COLLAS CRILL

Discover v VNHAM and SAMC

NOVEMBER 2018

Norwich Pharmacal relief and the Confidential Information Disclosure Law, 2016

In a detailed and thorough judgment, The Honourable Justice Kawaley reviews the governing principles of the Norwich Pharmacal[1] jurisdiction and in particular, the relevance of the purpose for which relief is sought to the test of necessity. The judgment also provides welcomed guidance on the relevance of the Confidential Information Disclosure Law (**CIDL**) and whether directions under section 4 are mandatory or directory, when Norwich Pharmacal relief is granted.

Background

The Applicant, Discover Investment Company (**Discover**) is an open-ended investment fund domiciled in the Cayman Islands. Discover holds investments in Vietnam Holding Limited (**VHL**), of which the First Respondent, Vietnam Holding Asset Management Limited (**VNHAM**), was at all material times, Investment Manager. Discover also holds investments in Vietnam Equity Holding Limited (**VEH**) of which the Second Respondent, Saigon Asset Management Limited (**SAMC**) is Investment Manager.

Discover asserts its belief that one of its former directors, Marcus Winkler (**MW**) earned "Secret Profits" pursuant to "Secret Agreements" that he indirectly entered into with the Respondents, in breach of his fiduciary duties to Discover.

Norwich Pharmacal Jurisdiction - Discover's Application

Discover applied for disclosure of information that it believed the Respondents possessed relating to the "Secret Agreements" and the payment of "Secret Profits".

The Court's jurisdiction to grant Norwich Pharmacal relief derives from section 11 of the Grand Court Law. It was noted that the English law approach to this jurisdiction is well recognized under Cayman law, as endorsed by the Chief Justice in *Braga v Equity Trust Company (Cayman) Limited.*[2] At paragraph 10 of the Judgment, Kawaley J states that *Braga* demonstrates how the Norwich Pharmacal principles have developed incrementally on a case by case basis, but stresses that care must be taken when considering the authorities to distinguish statements of pure principle from statements of what are effectively statements of mixed fact and law.

Subject to the above caveat and having summarised the general, guiding principles from the authorities, it was determined that the legal pre-conditions for granting relief in this matter were that the Applicant must:

1. make out an arguable case of wrongdoing;

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

2. demonstrate that the disclosure sought is "necessary" in the requisite sense to enable it to seek legitimate redress for the wrongdoing; and
3. demonstrate that the Respondents are likely to have relevant information acquired by them in circumstances where their involvement in the suspected wrongdoing make them more than mere witnesses.

The Respondents did not positively oppose the application, but rather raised principled objections so as to ensure that they did not consent to an Order which ought not properly be made. This was particularly important in circumstances where the Respondents were subject to obligations of strict confidentiality, pursuant to the agreements that they had entered into with MW and / or associated entities, that were sought by Discover.

There was a large measure of agreement between the parties as to the first and third pre-conditions being met. As to the second pre-condition, Kawaley J stated that "*The necessity requirement for obtaining Norwich Pharmacal relief requires firstly identifying the purpose for which relief is sought, secondly determining whether the form of relief sought is necessary in a general sense, and thirdly establishing that the scope of relief sought is necessary in terms of its scope and / or proportionality*".[3]

Another ancillary matter before the Court was whether directions were needed under CIDL before disclosure could be given.

Is relief necessary?

Kawaley J drew the distinction between the need to adopt a flexible and non-technical approach when considering whether a particular set of circumstances in general terms potentially qualifies for relief, and (assuming grounds 1 and 3 are met), the need to exercise caution when deciding whether it is, in practical terms, necessary to grant any relief in the particular circumstances of the case at all, and if so, to what extent.

As to the second pre-condition, this decision is an example of the jurisdiction developing so as to endorse the decision of the English High Court in *Various Claimants v News Group Newspapers Limited and Ors*[4] ("the phone-hacking case"), that Norwich Pharmacal relief can be granted to enable an alleged victim to investigate wrongdoing and that it was not only to be used to identify the wrongdoer or to obtain a crucial piece of information, often referred to as "*the missing piece of the jigsaw*" so as to issue proceedings. It was held that the jurisdiction can be deployed, as in the "*phone hacking case*"[5], to assist a potential victim of wrongdoing to decide whether or not there is a sound basis for bringing proceedings.

Kawaley J found that the main purpose of the application was to enable Discover to ascertain whether its suspicions of MW's wrongdoing are justified, and if so, to plead a sustainable case. The purpose of the application was not to enable Discover to properly plead a case that it has already decided to bring. Having determined that Discover's application was for a legitimate purpose, the Judge referred to Privy Council dicta which held that "*necessity*" in this context, means there must be no other "*straightforward or available, or any means of finding out*"[6].

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

It is well-established that when determining whether to exercise discretion and grant Norwich Pharmacal relief, the availability of other sources is a factor to be considered. However, placing reliance on Privy Council authority, Kawaley J applied a staggered threshold test to the second pre-condition of necessity, the relevant threshold being triggered depending on the status as to the availability of other sources and / or ease of obtaining the information from other sources.

At paragraph 40, he holds that "*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*".

Discover was said to be in the third category. The Court was satisfied, having regard to the findings of fact listed at paragraph 41, that it had been established in general terms, that relief was necessary.

Scope of relief

The Court noted that the authorities are clear that Norwich Pharmacal orders must be limited to compelling the production of essential information and should not be used as a means of obtaining broad discovery. The complaint of the Respondents that the Order that was being sought by the Applicant was too broad, was upheld by Kawaley J.

It was determined that six categories of documents or information were not necessary to enable the Applicant to determine whether or not it had a viable claim in respect of MW's suspected wrongdoing. These categories included an affidavit setting out particulars of Agreements and of any written correspondence relating thereto, documents without any temporal limitation, any written correspondence with MW / linked entities and all other records in respect of the Agreements. The Court found that the request for any correspondence relating to the Agreements did amount to "*fishing*".

The Judge provided for a substantially modified form of Order which included the provision of any written Agreements, documents evidencing payments and requests for payments made pursuant to the Agreements covering a 5 year period, together with an affidavit confirming that the documents disclosed are true copies and that they constitute a complete record of each of the two categories of documents required to be produced.

The Court therefore gave relief but in a much narrower form of Order than the Applicant had sought.

Confidential Information Disclosure Law, 2016 (CIDL or the Law)

This issue was not straightforward and was considered in the absence of any real guidance on the application of the Law to these kinds of applications.

A divergent set of positions were taken by the parties which required the Court to undertake a detailed and forensic analysis of the development of the Law's predecessor, the Confidential Relationships (Preservation)

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

Law (**CRPL**) traversing through its various iterations.

Whilst the authorities that were decided under the CRPL clearly demonstrate that an applicant for Norwich Pharmacal relief may seek directions under section 4 of CIDL, which has not materially changed since those cases were decided, they do not support the proposition that a section 4 application is invariably required today, because section 3 (which effectively sets out cases to which section 4 does not automatically apply), is now materially different.

It was held that:-

- no application for directions under section 4(2) of CIDL is obligatory in all the circumstances of the present case because Discover is entitled to produce the confidential information "*in accordance with, or pursuant to a right or duty created by any other Law or Regulation*" (the section 3(1)(j) exception); and /or
- the Court having ruled that the Respondents are obliged to produce the information sought by way of granting relief for suspected wrongdoing, they are entitled to produce the information "*in good faith and in the reasonable belief that the information [is] substantially true and disclosed evidence or wrongdoing*" (the section 3(2) exception).

As a result of these exceptions being held to apply, the Respondents would have a statutory defence to any breach of confidentiality claim brought by their principal, MW and / or associated entities.

The mandatory language in section 4(2) which suggests that directions must be sought in all cases where confidential information is to be deployed or obtained in legal proceedings must, in the wider context of the Law, be given merely directory effect. The suggestion that applications should be made under section 4(2) as a matter of course in every case involving the production of confidential documents was considered nonsensical.

By reading sections 3 and 4 in a purposive way, designed to give consistency to the provisions read as a whole and applying a meaning which does not lead to an absurd result, it was held that section 4(2) of CIDL properly construed, "*does not require in a mandatory sense that a party must apply for directions if compelled or seeking to adduce confidential material. The obligation to seek directions is only triggered in circumstances where such parties harbor doubts about their ability to adduce or produce the confidential evidence without breaching confidentiality obligations, which appear to apply*"[7].

Kawaley J analysed how the exemptions under section 3 of this Law have developed over the years through the various iterations of the CRPL leading to the CIDL, so as to reflect a public policy shift towards greater transparency. It is only where the availability of the defences created by section 3 are in doubt, may it be desirable and indeed necessary for the parties at risk of being sued for breach of confidence to seek directions under section 4(2).

Applying a purposive construction of the Law as a whole and its development over the years, Kawaley J held that "*Section 3(2) explicitly creates a defence to a breach of confidence claim where the recipient of confidential information disclose the information acting in good faith in the belief that the information constitutes evidence*

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

of, inter alia, wrongdoing. It follows that section 3(1)(j) should be construed as conferring a corresponding right on persons who are not in possession of the confidential information or subject to an express duty of confidentiality seeking to obtain it with a view to obtaining relief for, inter alia, wrongdoing".

Comment

This case encapsulates, in an insightful way, the developments of the Norwich Pharmacal jurisdiction and gives practical guidance as to the application of the general principles in Cayman.

This decision leaves very little (if any) doubt that an applicant can apply for relief if it is necessary to enable it to seek legitimate redress, which includes enabling the applicant to determine whether its suspicions of wrongdoing are well-founded, so as to justify commencing proceedings.

The 'any other or other available source' is a factor that has traditionally been taken into account when balancing all of the circumstances of the case, if and when all three pre-conditions are met. However, it appears that this factor has now been elevated and imported into the second pre-condition of "necessity", so as to stagger the necessity threshold according to the availability (or lack thereof) of other sources.

Furthermore, the case helpfully provides some much needed clarification as to CIDL and its application in the Norwich Pharmacal arena. In cases where the Court has determined that there is an arguable case of wrongdoing, so as to grant relief, it will not be necessary for an applicant or a respondent to apply for directions as the exceptions under section 3(1)(j) and 3(2) apply respectively.

As paragraph 88 of the Judgment makes clear, the CIDL point was not hotly contested, but rather was an issue on which the parties sought the Court's guidance on a new area of law that had not yet been tested in this context.

The Court noted that the case illustrated that there is room for doubt about precisely when directions under CIDL should be sought and has invited the Attorney-General to consider whether the language of section 4(2) might be refined so as to clarify the provision's true legislative intent. It will be interesting to see what (if any) changes to the Law are made in due course, as result of this decision.

Collas Crill acted for the First Respondent in this matter. Should you have any questions arising from this article or wish to instruct Collas Crill (Cayman) in relation to any dispute, please do not hesitate to contact Stephen Leontsinis, Partner and Head of Dispute Resolution.

[1] *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133

[2] [2011] (1) CILR 402

[3] Unreported Judgment, dated 5 November 2018 (paragraph 20)

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

[4] [2013] EWHC 2119 (Ch)

[5] *Various Claimants v News Group Newspapers Limited and Ors* [2013] EWHC 2119 (Ch) as cited and discussed at paragraphs 29-30 of the Judgment

[6] *The President of the State of Equatorial Guinea and Anor v The Royal Bank of Scotland International and Others* [2006] UKPC 7

[7] Unreported Judgment, 5 November 2018 (paragraph 80)

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

COLLAS CRILL

For more information please contact:



Matthew Dors

Partner | Cayman

t: +1 345 914 9631 | **e:** matthew.dors@collascrill.com

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.