

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 91 OF 2015

IN THE MATTER OF RE AB (A TRUST COMPANY)

AND IN THE MATTER OF RE CD (A TRUST COMPANY)

BETWEEN:

AB (A TRUST COMPANY)
CD (A TRUST COMPANY)

Applicants

Appearances:

Ms. Eleanor Morgan of Mourant Ozannes for the Applicants

2015: October 21.

***Norwich Pharmacal* relief – Non-disclosure orders – statutory reporting obligations - Anti-Money Laundering and Terrorist Financing Code of Practice 2008 – Suspicious Activity Reports (SARs)**

The Applicants are regulated entities offering company administration and registered agents' services within the Territory of the Virgin Islands ("trust companies") and are subject to statutory obligations including the obligation to make a suspicious activity report ("SAR") in respect of a suspicious client or transaction under the **Anti-Money Laundering and Terrorist Financing Code of Practice, 2008** ("Code"). Failing to file a SAR is a criminal offence.

A *Norwich Pharmacal* Order, granted only in cases where there is an apparent wrongdoing, requires a trust company to disclose and deliver up certain documents in its possession relating to a client. The evidence in support of a *Norwich Pharmacal* Order often contains information which may lead a respondent trust company to have a suspicion that its client has been involved in wrongdoing and/or has received the proceeds of crime and therefore to have a statutory

obligation to file a SAR. However, *Norwich Pharmacal* Orders typically prohibit the respondent from notifying or informing any third party of the existence of the court proceedings, the order, any evidence or documents filed in the proceedings and any materials disclosed as a result of the order (a “Non-Disclosure Order”). Sometimes a Non-Disclosure Order does not include an exception for compliance with statutory obligations.

Following service of a *Norwich Pharmacal* Order, together with the documents in support, the Applicants were concerned that if they formed the view that they were obliged to file an SAR they may be found to be in breach of the Non-Disclosure Order by filing a SAR, but they would be committing a criminal offence in breach of their statutory obligations if they did not.

Held:

- (1) The Applicants and others similarly situated may be “innocently mixed” in the wrongdoings of their clients: **Norwich Pharmacal Co. v Commissioners of Customs & Excise** [1974] A.C. 113; **Al Rushaid Petroleum Investment Company et al. v TSJ Engineering Consulting Company Limited** BVIHC (Com) 37 of 2010 (Hariprashad-Charles J, delivered 20th April 2010) applied.
- (2) In making a *Norwich Pharmacal* Order the Court is not intending to, and cannot, order a respondent to breach a provision of the laws of the Territory of the Virgin Islands. Accordingly, properly making a SAR to a Reporting Authority pursuant to a statutory obligation to do so could not lead to contempt for breach of a *Norwich Pharmacal* Order. **C v S and others** (Money Laundering Discovery of Documents) [1998] 1 W.L.R 1551; **Proceeds of Criminal Conduct Act, 1997** referred.

JUDGMENT

- [1] **LEON J [Ag]:** The Applicants applied on paper and without notice for a declaration confirming that, until further order, any order made by the Court prohibiting them from disclosing the existence of proceedings before the Court; the existence or content of any order or orders made in any proceedings before the Court; and/or documents, material or other evidence filed in any proceedings before the Court including documents or other material filed or disclosed by the Applicants themselves in any such proceedings did not preclude disclosure by them where it is required by law in the Territory of the Virgin Islands. The relief sought was granted, for the reasons set out in this Judgment.

Background

- [2] The Applicants are professional services companies offering services including company administration and registered agents' services within the Territory of the Virgin Islands, and are regulated by the British Virgin Islands Financial Services Commission (referred to as trust companies).
- [3] The evidence is that in the course of their business, the Applicants are, from time to time, served with orders by which *Norwich Pharmacal* type relief has been granted, and which relate to one or more of their clients ("Norwich Pharmacal Order" in the singular and "Norwich Pharmacal Orders" in the plural). The *Norwich Pharmacal* Orders require the Applicants to, among other things, disclose and deliver up to the applicant in those proceedings certain documents in their possession relating to those clients.
- [4] **Al Rushaid Petroleum Investment Company et al. v TSJ Engineering Consulting Company Limited**¹ ("Al Rushaid Petroleum") establishes that for a *Norwich Pharmacal* Order to be granted, among other things [see para. 18 of the Judgment]:
- (1) there must be an apparent wrong carried out, or arguably carried out, by an ultimate wrongdoer; and
 - (2) the person against whom the order is sought must be
 - a. 'mixed up in the wrongdoing' so as to have facilitated it; and
 - b. able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.
- [5] The result is that the evidence in support of a *Norwich Pharmacal* order sometimes contains information which leads the respondent to the application – including businesses in the Territory of the Virgin Islands which offer trust company services and the like (including the Applicants) – to have a suspicion that

¹ *BVIHC (Com) 37 of 2010*

their client has been involved in wrongdoing and/or has received the proceeds of crime.

[6] Typically, *Norwich Pharmacal* Orders prohibit the respondent from notifying or informing any third party (“Non-Disclosure Order”) of:

- (1) the existence or content of the proceedings in which the *Norwich Pharmacal* Order was made (“Proceeding”);
- (2) the existence or content of the *Norwich Pharmacal* Order;
- (3) any documents, material, information or evidence filed in or in connection with the Proceedings by any party; and/or
- (4) any documents which they have disclosed to the applicants in the Proceedings in accordance with the *Norwich Pharmacal* Order.

[7] Although Non-Disclosure Orders routinely permit communications between the respondent and its legal representatives, sometimes they do not *expressly* permit compliance by the respondent of its statutory obligations and, in particular, where these obligations require the respondent to make certain disclosures.

[8] In those circumstances, the result is that, on the one hand, the respondent is under an obligation of confidentiality as provided for in a valid and binding court order yet, on the other, is under an express statutory obligation to disclose the very information to which that order relates. Put colloquially, the respondent is “between a rock and a hard place”.

[9] In the context of the kinds of circumstances that give rise to *Norwich Pharmacal* Orders, an important statutory obligation may arise under the **Anti-Money Laundering and Terrorist Financing Code of Practice, 2008** (“Code”).² The Code compels reporting of “every suspicious customer or transaction”. Specifically it provides in Section 17 as follows:

² S.I. 2008/13 of the Laws of the Virgin Islands

- (3) A Reporting Officer shall make a report to the Agency of every suspicious customer or transaction relating to his entity and such report may
- a. be made in such form as the Reporting Officer considers relevant provided that it complies with the requirements of section 55; and
 - b. be sent by facsimile, or by other electronic means if signed electronically, where the Reporting Officer consider the urgent need to make the report.
- (4) A Reporting Officer who fails to comply with subsection (1) commits an offence and is liable to be proceeded against under section 27(4) of the Proceeds of Criminal Conduct Act, 1997.

[10] Section 55 of the Code sets out that the report must be submitted and sub-section (c) goes on to prescribe that the report must contain:

“c. ... sufficient information and clarity as would enable the receiver of the report to understand its contents and determine its compliance with the requirements of this Code or any provisions of the Code pursuant to which the report is made or submitted”.

[11] Sub-section 7(2) of the Code enables the Financial Investigation Agency (“FIA”) to request further information from a party who has made a suspicious activity report (“SAR”) and, in practice, this regularly includes requesting the disclosure of documents.

The Applicants’ Concern

[12] The Applicants are concerned that if following service of a *Norwich Pharmacal* Order, together with the documents in support thereof, they form the view that they are obliged to file a SAR, there then exists a very real likelihood that, in doing so, they would be in breach of the Non-Disclosure Order. Failing to file a SAR would, however, be a criminal offence. The Applicants are, therefore, in the unenviable position of facing a choice between risking being found to have breached a court order (and thereby facing a contempt proceeding) and committing a criminal

offence in breach of their statutory obligations as a regulated entity in this jurisdiction. It is important to note that in these instances typically there is no suggestion of any actual wrongdoing by the respondent trust company.

[13] The Court of Appeal in **Al Rushaid Petroleum** held that for persons to be subject to Norwich Pharmacal Orders they needed to be related to (“mixed up in”) the wrongdoings of their clients. The foundational judgment of **Norwich Pharmacal Co. v Commissioners of Customs & Excise**³, which is cited and quoted in **Al Rushaid Petroleum** (at para. 13), contemplated that the subject of a *Norwich Pharmacal* Order will be a person who is “innocently mixed in the wrongdoing of another, so that he is more than a ‘mere witness’ . . .”

[14] The words used by Lord Reid in *Norwich Pharmacal* that were quoted by the Court of Appeal in **Al Rushaid Petroleum** are as follows :

“ . . . if through no fault of his own a person gets mixed up in the tortious act 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 . . .”

[15] The Applicants – and others similarly situated – unfortunately, in carrying out their trust company businesses (which businesses are important to the functioning of company law, and in turn to the financial services industry, in this jurisdiction) may find themselves facing a choice between risking breaching, or at least being concerned about the possibility that they may be found to have breached, the provisions of a court order and committing a criminal offence in breach of their statutory obligations as a regulated entity in this jurisdiction as a result of actions entirely outside of their control.

[16] Such a situation is neither fair to such persons nor beneficial to the objectives of either the legislation in issue or the court’s orders.

³ [1974] A.C. 113

[17] The Applicants relied on the judgment of Lord Woolf M.R. in **C v S and others** (Money Laundering Discovery of Documents) ⁴ at 1557 where, in similar circumstances, he held as follows :

“ . . . the order is sometimes coupled with an order not to disclose the fact that an order has been made. Such an order should not be regarded as preventing the financial institution from approaching the N.C.I.S.; seeking the co-operation of the N.C.I.S. is a step which is necessary in complying with the requirement to give disclosure. The approach to the N.C.I.S. is to be regarded as being impliedly permitted despite the non-disclosure requirement.”

[18] Although the Court in that case was concerned with an approach to the NCIS (an equivalent anti-money laundering agency to the FIA in England and Wales at that time) seeking permission to give disclosure where that disclosure would include disclosing the existence of a SAR, the Court was satisfied that the non-disclosure order did not prevent discussions with or disclosure of the order to that agency.

[19] Sub-section 28(2) of the **Proceeds of Criminal Conduct Act, 1997** (“POCCA”)⁵ provides as follows:

(2) Where a person discloses to the Reporting Authority a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to the Reporting Authority any matter on which such a suspicion or belief is based,

(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise [emphasis added] and shall not give rise to any civil liability.

[20] This section is said to give some comfort to the Applicants that making a SAR is permissible and could not lead to contempt or other civil proceedings. It does not, however, appear to cover any subsequent disclosure of documents later

⁴ [1998] 1 W.L.R 1551

⁵ Act No. 5 of 1997 of the Laws of the Virgin Islands (as amended).

requested by the FIA pursuant to its powers in Sub-section 7(2) of the Code (as outlined above).

[21] Further, once a SAR is made, or any disclosure is given, the Applicants have no control over the actions taken by the FIA.

[22] The Applicants acknowledged that they are aware that Section 7 of the Code sets out the actions to be taken by the FIA on receipt of an SAR and provides that it shall:

- b. through the investigating officer, conduct discreet inquiries to ascertain the basis for the suspicion;
- c. ensure that the customer who is the subject of the inquiry is, as far as possible, never approached during the conduct of the inquiries;
- d. maintain the integrity of a confidential relationship between the [FIA], other law enforcement agencies and the reporting entities and professionals and any person acting for, through or on behalf of the entities or professionals . . .

[23] However, these protections do not — and cannot — eliminate the concerns of the Applicants even though they may provide some practical comfort.

Conclusion

[24] It cannot be that this Court has the power to order a person to breach the provisions of the law of the Territory of the Virgin Islands, or that in making a *Norwich Pharmacal* Order, this Court is intending to so order, and to put the parties in the positions of the Applicants in an untenable situation.

[25] It therefore appeared just and equitable that, in the unusual and difficult circumstances raised here, the Applicants should be given the declaratory relief they sought so that clarity and certainty is brought to the situation.

[26] Going forward, and particularly after this Judgment is unsealed (see below), it is hoped and expected that applicants for *Norwich Pharmacal* Orders will draw to the

Court's attention, as part of their disclosure on their *ex parte* applications, the need for an express exception and will prepare draft orders containing an express exception for compliance with the laws of this Territory, and that *Norwich Pharmacal* Orders issued will expressly provide accordingly. Even where they do not, such orders should not be taken as preventing any disclosure required by the law of the Territory of the Virgin Islands (in the manner, and to the extent required by that law).

Sealing Order

- [27] The Applicants sought, and this Court granted, a sealing order for the following reasons.
- [28] Where a SAR is made, Section 31 of the POCCA, provides that it is an offence for any person who knows or suspects that a SAR has been made to disclose to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure.
- [29] In the circumstances, this Application, the Order and this Judgment were ordered to be sealed until further order of this Court so that the applicants in the Proceedings would not become aware of the Applicants' concerns in relation to the possible need to file a SAR.
- [30] The Court expects that the Applicants, and their legal practitioners, will apply for the sealing order to be lifted if and when the concerns arising by reason of section 31 of the POCCA no longer reasonably exist.

Order

- [31] The Order of this Court therefore read as follows:

IT IS ORDERED, DECLARED AND DIRECTED THAT UNTIL FURTHER ORDER:

1. The Registrar of the Court shall seal the record of these proceedings and shall prevent the disclosure to any person of:
 - a. the existence or content of this proceeding;
 - b. the existence or content of this Order; and/or
 - c. any material, documents and/or evidence delivered to and/or filed in the Court in, or in connection with, this proceeding.
2. Any order made by the Court in any proceeding prohibiting the Applicants or either of them from disclosing:
 - a. the existence of any proceeding before the Court;
 - b. the existence or content of any order or orders made in any proceeding before the Court; and/or
 - c. documents, material or other evidence filed in any proceeding before the Court, including documents or other material filed or disclosed by the Applicants themselves in any such proceeding

shall not preclude disclosure by the Applicant or Applicants where, in the manner, and to the extent such disclosure is required by law in the Territory of the Virgin Islands.

Barry Leon
Commercial Court Judge