

Developments in Norwich Pharmacal in foreign proceedings – what you need to know

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Two recent judgments broaden the Norwich Pharmacal jurisdiction in the BVI, each by the two incumbent Commercial Court justices: the Honourable Justice Malcolm Davis-White [Ag] and the Honourable Justice Gerhard Wallbank [Ag].

In recent years the BVI Commercial Court showed reluctance to grant Norwich Pharmacal orders. Bannister J expressed his view in no uncertain terms that these applications to provide third party disclosure to assist foreign parties, always against registered agents, were highly onerous. Bannister J's decision in ***JSC BTA Bank v Fidelity Corporate Services Limited BVI HC (Com) 2010/137*** illustrates this, ruling that the activities of a registered agent were not sufficient to meet the threshold test of being "mixed up in the wrongdoing" and that the applicant had to establish "necessity". On appeal in ***JSC BTA Bank HCVAP 2010/035***, the Court of Appeal overturned this decision, finding that registered agents were not mere onlookers and that the necessity requirement will vary with the circumstances of the case. However, despite this ruling, the BVI Commercial Court remained reluctant to grant the orders and did not make a further decision expanding the jurisdiction.

The landscape for these orders has changed, as shown in two recent decisions in aid of foreign proceedings:

(1) In ***UVW v XYZ*** (unreported decision of 27 October 2016), Wallbank J held that an applicant can, without evidence that a judgment debtor has misused a BVI company but where a judgment creditor is able to show some evasive conduct by the judgment debtor (as opposed to a mere non-payment), obtain a Norwich Pharmacal order to support asset tracing. This goes further that ***NML Capital Ltd v Chapman Freeborn Holdings et al [2013] 1 CLC 968***, where the court doubted there was post-judgment jurisdiction and where more evidence of wilful evasion was needed.

(2) In a separate case (in which Ogier appeared for the Applicant), Davis-White J granted an order on 24 October 2016 against a registered agent where three of its companies were alleged to be involved in fraudulently contriving a debt. Importantly, one of these companies was involved in concurrent proceedings in Hong Kong in which the subject was the same debt. This is an extension beyond the case of ***Mitsui & Co Limited v Nexen Petroleum UK Limited [2005] EWHC 625 (Ch)***, where an English application was dismissed because the existence of concurrent proceedings provided the opportunity for other disclosure relief to the applicant.

This change in landscape provides a much wider set of opportunities to seek Norwich Pharmacal relief in aid of foreign proceedings in the BVI and, likely, suggests the form of relief will continue to be available for an expanding range of objectives.

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