IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 297 OF 2022 (IKJ)

IN THE MATTER OF AN APPLICATION FOR NORWICH PHARMACAL RELIEF

BETWEEN:

NORTHEAST SECURITIES CO., LTD.

Plaintiff

-v-

(1) TRICOR SERVICES (CAYMAN ISLANDS) LIMITED;

-and-

(2) INTERNATIONAL CORPORATION SERVICES LTD

Defendants

Appearances:

Ms Katie Pearson of Claritas Legal Limited for the Plaintiff

Mr Paul Smith and Ms Sarah Sussman of Harneys for China Hydrogen Energy Limited ("CHEL")

Mr Denis Olarou and Mr Jason Mbakwe of Carey Olsen for the 1st Defendant

Mr Bhavesh Patel of Travers Thorp Alberga for the 2nd Defendant

Before: The Hon. Justice Kawaley

Heard: In Chambers

Date of hearing: 16 March 2023

Draft Judgment circulated: 23 March 2023

Judgment Delivered: 3 April 2023

HEADNOTE

Inter partes application for Norwich Pharmacal Order-governing principles-suspicion that Caymanian companies beneficially owned by foreign judgment creditor-adequacy of evidence

Introductory

1. The Originating Summons herein was filed on 9 December 2023. The following summary of the relief sought and the procedural history of the current proceedings is helpfully set out in the Plaintiff's Skeleton Argument:

> "*5. The Plaintiff seeks disclosure from both Defendants pursuant to the jurisdiction set out in Norwich Pharmacal Co v Customs and Excise Commissioners [1974] 3 WLR 164. The Plaintiff is a judgment creditor of Wenbin Que (Que). It seeks disclosure of the Defendants' records relating to China Hydrogen Energy Limited (CHEL) and Guo Ao Mining Investment International Limited (Cayman Islands) (GAMIIL), two Cayman companies which it believes may be beneficially owned by Que. The First Defendant (D1) provides registered office services to CHEL, and the Second Defendant (D2) to GAMIIL.*
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> *6. These proceedings were served on both Defendants on 13 December 2022.*
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> *7. The Originating Summons was originally listed to be heard on 20 January 2023. After receiving correspondence from Harneys acting on behalf of CHEL from 9 January 2023 onwards, the Plaintiff agreed that the hearing should be adjourned to 16 March 2023, to allow CHEL an opportunity to put in evidence.*"

2. The Plaintiff obtained a judgment against a Chinese former billionaire Mr Wenbin Que (the "Judgment Debtor") on 16 November 2018 based on a loan which was partially secured by the

pledge of shares (the "Judgment"). On 23 August 2021, the Court in Jilin Province in the People's Republic of China (PRC) granted an Enforcement Judgment in favour of the Plaintiff. After an attempted auction failed, pursuant to a later enforcement Ruling the shares in Hengkang Medical Group Limited ("Hengkang Medical") were transferred to it in partial satisfaction of the judgment debt leaving RMB 294,836,133.74 (US$43,550,506.04) plus interest outstanding ("the Judgment Debt"). The Plaintiff is currently enforcing its Judgment in the United States. Its New York lawyers DGW Kramer LLP identified CHEL and GAMIIL as potential asset recovery targets in the Cayman Islands.

3. Counsel was instructed to appear for CHEL to positively oppose the Originating Summons, with the Defendants, registered office service providers, adopting a neutral position as is the custom in matters such as these.

Governing legal principles

4. In her Skeleton Argument, Ms Pearson submitted as follows:

> "*27. The leading case in the Cayman Islands on the Norwich Pharmacal jurisdiction is the decision of the Cayman Islands Court of Appeal dated 3 May 2021 in Essar Global Fund Limited and Essar Capital Limited v Arcelormittal USA LLC (Arcelormittal). As stated at paragraphs 15-16 of that judgment:*
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> *'15. The Norwich Pharmacal jurisdiction takes its name from Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 13345. The underlying complaint in that case was of patent infringement by illicit importation of infringing articles; but Norwich Pharmacal, the patent holder and intending plaintiff, did not know the identity of the importers. That information was, however, available to the Commissioners, and an order was sought for disclosure of the relevant names and addresses. An allegation that the Commissioners were themselves liable for infringement by allowing the articles to be imported was abandoned, so that the action was solely one for discovery. In a well-known passage, Lord Reid said this (at p175 B-C):*
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> *'[The authorities] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts 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 by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration'.*
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> *16. It is now well established that the requirements for the grant of a NPO are as follows:*

'(i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;

(ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and

(iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued": Mitsui & Co Ltd v Nexen Petroleum Ltd [2005] 3 All ER 511 at [21], Lightman J.'

28. As set out below, all three tests are clearly met in this case." [Emphasis added]

5. The wrongdoing alleged was wilful evasion of the Plaintiff's Judgment. In oral argument, Ms Pearson commended the following test that had to be met to establish this limb of the relief sought. In *Arcelormittal*, Martin JA (after describing the evidence of wilful evasion relied upon) held as follows:

"*42…These matters were not then explained away either by ESL or by the appellants. Taken together, they were in my view adequate to raise a good arguable case, which did not depend merely on AMUSA's suspicions, that ESL's failure to take steps to satisfy the Award was attributable to deliberate evasion and not an innocent inability to pay.*" [Emphasis added]

6. Mr Smith did not contest the applicability of these general principles. However, in CHEL's Skeleton Argument, the following additional helpful judicial guidance was also set out. As regards the approach to what constituted 'wrongdoing':

"*36. The court in…NML Capital v Chapman Freeborn Holdings Ltd [2013] EWCA Civ 589)…confirmed that care must be taken to analyse precisely what constitutes the wrongdoing in question and cautioned against a 'jurisdiction of absurd width':*

'54. I have considered the NML Capital decision. As to the element of participation/facilitation for a Norwich Pharmacal order, and whilst recognising the need for flexibility in granting the relief, Tomlinson LJ held (in the section of his judgment that precedes that quoted in Documentary Evidence):

…

[26] It follows that it is important to analyse with some care in what precisely lies the alleged wrongdoing. There is nothing inherently wrong in chartering an aircraft, unless it be said that any trading by a judgment debtor which involves using his assets for that purpose rather than satisfying a judgment debt is in itself wrongdoing. However I reject that proposition. It would lead to a jurisdiction of absurd width. It is no answer to that objection that the exercise of the jurisdiction would be subject to discretionary considerations. It would be absurd and exorbitant if parties were exposed to the risk of having to defend applications for discovery on the basis of no more than having traded with a person who turns out to have been at the relevant time a judgment debtor. It would encourage speculative litigation.""

7. As regards necessity:

"*22 In Discover Investment Company v Vietnam Holding Asset Management Ltd & Another [2018 (2) CILR 424], Justice Kawaley made the following observations as to 'necessity':*

'17. In summary, whether an applicant has satisfied the necessity condition for obtaining Norwich Pharmacal relief is a fact-sensitive inquiry which requires consideration of both (a) whether any relief at all is required and, if so, (b) what scope of relief is proportionate in all the circumstances of each case.

....

26. ....<u> In my judgment the question of whether or not the Order is "necessary" in general terms must properly be considered by reference to the predominant purpose for which it is sought</u>...

...

40. Where it is possible to demonstrate that no other means of obtaining the information exist at all, the necessity bar will be easily met. Where it is possible to demonstrate that, although other means theoretically exist, the relevant means is not in reality available to the applicant, the bar will be set marginally higher. Where other means of accessing the information both exist and are available but are said to be not straightforward the necessity bar will likely be set marginally higher still... "" [Emphasis added]

8. As regards the requirement that the defendant be "mixed up" in the wrongdoing:

> "*35 This requirement was addressed in the judgment of Lord Woolf in Ashworth Hospital Authority v MGN Ltd, [2002] 1 WLR 2033 at [35], recently cited in Stephanie Rebecca Hayden v Associated Newspapers Ltd [2022] EWHC 2693 (KB) at [50]:*
>
> *'Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement (the reference to participation can be dispensed with because it adds nothing to the requirement of involvement) is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion.* '" [Emphasis added]

The Plaintiff's evidential case

9. The Plaintiff primarily relied upon the First and Second Affirmations of Rongping Wu dated 9 December 2022 and 8 February 2023, one of its New York lawyers. By way of introduction, he avers that the Judgment Debtor's net worth was US$1.5 billion as of 6 March 2018, but that he dropped off the Forbes Billionaires' list in 2019. He was at one time the controlling shareholder of Hengkang Medical, and is believed to be still a shareholder of this company. The Judgment Debtor also has links to Hengkang Development Company, a guarantor for the loan made by the Plaintiff in 2016 which fell due (after an extension) in January 2018. His evidence next establishes the existence of the Judgment and the Judgment Debt, but the affiant also avers that the Judgment Debtor is "*has a history of non payment of his creditors, and of sanction by the Chinese securities regulators*" (First Affirmation, paragraph 15). Searches are said to show that the Judgment Debtor has been placed on the 'Dishonest Persons List' 19 times. Being placed on this list enables the Chinese courts to make Orders on Restriction of Spending, and such an order made against the Judgment Debtor by the Intermediate People's Court of Chengdu City on 28 April 2022 (in relation to another judgment) is exhibited. This Order was made because the Judgment Debtor had "*failed to fulfil* [his] *payment obligations…within the period specified in the enforcement notice*".

10. The First Affirmation of Shi Zhao, a partner with the Beijing office of JunZeJun Law Offices, dated 9 January 2023 explains the Chinese Supreme People's Court's '*List of Dishonest Parties Subject to Enforcement*'. Of the six listed grounds for placing a person on the list, only one (violating a consumption restriction order) does not explicitly or implicitly relate to acts of deliberate evasion of debt obligations. It is averred (at paragraph 10):

> "*It is generally considered a severe credit crisis for a judgment debtor to be placed on this national list, even once or twice, and it is quite unusual to see such a great number of listings for a single judgment debtor.*"

11. Mr Smith submitted that this evidence amounted to no more than evidence of propensity rather than actual evidence of wilful evasion. The First Wu Affirmation also identified as, suspicious a 29 November 2019 loan by CHEL in the amount of AUD 47.8 million to an Australian mining company, Alita, which was in administration. Although CHEL initially entered into an agreement pursuant to which its subsidiary would take over the Alita shares, this did not occur and in 2020 the debt was seemingly transferred to Austroid, which was described as having the Judgment Debtor's son Mike Que as its managing director. Mention is also made of the fact that Hengkang Development Company, controlled by the Judgment Debtor, was involved in shipping products to Antigua and Barbuda. The Antigua connection is said to be suspicious because the sole shareholder of CHEL, incorporated on 2 January 2018 (less than a month after a regulatory sanction imposed on the Judgment Debtor in connection with Hengkang Medical was upheld on appeal), is an Antiguan. When the Judgment Debtor's son became a CHEL director, he was only 26 years old.

12. In his Affidavit dated 30 January 2023 on behalf of CHEL, Mike Que explains that GAMIIL was sold to an unrelated third party on 7 September 2022. He avers:

> "*13…confirmation has already been provided to the Plaintiff that Mr Wenbin Que is not a director, a shareholder, or the ultimate beneficial owner of CHEL. My father has never held any such position in relation to CHEL…*"

13. Mr Smith submitted that the Court could not go behind this positive denial that the Judgment Debtor was the ultimate beneficial owner. Ms Pearson countered that what was not said was significant. No clarification was given as to whether the legal owner was also the beneficial owner, nor did the Judgment Debtor's son give any indication that he had independent sources of wealth. Mike Que also denied that his father had any connection with Austroid, explaining that CHEL transferred its

interest in Alita to its US affiliate because the fact that CHEL's name included "China" raised regulatory concerns in Australia. This was on the face of it a straightforward response to the Plaintiff's Alita suspicions although, again, who actually was the beneficial owner of Austroid (and indeed what consideration CHEL obtained for the transfer) was left unexplained.

14. The Second Wu Affirmation avers that the California Court would have no jurisdiction to order the production of the Cayman Islands documents sought in the present proceedings. It also exhibits a 14 October 2021 Jilin Court Enforcement Ruling which required the Judgment Debtor to report property subject to enforcement ruling which not only required the Hengkang Medical shares to be transferred to the Plaintiff, but also recorded that:

(a) the court's own searches did not find any bank deposits or securities or vehicles registered in the name of the Judgment Debtor (and other debtors);

(b) no further enforcement steps could be taken until further assets could be found and the Court was of the opinion that the Judgment Debtor (and other debtors) lacked the means to pay.

Findings: Merits of Norwich Pharmacal application

Wrongdoing

15. The Plaintiff's case that it is arguable that wilful evasion of the Judgment Debt has occurred is not a clear and straightforward one. However, viewing the circumstantial case in a worldly-wise way, it is ultimately possible to confidently find that an arguable case of wilful evasion has been made out. The main strands of case may be summarised as follows:

(a) the Judgment Debtor was a substantial businessman in global terms although he faced regulatory challenges and an imminent decline in his financial fortunes when the Plaintiff's debt fell due in January 2018;

(b) CHEL was incorporated in the same month that the Plaintiff's debt fell due and only weeks after an appeal against a regulatory sanction imposed on the Judgment Debtor by the Chinese Securities and Regulatory Commission on 10 August 2017 was refused. This is consistent with this company being used as a debt evasion vehicle;

(c) CHEL used to indirectly own 90% of GAMIIL, another Cayman Islands company;

(d) GAMIIL was sold around the same time that the Plaintiff commenced enforcement proceedings against the Judgment Debtor in California;

(e) the Judgment Debtor has been placed on the '*List of Dishonest Parties Subject to Enforcement*' in China so many times that it is inherently probable that he is generally wilfully evading his debts, as well as wilfully evading the Judgment Debt in particular;

(f) although the Jilin Court concluded that the Judgment Debtor lacked the means to pay based on a lack of identifiable assets, that conclusion was reached within a legal framework where it was for the Court to initiate enforcement action, not the judgment creditor. The inability of the Chinese courts (at home) and the Plaintiff (abroad) to identify any readily identifiable assets in the name of a former billionaire is in itself strongly indicative of wilful debt evasion, absent a plausible basis for believing that either (1) the entirety of the Judgment Debtor's wealth has literally disappeared, or (2) the Judgment Debtor had a historic practice of indirect ownership (a possibility which is undermined by his Forbes List net worth assessment in of $1.5 billion in March 2018).

16. On balance, I am satisfied that the Plaintiff has established a good arguable case of wrongdoing, namely deliberate acts of debt evasion on the part of the Judgment Debtor, a case which does not merely depend on the Plaintiff's suspicions. However, I will consider separately the more difficult question of whether it is likely that the Defendants will have the information sought on the basis that CHEL and/or GAMIIL were arguably used as part of those debt evasion acts.

Necessity

17. The Plaintiff's evidence clearly establishes the necessity requirement. There is no basis for finding that that the corporate records sought in relation to Cayman Islands companies could in any practical sense be obtained elsewhere. Moreover, in the judgment enforcement context, a creditor has greater latitude to seek its assets wherever they can be found and the countervailing policy considerations (such as the availability of post-action discovery) do not generally arise.

Mixed-up in wrongdoing

18. The third limb of the Norwich Pharmacal jurisdiction was summarised above as consisting of the following two elements:

> "*the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued*" *(Mitsui & Co Ltd v Nexen Petroleum Ltd* [2005] 3 All ER 511 at [21], Lightman J).

19. This was the most marginal limb of the Plaintiff's case, but only in a limited sense because of the peculiar nature of the evidential case. The Defendants as registered office providers were clearly likely to have innocently facilitated the alleged wrongdoing and were clearly likely to be able to provide the information sought, but only assuming that it was at least arguable that CHEL and GAMIIL were beneficially owned or controlled by the Judgment Debtor. In previous *Norwich Pharmacal* applications I have dealt with, the link between the judgment debtor or potential defendant and the local service companies from which information is sought has been uncontroversial. No anxiety has arisen that in granting *Norwich Pharmacal* relief confidential information might be obtained from parties unconnected with the judgment debtor, or potential defendant, against whom an arguable case of wrongdoing has been established.

20. No authority shedding light on how the issue of undisclosed beneficial ownership should be evidentially evaluated was placed before the Court. However, Mr Patel, whose client (the 2nd Defendant) adopted a neutral stance, astutely appreciated my need for guidance on this unusual point and suggested assistance might be found in the Privy Council's decision in *Broad Idea International Ltd.-v-Convoy Collateral Ltd.* [2021] UKPC 24 at paragraphs 106-108. The relevant passages appear in Lord Leggatt's judgment with which the majority of the Board agree, but they articulate principles which do not appear to form part of the dissent:

> "*106. The judge said that he was satisfied that there was a good arguable case that Broad Idea is a "money-box" of Dr Cho. That is not a legal term of art but was used by Sir Bernard Rix in Lakatamia Shipping Co Ltd v Su [2014] EWCA Civ 636; [2015] 1 WLR 291, para 42, in a passage quoted by the judge, to refer to a company which holds assets to which a defendant is beneficially entitled. It is not entirely clear whether the judge considered there to be a good arguable case that the shares held by Broad Idea in Town*

Health were beneficially owned by Dr Cho alone or by Dr Cho and Mr Choi in proportion to their shareholdings in Broad Idea (compare paras 36 and 38 of his judgment), though the latter seems more probable.

107. On appeal, as discussed above, the EC Court of Appeal set aside the injunction on the ground that the BVI court had no jurisdiction to grant it. Having reached that conclusion, Pereira CJ (with whose judgment Webster JA agreed) nevertheless went on "for completeness" to consider whether, if the BVI court did have such jurisdiction, it had been properly exercised on the facts of the case. (Blenman JA thought it unnecessary to address this question.) Pereira CJ concluded that there was no proper evidence to support the judge's finding that there was a good arguable case that the shares in Town Health held by Broad Idea (or any of them) are beneficially owned by Dr Cho.

108. In the Board's view, the conclusion of the Chief Justice on this point is unimpeachable. In his reasons for granting the injunction, the judge did not refer to any evidence capable of supporting an inference that Broad Idea does not beneficially own the shares in Town Health registered in its name. Nor did CCL identify any such evidence on this appeal. The high point of its case appeared to be the fact that Mr Choi had referred in affidavits filed on behalf of Broad Idea to 'my investment' in Town Health. However, Mr Choi explained that the way in which his investment was made was by acquiring Broad Idea with Dr Cho for the purpose of making investments in Town Health. There is nothing in his evidence which suggests that the corporate structure put in place was not intended to reflect the reality of the chain of legal and beneficial ownership. The fact that - as it was put in CCL's written case - Broad Idea is purely a holding company and its shareholding in Town Health 'provides the source of value for' the shares in Broad Idea is not a reason to regard Town Health as a mere nominee; rather, the reverse. No reasonable basis has been shown for asserting that Dr Cho had any direct beneficial interest in any of the shares acquired by Broad Idea." [Emphasis added]

21. *Broad Idea* concerned the jurisdiction to grant a freezing order, a jurisdiction which is analogous to the *Norwich Pharmacal* jurisdiction. The courts are, where appropriate, willing to look behind formal corporate ownership arrangements where there are reasons to believe that such arrangements are being used as a shield to defeat judgment enforcement. A balance must be struck between the need to (a) respect *prima facie* legal arrangements and (b) prevent corporate structures

from being used as vehicles for wrongdoing. How that balance should be struck depends on factual and legal matrices of each case. This helpful judicial guidance demonstrates the importance of identifying clear evidential grounds for arriving at an interlocutory finding that shares are beneficially owned by a party other than the registered shareholder.

22. The essence of the Plaintiff's evidence on this issue amounts to this:

(a) CHEL's beneficial ownership is unclear, in that CHEL has merely denied that the Judgment Debtor is the beneficial owner while studiously omitting to say who is;

(b) although CHEL is incorporated in the Cayman Islands, its registered shareholder (a Mr Christian) is a national or resident of Antigua and Barbuda, a country with which the Judgment Debtor has business links through a company he clearly has an ownership interest in;

(c) the Judgment Debtor's son has been a director of CHEL since he was 26 years of age, and how he came to occupy this role is unexplained. In the absence of an explanation as to his having acquired independent wealth, it is reasonable to infer that CHEL is his father's "money box" ;

(d) as already noted above in relation to wrongdoing, CHEL was incorporated in the same month that the Plaintiff's debt fell due and only weeks after an appeal against a regulatory sanction imposed by the Chinese Securities and Regulatory Commission on 10 August 2017 on the Judgment Debtor was refused. This is consistent with this company being used as a debt evasion vehicle by a former billionaire Judgment Debtor who appears to legally own no assets capable of responding to enforcement measures and to have left many unpaid debtors in China frustrated (in addition to the Plaintiff); and

(e) the cumulative weight of all of the above factors provides a reasonable basis for asserting that the Judgment Debtor has a direct beneficial interest in the two Cayman Islands companies.

23. In the course of the hearing I expressed the provisional view that if the Plaintiff made out a case for relief, it would probably only do so narrowly, succeeding "by the skin of its teeth". I find that the Plaintiff's evidence does indeed just meet the requisite threshold for supporting a good arguable case that CHEL and GAMIIL are beneficially owned (or controlled) by the Judgment Debtor.

Relief

24. In the course of the hearing I also expressed the provisional view that if the Plaintiff succeeded on the basis of a marginal case, the only relief which seemed likely to be proportionate was that proposed as a fall-back position in CHEL's Skeleton Argument:

> "*50. To the extent that any further information is ordered to be disclosed to the Plaintiff (beyond the sworn evidence already provided by CHEL), that information should be limited to the provision by Tricor of CHEL's register of shareholders, and details of its ultimate beneficial owner, from CHEL's inception to date. If the Court considers it necessary to go further, Tricor might also be ordered to disclose whether it has had any correspondence with or involving WQ in relation to CHEL's establishment or subsequent business affairs (such disclosure would demonstrate that it has not).*" [Emphasis added]

25. In my judgment, the Plaintiff has demonstrated an entitlement to a Norwich Pharmacal Order against both Defendants limited to the production of register of shareholders and details of ultimate beneficial owners, from inception to date. Its application for further information should be adjourned with liberty to apply. My provisional view is that the costs of the present application should also be adjourned. I express no view at this stage as to how dispositive the official beneficial ownership records will be. However, I shall hear counsel if required as to the terms of the Order and as to costs.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT