Norwich Pharmacal: An Instrument of the State?

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The application of the Norwich Pharmacal principle in Jersey has recently been extensively reviewed in the case of New Media Holding Company LLC v. Capita Fiduciary Group Limited [2010] JRC 117. Although in this instance the dispute was between private parties, it is of note that two of the leading cases referred to in the judgment were applications by foreign states.

In **Macdoel Investments Ltd & Others v. Federal Republic of Brazil & Others** [2007] JLR 2001, before Jersey's Court of Appeal, the Brazilian Government was seeking information from banks in Jersey in connection with funds alleged to be misappropriated by the former Mayor of St Paulo. In the case of **President of the State of Equatorial Guinea & Another v. Royal Bank of Scotland and Others** [2006] UKPC7, the Privy Council sat on an appeal from Guernsey's Court of Appeal. In that case, the Government of Equatorial Guinea was seeking information for use in English proceedings concerning the funding of an attempted coup against the President.

In the present case, the Plaintiff had obtained *ex parte* **Norwich Pharmacal** order relief against the Defendant. The Plaintiff was in partnership through a series of structures with another entity for the purposes of developing a Ukranian TV station. The Plaintiff alleged that certain assets had been wrongfully removed by its partner from the partnership. The Plaintiff had taken action against its partner in the Supreme Court of the State of New York. The original application for disclosure in Jersey was two fold – firstly on the basis that the Defendant held certain partnership documents to which the Plaintiff had a claim as a partner, and secondly it held other non-partnership material which as a result of the alleged wrong doing, the Plaintiff claimed on the Norwich Pharmacal basis. The partnership material had already been disclosed and it was the second part of the order which the Defendant sought to set aside.

The court noted that the leading authority in Jersey on this jurisdiction was **Macdoel** in which the Court of Appeal said:

> *"In any event, whilst the cases in which the Norwich Pharmacal jurisdiction has been developed in England and Wales provides useful guidance on how Lord Reid's statement of principle [in the Norwich Pharmacal case itself] may be applied, the courts of Jersey are in no sense bound by the scope of the jurisdiction that may have been delineated de facto by the circumstances of these cases.*
>
> *Nor are these courts constrained by the limits which may be placed on the application of the principle in the difficult social and economic conditions that may prevail from time to time in England and Wales…They will have regard to, amongst other things, the policy considerations which shape the law of Jersey and the social and economic context in which it operates."*

Necessary Questions

The court then set out three questions which it considered necessary to answer:

(i) Is there a good arguable case that the Plaintiff is the victim of wrong doing?

(ii) Is there a good arguable case that the defendant is mixed up in that wrong doing?

(iii) As a matter of discretion, is it in the interests of justice to order the disclosure?

As to the exercise of discretion, the court noted that although no comprehensive statement of principle could be made, there were some considerations which could well be of general relevance:

1. It is an *"extraordinary"* jurisdiction not to be exercised lightly and so it is important to consider whether it is just to make the order.

2. Although the Plaintiff does not have to show formally that there is no other way of gaining the information, it would probably not be reasonable to exercise the discretion in his favour if there is a *"straightforward and available"* alternative available to him. his follows the judgment of the Privy Council in **President of the State of Equatorial Guinea.**

3. The purpose of the order sought may be for the identification of potential defendants in litigation or for other purposes, whether in connection with other litigation, or for the purpose of taking other lawful steps.

4. The third party against whom the information is sought need not necessarily be innocent, but may be the wrong doer himself, following the English position. However, as Jersey does not generally permit pre-action discovery, if that were the purpose, it is unlikely that it would exercise its discretion in the applicant's favour.

5. It may be appropriate to make an order assisting another court, whether in Jersey or elsewhere.

On the facts of their particular case, the court decided to set aside the *ex parte* order which related to non partnership material. The court noted that the jurisdiction was not available to provide pre-action disclosure, nor was it generally available to supplement discovery in aid of existing foreign proceedings. The court indicated that the Plaintiff may be able to obtain the relief it sought by joining the Defendant into the New York proceedings, or by commencing substantive proceedings against the Defendant in Jersey.

Lack of Pre-action Discovery

Thus, given Jersey's lack of pre-action discovery it does seem unlikely that the discretion will be exercised where there is any suggestion that the party giving the disclosure is the wrong doer. Further, if proceedings in another jurisdiction are extant, consideration should be given as to whether they can be used to obtain the necessary disclosure. However, where foreign states are seeking assistance regard should be had to the **Equatorial Guinea** case. The Privy Council noted that the English proceedings "*seemed to represent an exercise of sovereign authority",* and indicated that it may be more appropriate for cooperation to be extended via the legislative and executive rather than by way of private remedies. However, as these arguments had not been deployed by the parties, their Lordships merely noted them for completeness and upheld the order giving disclosure.

Gillian Robinson appeared for the applicant at the *ex parte* application and Michael O'Connell, Managing Partner of Appleby in Jersey, at the *inter partes* hearing.

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