



NORWICH PHARMACAL RELIEF AGAINST FOREIGN DEFENDANTS: STILL UP IN THE AIR?

Authored by: Sarah Tresman – Twenty Essex

Lawyers in common law jurisdictions, and especially those specialising in fraud and asset recovery, will be familiar with Norwich Pharmacal relief as a means of obtaining discovery from a third party mixed up with another's wrongdoing. As frauds diversify and become more elaborate, assets can end up in multiple jurisdictions; and in recent years, registered agents in offshore jurisdictions have become attractive targets for Norwich Pharmacal relief on the basis of the information they hold regarding beneficial ownership. So, what happens when the underlying proceedings are subject to the jurisdiction of the English courts, but a Norwich Pharmacal-respondent is out of the jurisdiction? Is it possible to require a foreign entity to provide information by an English Norwich Pharmacal order and to serve that order out of the jurisdiction? A definitive answer has not been rendered by the courts.

AA v Persons Unknown [2019] EWHC 3556 (Comm)

In *AA v Persons Unknown*, following a ransomware attack, the claimant-insurer applied for a Bankers Trust and

or Norwich Pharmacal order against two BVI companies. For current purposes, Bankers Trust relief may be considered an extension of the Norwich Pharmacal jurisdiction or an example of how it may be exercised against a bank (but it may alternatively be considered an equitable remedy distinct from the Norwich Pharmacal jurisdiction). On hearing the application, the English High Court observed that a “*potential complication*” was that such an order would be requiring an institution out of the jurisdiction to provide information pursuant to an order of the English court [44]. Bryan J. asked:

“whether there is jurisdiction in this court to do that and to serve such an order out of the jurisdiction”?

The Judge noted that the position had not be “*definitively determined*” [45].

The claimants had relied on *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm), where Bankers Trust relief was successfully sought against foreign banks. As to the question of service out, the Judge said that he was satisfied that

“in relation to those banks which are situate outside the EU and outside this jurisdiction, that is covered by the fact that they are a necessary and proper party to the claims which have been brought against the perpetrator defendants; and in respect of service within the EU that Article 7.2 of the recast Brussels Regulation will apply...” [10].

The case did not refer to Norwich Pharmacal relief as the application was made pursuant to the court's Bankers Trust jurisdiction and/or CPR r. 25.1(1)(g). Subsequently, in *Azra Sabados v Facebook Ireland* [2018] EWHC 2369, the Court concluded—not without difficulty—that there was an arguable case that the claimant could serve a Norwich Pharmacal order out of the jurisdiction under Article 7(2) [25].



In *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC* [2017] 1 WLR 810, Teare J. took a different view of the availability of the “*necessary or proper party*” gateway in Practice Direction 6B §3.1(3). In that case, the Judge held that it was not available as the claim form served on the UAE bank raised a

“quite different cause of action, namely, that which establishes a basis for Norwich Pharmacal relief” [19].

The bank was not, therefore, a necessary or proper party to the action alleging fraud. The Judge also held that the Norwich Pharmacal/Bankers Trust relief was not a claim for an interim remedy for the purposes of §3.1(5) of Practice Direction 6B (that provides that a claimant may serve a claim form out of the jurisdiction with the permission of the court under CPR r. 6.36 where a claim is made for an interim remedy under s.25(1) of the Civil Jurisdiction and Judgments Act 1982) and said that the Norwich Pharmacal order (which the Judge said was an injunction) did not require the bank to do anything *within the jurisdiction* for the purposes of §3.1(2) of Practice Direction 6B. The application to set aside the order for service out of the jurisdiction was ultimately successful.

AA v Persons Unknown: the outcome

In light of the complications identified by the Judge, the claimant’s application for Bankers Trust/Norwich Pharmacal relief in *AA v Persons Unknown* was adjourned. However, the claimant did obtain a disclosure order against the BVI companies, ancillary to a proprietary injunction, that required those companies to identify the alleged wrongdoers [81]. An ancillary order, if injunctive relief is available, may therefore provide a practical solution to the jurisdictional issue at hand.

It is worth noting that in neither *AA v Persons Unknown* nor *AB Bank* did the Court have to consider an EU-domiciled Norwich Pharmacal respondent. In *CMOC*, in respect of service within the EU, the Judge considered Article 7(2) of the recast Brussels Regulation would be available, which provides that in matters relating to tort, a person may be sued in the courts for the place where the harmful event occurred or may occur (the judgment had earlier referred to “[t]he immediate loss to the claimant is the deprivation of funds which were otherwise sitting in its bank account with Bank of China in London”) and the same view appears to have been taken in *Azra Sabados*. However, in neither case was there *inter partes* argument and whether Article 7(2) is available will warrant examination in the future.

Comment

This short survey of the recent case law is illustrative of the issues that may arise where a foreign entity is the respondent to a Norwich Pharmacal/Banker’s Trust application. When deciding whether to apply for such relief in support of domestic proceedings, it will be important to bear in mind whether discovery could instead be obtained ancillary to a freezing or proprietary injunction or pursuant to CPR r. 25.1(1)(g), or indeed whether the foreign entity has a branch within the jurisdiction on which service may be effected.

L