been committed. Furthermore, it has been said that the respondent, from whom the information is sought, must not be a mere witness, but one who has become mixed up in the wrongdoing. This gives rise to a duty to assist the person who has been wronged, by giving disclosure of documents and information which tend to show the identity of the wrongdoers and or the nature of the wrongdoing¹¹. Also, Norwich Pharmacal relief may be ordered in aid of foreign proceedings, but the applicant must satisfy the court that there is a serious issue to be tried in those proceedings.

[39] In applying these principles, a court must be cautious not to permit what is purely a 'fishing expedition' by an applicant, and the information and documents sought must be necessary and proportionate in all the circumstances. **Ashworth Security Hospital v MGN Limited**¹².

[40] Importantly, the Court of Appeal has found that a registered agent is not a mere bystander or onlooker. **JSC BTA Bank v Fidelity Corporation Services Limited and others**¹³ – per Mitchell JA at [27] –

“I am satisfied that the respondents by virtue of their very role in providing registered agent services to the companies, a role which is voluntary, cannot on any view be considered as mere onlookers..... Registered agents and registered office service providers who are used by others to create and maintain for them corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them seeking discovery of the names and addresses and other information and documents that will enable the perpetrators to be discovered and the misappropriated assets traced.”

Application to the Facts

[41] The wrong which the Claimant believes to have been committed against it is the concoction and presentation of a bogus and fraudulent claim [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] It is the Claimant's belief that this fraudulent claim was presented with the intent of significantly damaging or diminishing its prospects of recovering a substantial part of its Debt in the said insolvency proceedings. [REDACTED]

¹¹ per (Lord Reid) in *Norwich Pharmacal Co v Commissioners of Customs & Excise* at page 175B

¹² [2002] UKHL 29

¹³ HCVAP 2016/035

[REDACTED]

[REDACTED] Furthermore, if allowed to go uninvestigated and unchallenged, the Claimant's claim as a creditor in those proceedings would be defeated or severely diminished. The Claimant must satisfy the Court on prima facie evidence that the Defendant has become mixed-up in the alleged wrong-doing and is likely to have documents and information necessary to identify the wrongdoer or wrongdoers, and to enable it to properly investigate and bring any claim or claims - see **Mercantile Group (Europe) A.G. v Aiyela**.¹⁴

[42] Having considered the affidavit evidence put forward by the Claimant in support of these contentions, I am satisfied that the Claimant has shown an arguable case that a wrong has or may have been committed against it. There is sufficient documentary evidence before me tending to show that a fraudulent claim may have been made in the [REDACTED] insolvency proceedings, aimed at defeating or damaging significantly the likelihood of the Claimant recovering its debt [REDACTED], and that the Company [REDACTED] is arguably involved in that scheme.

[43] I am also satisfied, to the extent that I need be in these proceedings, that there is a need for the an order of this court to compel the disclosure of documents and information about the Company [REDACTED], so as to enable the Claimant to investigate and determine the identity of the wrongdoers, and to bring a claim or claims against them, whether in the Russian insolvency proceedings or in separate proceedings. [REDACTED]

[REDACTED] I am also satisfied that there is no other means available to the Claimant from which this information can be obtained.

[44] The Defendant, as registered agent of the Company [REDACTED], may have become, albeit innocently, mixed up in or may have facilitated the alleged wrongdoing, by and through the involvement of the Company [REDACTED] in the facilitation and submission, through various loan agreements, assignments and other documents, of a fraudulent claim [REDACTED]

¹⁴ [1994] QB 366, 375 E

██████████ in the ██████████ insolvency proceedings. The kind of documents and information which the Defendant may have in its capacity as registered agent of the Company ██████████ ██████████ can assist the Claimant in discovering who owns or controls the Company ██████████ ██████████, and from what bank accounts the annual fees for the company were provided. Furthermore, from the materials before me, I am satisfied that there does not seem to be any other means available to the Claimant to obtain such information.

- [45] Accordingly, on well-established principles relating to Norwich Pharmacal relief, the Defendant is under a duty to disclose such information to the Claimant, as it is not a mere onlooker with respect to the Company ██████████ and its dealings. In all the circumstances, a disclosure order is necessary so as to enable the Claimant to investigate the ownership, control and funding of the Company ██████████ for the purpose of determining whether there are third parties against whom it ought to bring a claim, or whether it ought to seek interim relief against the Company ██████████ itself, in BVI or elsewhere.

Conclusion

- [46] I therefore conclude, on the evidence before me, that the Claimant has satisfied all three tests for the grant of Norwich Pharmacal relief. Accordingly, the Claim for Norwich Pharmacal relief, and for seal and gag orders, is granted.

The Hon. Gerard St. C Farara Q.C.
High Court Judge

By the Court

Registrar