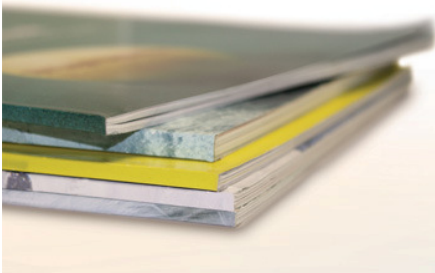


## Defining the Scope of Norwich Pharmacal Relief in the British Virgin Islands

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**Applications seeking disclosure orders against BVI registered agents have become quite common in the BVI. In overturning a judgment of the Commercial Court which appeared to restrict the availability of such orders the Court of Appeal of the Eastern Caribbean Supreme Court has held that registered agents cannot be considered as “mere onlookers” and that by incorporating and maintaining BVI companies they may be facilitating, albeit innocently, the commission of fraud.**

In **JSC BTA Bank v. Fidelity Corporate Services Limited and Others** (BVIHC (COM) 137 of 2010), the applicant bank (the “Bank”) sought disclosure orders from Bannister J against seven BVI trust companies, which acted or had acted as registered agents for BVI companies alleged to have been the recipients of funds fraudulently advanced by the Bank’s previous owner, Mr.

Ablyazov. He is the accused in proceedings in the Commercial Court in London (“the English Proceedings”), of being behind the fraudulent advancement of over one billion dollars by the bank to various “borrowers” who simply (in the words of Bannister J) “*went off with the money*”.

In its application, the Bank sought against each of the trust companies, the disclosure of: (1) all information and documents relating to the ownership of the BVI companies for whom they each acted (or had acted) as registered agent; (2) the circumstances in which the BVI companies had remained in good standing; (3) the receipt of any money from any of certain defendants to the English Proceedings; and (4) the details of any onward payment of any money received.

The traditional basis upon which **Norwich Pharmacal** relief may be granted is that the person against whom the disclosure order is sought knows

the identity of the person who has wronged the applicant, and the applicant does not, and cannot discover that person's identity without a court order. Thus without a court order the applicant would be left without a remedy (the “*necessity*” requirement).

### **Principal Wrongdoers**

The Bank's application differed from this traditional model in that the identities of the principal wrongdoers as well as the identities of the BVI companies administered by the disclosure defendants were known to it. Instead, the Bank sought disclosure from the trust companies in an attempt to identify the directors and owners of the BVI companies (directors' and shareholders' registers are not publicly available in the BVI); and in order to trace where the Bank's funds had gone. The applicant Bank relied, it appeared, upon the **Bankers Trust** line of cases which established that **Norwich Pharmacal** principles may be applied not only to unmask the unknown wrongdoer, but also to trace the proceeds of the wrongdoing of known defendants.

In noting that the Bank had not sued the BVI companies and that it had already identified as having received funds that it alleged had been stolen from it, Bannister J said “*It seems to me quite wrong to harass innocent third parties with disclosure orders in circumstances where no action is taken against the persons who have been identified to the bank as having received the funds which it claims to be anxious to recover*”. Moreover, in the absence of any evidence to suggest that the trust companies were likely to be in

possession of any relevant information, or of any grounds upon which to suppose that they knew anything at all about the alleged receipt of funds, the idea that the BVI companies might have left traces of the money's whereabouts at the offices of their registered agents appeared to Bannister J “*fanciful*”.

On that basis the bank failed to meet the “*necessity*” test for either traditional or **Bankers Trust** type **Norwich Pharmacal** relief – not so in the Court of Appeal.

On Appeal (HCVAP 2010/035), the Bank sought to adduce evidence which had only become available after Bannister J's judgment was handed down. It comprised the defence of the second defendant in the English Proceedings (Mr. Ablyazov's associate) which made it clear that both defendants alleged that they had no knowledge or control over the BVI companies and, therefore, that no information would be forthcoming as to who might be behind them. Rather than considering it “*fanciful*” that traces of the monies' whereabouts might have been left at the offices of the registered agents, the court that such information would “*in all probability*” be in the agents' possession.

A further “*threshold*” test to be satisfied before **Norwich Pharmacal** jurisdiction may be invoked as whether the defendant had participated in or been involved in the wrongdoing (the “*involvement*” test) (see **Ashworth Hospital Authority v. MGN Ltd** [2002] 1WLR 2033). In its application, the Bank argued that the trust companies had become

involved in the wrongdoing “*by offering corporate services to [the companies]*”.

### **Corporate Services**

The offering of corporate services including the incorporation and administration of BVI companies is, of course, the day-to-day business of BVI trust companies (and indeed of the corporate services companies affiliated with many offshore law firms). A ruling that such day-to-day activities could constitute “*involvement in [the] wrongdoing*” of any of the companies administered, for **Norwich Pharmacal** purposes would clearly have severe implications for all those offering registered agent services in the BVI. As Bannister J put it, “*A claimant had only to allege that he had been wronged by a company for him to be entitled as of right to obtain the widest disclosure from its registered agent*”.

The wrongdoing alleged in this case was the knowing receipt and onward transmission of money stolen from the Bank. Although Bannister J acknowledged that there may be circumstances where the incorporation of companies and/or provision of registered agent services might reach the necessary threshold of involvement at the level at which he had set it (which could be, for example, where the incorporation agent knew or had reason to believe that a company had been purchased or was being incorporated in order to be used as a vehicle for a particular fraud), it will surely be a rare case in which this threshold is reached. Bannister J found the present application, not to be one of those cases.

Again, the Court of Appeal disagreed, and in doing so appears to have set the threshold rather lower than Bannister J. Indeed, as it stands, it may instead be the “*rare*” case in which disclosure will not be ordered against a registered agent whose services have been used by others to create and maintain corporate vehicles implicated in fraud. As the Court of Appeal found, registered agents and corporate services providers must now “*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*”.

In overturning Bannister J’s ruling, the Court of Appeal has ensured that **Norwich Pharmacal** relief remains not only a powerful tool for claimants, but also an accessible one which is of particular importance in the BVI, given the absence of any pre-action disclosure provisions in the applicable Civil Procedure Rules.

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