

HONG KONG / JUDGMENT

A v. R1 AND ANOTHER

[2022] HKCFI 3012

COURT

Court of First Instance

DECIDED

27 September 2022

CASE / FILE NUMBER

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HCMP 1062/2022

[2022] HKCFI 3012 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO 1062 OF 2022

IN THE MATTER OF section 42 of the High Court Ordinance (Cap 4) and Order 24 rule 7A of the
Rules of the High Court (Cap 4A) and IN THE MATTER OF an application for Norwich Pharmacal
Order and ancillary orders

BETWEEN A Applicant and R1 R2 1st Respondent 2nd Respondent

Before: Deputy High Court Judge Jonathan Chang SC in Chambers (Not Open to Public) Date of
Hearing: 27 September 2022 Date of Decision: 27 September 2022

DECISION

This is the hearing of the application by A seeking Norwich Pharmacal order against two banks (R1 and R2) for provision of bank documents relating to bank account(s) that a judgment debtor (“B”) may have maintained with each of them in Hong Kong. A commenced proceedings against B in Country X, claiming that B had misappropriated A’s assets of a substantial value. This resulted in a money judgment against B. So far A has only been able to recover a small portion of the judgment sum against B’s assets. The evidence suggested B has made consistent attempts to frustrate A’s recovery of assets. Notably, B opened various bank accounts in Country Y shortly before trial of the action in Country X, and shortly after B had failed in an appeal in a related

action in Country Z. Coincidentally, shortly after these bank accounts were opened, one of B's bank accounts in Country X (which at one point held substantial sums) was closed. An inference that may be legitimately drawn is that the bank accounts in Country Y were opened to facilitate transfers to prevent or hinder enforcement by A against B's assets. Given the difficulties faced, A searched for assets of B over the world against which A could enforce the judgment. Investigation revealed funds transferred out of two bank accounts under B's name maintained with R1 and R2 in Hong Kong to B's accounts outside Hong Kong. Three points are of note: (1) the transfers took place two years before A had commenced proceedings in Country X against B; (2) A asserted no proprietary claim over such funds; and (3) the bank account(s) that B had maintained with R2 are already closed. The purpose of the Norwich Pharmacal order is therefore to identify and locate general assets of B for possible enforcement of the money judgment obtained by A in Country X. The guiding principles for the grant of a Norwich Pharmacal order were set out in *A Co v B Co* [2002] 3 HKLRD 111 at [12]-[13]. It is made against a third party whose only involvement is to become mixed up in the tortious or wrongful activities of others. In this regard, Tomlinson J in *NML Capital Ltd v Chapman Freeborn Holdings Ltd & Ors* [2013] 1 CLC 969 at [23]-[26] stressed that the third party must have become mixed up in the transaction (which must be identified as wrongdoing) concerning which discovery is required, in that the third party must be involved in the furtherance of such a transaction. It is therefore important to analyze with some care in what precisely lies the alleged wrongdoing. It would not suffice if the third party just happened to have traded with a person who turns out to have been at the relevant time a judgment debtor. One illustration quoted at [29] was as follows: "An English judgment debtor has a secret stash of cash and wishes to spend it rather than hand over to the judgment creditor. He spends the bulk of the money at The Ritz and gives the rest to a benevolent fund. Are the hotel and the charity involved in wrongdoing? Manifestly not." At [32], Tomlinson J said: "Whether the Norwich Pharmacal jurisdiction should be available post judgment in aid of execution is a wider question ... if Norwich Pharmacal relief is available post judgment in aid of execution it will only, I consider, be available in very particular and restricted circumstances. It could not be enough to engage the jurisdiction merely to trade with the judgment debtor. Lord Reid spoke of the essence of the jurisdiction being that justice requires that the innocent party mixed up in the wrongdoing should co-operate in righting the wrong if he unwittingly facilitated its perpetration. Leaving on one side the debate as to facilitation, it seems to be unlikely that the jurisdiction could be triggered short of involvement in something which in itself and necessarily amounts to what Sir Thomas Bingham MR in *Aiyela* described as 'wilful invasion' by the judgment debtor. Non-satisfaction of a judgment debt is not wilful evasion of it." On the present facts, how were R1 and R2 to be regarded as having been involved in the furtherance of any wrongdoing of B? On one view, R1 and R2 only at one stage and long before the commencement of proceedings in Country X handled B's monies, over which A did not assert any proprietary claim. The fact that they may have traded with B is not per se sufficient to trigger the Norwich Pharmacal jurisdiction, even though they may possess information revealing the whereabouts of B's assets. Ms Natalie So who appeared for A argued that the Court should consider the fund transfers in the context of the overall factual matrix and the various litigations against B in Country X and Country Z. She submitted that the evidence pointed to B engaging in a scheme to defeat execution, as gleaned by

the opening of new bank accounts in Country Y shortly after B had lost the first tranche of the proceedings in Country Z, followed by the closure within two months of B's bank account in Country X which at one point held significant amounts. Part of the scheme of evasion involved moving monies around different accounts globally, as supported by the transfer away of funds from B's bank account in Country X, and B's misappropriation of A's assets as found by the Court in Country X. The fund transfers in the two Hong Kong bank accounts maintained by B with R1 and R2 took place in around the same 6-month period when B opened new bank accounts in Country Y and closed B's bank account in Country X. In such circumstances, Ms So invited me to draw the reasonable inference that R1 and R2 were involved in B's scheme in the sense that they may have unwittingly been used to effect transfers in and out of Hong Kong as part and parcel of B's plan to confuse and obfuscate, and it would be harsh to require specific evidence that directly pinpoints how R1 and R2 were involved in the plan. I agree. As held by Jacob J in *Arcelormittal USA LLC v Essar Steel Ltd* [2019] EWHC 724 (Comm) at [158], the relevant wrongdoing to trigger the Norwich Pharmacal jurisdiction can include cases where assets are removed from a jurisdiction for no purpose other than to insulate them from execution in satisfaction of a judgment debt, or assets are transferred between persons or companies for a similar purpose. On the evidence before me, there is a real possibility that R1 and R2 have been mixed up in such wrongdoing. I also agree with Ms So that the disclosure order will, or will at least likely, yield real, substantial and worthwhile benefit to A. With the disclosure from R1 and R2, A will be able to ascertain whether B still has assets in Hong Kong. A will also be able to undergo further investigation to see whether monies have been dissipated through bank accounts held in Hong Kong and/or where those monies went, in order to enable A to take further steps to enforce the money judgment obtained in Country X against B, whether in Hong Kong or elsewhere. These advantages far outweigh any potential detriment to R1 and R2 (which in any event they have not indicated any) and weigh strongly in favour of the Court granting the order. R1 and R2 did not object to the application save that they had each made some comments on the terms of the proposed draft order. I make an order in terms of the draft order submitted (with modifications discussed with Ms So at the hearing). It remains for me to thank Ms So for her assistance. (Jonathan Chang SC) Deputy High Court Judge Ms Natalie So, instructed by Zhong Lun Law Firm LLP, for the Applicant

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