NORWICH PHARMACAL RELIEF IN AID OF FOREIGN PROCEEDINGS

Seminar for the Commercial Fraud Lawyers Association

Tuesday 27th January 2015

by

Jasbir Dhillon QC

Brick Court Chambers

1. Since the House of Lords revived the historic *Norwich Pharmacal* remedy in 1974, the courts have extended the ambit of the *Norwich Pharmacal* jurisdiction in myriad directions over the last twenty years. One of the ways in which the Court has extended the *Norwich Pharmacal* jurisdiction is to permit it to be exercised in aid of foreign proceedings. This occurred most recently in the human rights in the Binyam Mohammed case: ***R. (Mohamed) v. Sec. of State for Foreign and Commonwealth Affairs (No.1)***.[1]

2. The ability to use the Norwich Pharmacal remedy in aid of foreign proceedings is extremely useful in the battle against international commercial fraud. However, in another recent human rights case, the English Court considered whether the existence of the *Norwich Pharmacal* remedy in aid of foreign proceedings was compatible with the criminal and civil statutory regimes governing the provision of evidence for foreign proceedings.

3. The facts in ***R. (on the application of Omar) v. Sec. of State for Foreign and Commonwealth Affairs***[2] can be summarised as follows. In July 2010 bombs were exploded in Uganda which resulted in the deaths of 76 people. Later that month the applicants were detained in Kenya, transferred to Uganda and were charged in Uganda with murder. The applicants alleged that they were tortured at the hands of intelligence agents of Kenya, Tanzania, Uganda, the USA and the UK. Thereafter, the applicants launched proceedings in Uganda contending that the proceedings against them were unlawful on the ground that their rendition from Kenya to Uganda was illegal and that they had been tortured. In the English Court the applicants sought *Norwich Pharmacal* orders to obtain evidence of complicity by UK and other intelligence agencies in the alleged unlawful rendition and ill-treatment for the purposes of the criminal and judicial review proceedings in Uganda.

4. However, in ***Omar*** the applicants ran into an obstacle which had not been identified in any other case, or indeed the Secretary of State at the outset. However, in response to a

1 [2009] 1 W.L.R. 2579.
2 [2012] EWHC 1737 (Admin) and [2014] Q.B. 112 (C.A.).

question from the Court, an issue arose as to whether the Court could order the provision of evidence for proceedings in an overseas court other than through the relevant statutory regime. Both the Administrative Court and the Court of Appeal recognised that although there was authority supporting the use of *Norwich Pharmacal* relief to provide information to enable a defendant to be identified for that purpose of suing him in foreign proceedings, but the effect of an order in the present case, which was a request for evidence, would be to circumvent the statutory evidence-gathering scheme under the Crime (International Co-operation) Act 2003, or, in civil cases, the Evidence (Proceedings in Other Jurisdictions) Act 1975. The Court held, therefore, that there was no jurisdiction to make an order for evidence for use abroad because that would circumvent the statutory scheme.[3]

5. Prior to ***Omar*** there was a body of authority in England and in Commonwealth jurisdictions where *Norwich Pharmacal* orders had been made in aid of proceedings abroad but where the exclusive statutory regime point had not been taken. The Court of Appeal in ***Smith Kline Ltd v. Global Pharmaceuticals Ltd***[4] held that *Norwich Pharmacal* proceedings could be brought to obtain information as to the identity of persons and other details about them so that proceedings can be brought in a foreign state; this was said by the Divisional Court in ***Omar*** to be the practice in intellectual property cases and such orders are included with freezing or Search Orders.

6. Section 1 I of The Evidence (Proceedings In Other Jurisdictions) Act 1975 provides that there is jurisdiction to make an Order:

"Where an application is made to the High Court, the Court of Session or the High Court of Justice in Northern Ireland for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction and the court is satisfied –

...(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated."

3 See ***Re Pan American World Airways*** [1992] Q.B. 854 (Lord Donaldson M.R).

4 [1986] R.P.C. 394.

7. The effect of ***Omar***[5] is that if the application fell within the ambit of section 1 of the Act, the English court cannot circumvent section 1 by making a *Norwich Pharmacal* order. So where the *Norwich Pharmacal* application is for the purpose of obtaining evidence for foreign proceedings, this is a limiting factor.

8. The first question, therefore, is whether the application is to provide information for proceedings which *have been instituted or are contemplated* within a foreign state. If so, then the English court cannot make a *Norwich Pharmacal* order. In ***Omar*** a decision had been taken by the applicant not to ask the Ugandan court to make a request to the English court. The question arises, therefore, whether the English Court has jurisdiction to make a *Norwich Pharmacal* order when the evidence shows that the foreign court's rules do not give it power to make a request to the English court. If the foreign court has power to make a request but has declined to do so, or would be likely to decline to do so, it seems that the English court would, in the light of ***Omar***, decline to make a *Norwich Pharmacal* order.

9. It might be possible to distinguish ***Smith Kline*** on the basis that matters were at too preliminary a stage for it to be possible to say that proceedings in the foreign court were "*contemplated*", and thus section 1 of the Act did not apply. If the defendant has not been identified, then one can see that might be a tenable distinction. However, in citing ***Manufacturers Life Insurance Company v. Harvest Hero***[6] and ***Secilpar SL v. Fiduciary Trust***[7] the Divisional Court in ***Omar*** sought to distinguish a request for "*information*" (not within the statutory scheme) from "*evidence*". Sir John Thomas P said that the distinction between evidence and information in these decisions was not entirely clear but recognised that these decisions showed that "information" could be the subject of an order. This did not find favour, however, in the Court of Appeal. Maurice Kay LJ said[8] the distinction was "elusive, illusory or ephemeral": "*today's information often ripens into tomorrow's evidence*." So the question seems to be simply: is the application covered by the statutory scheme and (arguably) can the foreign court make a request to the English Court.

---

5 ***Omar*** was a case under the Crime (International Co-operation) Act 2003. However, there is no suggestion by the Court that different principles applied to the Evidence (Proceedings In Other Jurisdictions) Act 1975 in civil cases.

6 [2002] H.K.C.A. 430

7 [2003-4] Gib. L.R.

8 ***Omar***, *supra*, [2014] Q.B. 112, at [12]

10. In circumstances where there have been a number of cases where the English court has made an order in the past in aid of foreign proceedings, and the Court of Appeal of Hong Kong and Gibraltar have taken similar views, this is a significant limiting factor.

Brick Court Chambers

7-8 Essex Street

London WC2R 3LD

Email:jasbir.dhillon@brickcourt.co.uk