Be Careful What You File: Norwich Pharmacal Order Issued Against Solicitors

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Key Takeaways

- In *Filatona Trading Ltd v Quinn Emanuel Urquhart & Sullivan UK LLP* [2024] EWHC 2573 (Comm), the High Court issued a *Norwich Pharmacal* order requiring a firm of solicitors to disclose the identity of a private intelligence firm from whom they obtained a report that they then provided to their clients (Vladimir Chernukhin and his corporate group) to be deployed in litigation. The firm of solicitors had passed on the report for use in litigation without disclosing the identity of its ultimate author or how it had been obtained by the private intelligence firm.

- In making this order, the High Court held that the information was not protected by litigation privilege. The High Court reiterated that litigation privilege can apply to *communications* (including secondary evidence of those communications) but not, generally, to information or facts divorced from communications. Therefore, the identity of a person communicating with a solicitor for litigation purposes is not necessarily privileged, unless revealing the identity would give something away about the content of privileged communications.

- This case highlights that it is important for litigants and service providers to bear in mind the risk that the lawyers on their side are ordered to disclose information or documents pursuant to a *Norwich Pharmacal* order. However, in light of the unique facts in this case, we consider it unlikely that it will lead to an increased frequency of successful applications for *Norwich Pharmacal* orders against solicitors.

Factual Background

For over a decade, a complex and acrimonious legal dispute has been raging between two Russian groups: on one side Oleg Deripaska and his corporate group (the "Deripaska Parties"), and on the other side Vladimir Chernukhin and his corporate group (the

"Chernukhin Parties"). The origin of this dispute is a failed joint venture that was formed in the early 2000s.

In the midst of this dispute, the Chernukhin Parties alleged that during an arbitration in the mid-2010s the Deripaska Parties had fraudulently concealed a 17-page report that had been prepared by one of their companies (the "Report"). The Chernukhin Parties claimed that if the Report had been disclosed in the arbitration then the arbitral award that was ultimately made in their favour in 2017 would have been US$300 million higher. Therefore, in 2020, the Chernukhin Parties asked the High Court to set aside the arbitral award under section 68 of the Arbitration Act 1996 (on the basis of a serious irregularity) and send the matter back to the arbitral tribunal to be reconsidered (the "Section 68 Application"). At the time of this application, Clifford Chance were the Chernukhin Parties' solicitors on the record, but Quinn Emanuel ("QE") were providing additional support to the Chernukhin Parties in an "*advisory capacity*".

In support of the Section 68 Application, the Chernukhin Parties submitted a copy of the Report to the High Court. The Chernukhin Parties explained that they had obtained the Report from QE, and that QE in turn had obtained the Report from an unnamed "*business intelligence consultancy*" (the "Consultancy").[1] The Consultancy was in turn said to have procured the Report from some unnamed "*trusted sources*". QE had not revealed the identity of the Consultancy to the Chernukhin Parties or Clifford Chance. QE also did not know the identities of the Consultancy's "*trusted sources*" but had apparently spent 10 weeks conducting a "*detailed analysis*" of the Report in order to confirm its legitimacy. After receiving the report from QE, Clifford Chance then apparently also analysed the Report in order to assess its authenticity, before submitting it to the High Court. Evidently, this "*detailed analysis*" was not detailed enough, as within one week of receiving the Report the Deripaska Parties' solicitors had identified that it was likely a forgery. The multiple indications that the Report was a forgery included: the Report was dated May 2016 but referred to various documents, facts and events that did not come into existence until after that date, the name of the individual who purportedly authored the report was repeatedly misspelled, the company said to have commissioned the Report (Glavstroy, which is now independent of the Deripaska Parties) denied any knowledge of it, and the Report claimed that various third parties (including reputable firms) had performed work for Glavstroy, but when contacted those third parties denied this.

Initially, QE rigorously defended the legitimacy of the Report and the process by which it came to be submitted to the High Court. QE even went so far as to suggest that if the Report was illegitimate it was because it had been "*deliberately leaked*" to the Consultancy "*in an attempt to sabotage our clients*". This bravado soon faded when the

[1] It has subsequently been reported that the Consultancy was CT Solutions & Private Advisory.

High Court issued a judgment (relating to a separate application) expressing significant concerns about the extent to which the Chernukhin Parties' solicitors had investigated the authenticity of the Report.[2] Shortly thereafter the Chernukhin Parties discontinued the Section 68 Application and agreed to pay indemnity costs to the Deripaska Parties.

While the Deripaska Parties were the victors of the Section 68 Application, this was not enough for them—they wanted to take action against whoever was responsible for creating the Report. Neither the Chernukhin Parties nor Clifford Chance knew anything about the origins of the Report beyond that it had been provided to them by QE. QE in turn said it knew nothing about the origins of the Report other than that it had been provided to it by the Consultancy. When asked to reveal who the Consultancy was, QE refused on the basis that it had "*serious concerns*" that the safety of the ultimate sources of the Report would be placed at risk if the Deripaska Parties found out their identities. The Deripaska Parties responded by applying for a *Norwich Pharmacal* order ("NPO") requiring QE to disclose the identity of the Consultancy so that steps could then be taken against the Consultancy to find out the identities of its "*trusted sources*".

The Law Regarding NPOs

An NPO is an order requiring the respondent to provide information that is needed by the applicant for the purpose of commencing legal proceedings or seeking another form of legitimate redress in response to wrongdoing by a third party.[3] NPOs are most frequently deployed where the applicant knows that someone has wronged them, but they do not yet know the identity of the wrongdoer.

For an NPO to be awarded, the following threshold conditions must be satisfied:

- It must be arguable that a legally recognized wrong has been committed against the applicant (the "Arguable Wrong Condition");
- The respondent must be "*mixed up*" in this legally recognized wrong, so as to have facilitated, although not necessarily caused, the wrongdoing (the "Mixed Up Condition"); and

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2 *Navigator Equities Ltd v Deripaska* [2020] EWHC 1798 (Comm) at [162].

3 The origin of the NPO is the House of Lords decision of *Norwich Pharmacal Company v Customs and Excise Commissioners* [1973] UKHL 6.

- There must be a "*realistic prospect*" that information held by the respondent would assist with the pursuit of the ultimate wrongdoer (the "Possession Condition").[4]

If these threshold conditions are met, the Court will then consider if requiring disclosure from the respondent is an appropriate and proportionate response to all the circumstances of the case (the "Overall Justice Condition"). The Court's assessment of the Overall Justice Condition can include an assessment of a variety of factors, including how the applicant ultimately intends to use any information obtained through the NPO and whether there are any alternative means of obtaining that information.

Judgment: The Threshold Conditions

In a judgment dated 14 October 2024, Calver J held that all three threshold conditions were satisfied:

- Arguable Wrong Condition: Calver J was easily satisfied that the Report was a forgery. Likewise, while QE refused to admit outright that the Report was a forgery, the witness statement QE filed in response to the NPO application did not include an assertion that the Report was genuine. Calver J was in turn satisfied that there was a good arguable case that a legally recognized wrong had been committed against the Deripaska Parties. Creating and dispersing a forged document for use in litigation arguably gave rise to a variety of potential legal claims, including: civil claims in tort (such as unlawful means conspiracy and malicious falsehood), criminal contempt (i.e. interfering with the administration of justice), and (in the event the creator of the Report was someone within the Deripaska Parties' organization) disciplinary actions against that individual. In reaching this conclusion Calver J gave short shrift to QE's claim that the forgery of the Report had actually been part of some sort of convoluted scheme to harm the Chernukhin Parties, as Calver J found on the contrary that "*all of the evidence points towards [the Report] being a forgery designed to cause very considerable loss to the Deripaska parties by deceiving this court into granting section 68 relief*".

- Mixed Up Condition: Calver J rejected QE's claim that it was a "*mere witness*" who was not "*mixed up*" in the wrongdoing. QE had been actively involved in the deployment of the Report in the Section 68 Application, including attempting to give the Report an "*imprimatur of authenticity*" by making representations about the apparently extensive analysis they had performed on it. QE was therefore mixed up in the wrongdoing as it had "*enabled the purpose of that wrongdoing*" to be furthered.

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[4] *Collier v Bennett* [2020] 1884 (QB) at [35].

However, Calver J declined to make a finding that QE knew, or ought to have known, that it had facilitated arguable wrongdoing.

- Possession Condition: Calver J was satisfied that QE was likely to be able to provide the information necessary to enable the ultimate wrongdoer to be identified. QE had accepted that it knew the identity of the Consultancy, and Calver J was satisfied that if this information was provided to the Deripaska Parties they would be able to use it to find out the identity of the person who provided the Report to the Consultancy (including, if necessary, by obtaining a separate NPO against the Consultancy).

Judgment: Overall Justice

Having accepted that the threshold conditions were met, Calver J finally addressed whether granting an order would be an appropriate and proportionate response in all the circumstances of the case.

QE's primary line of defence was that the identity of the Consultancy was legally privileged information as the Consultancy had been engaged for litigation purposes. Calver J rejected this argument as it was based on a misunderstanding of how the law of privilege works. Legal privilege protects *communications* (such as communications between client and solicitor), it does not protect mere *facts or information* that are disconnected from those communications. Putting things another way, a litigant will only be able to use privilege as a basis to avoid revealing a particular fact if doing so would also (by extension) reveal the contents of a privileged communication. For example, a demand that a litigant reveal the identity of a prospective witness who its solicitor had interviewed could be resisted on the basis that this would reveal the content of privileged communications regarding litigation strategy (such as what sort of factual evidence to call). This logic did not apply in the present case—the Chernukhin Parties had already deployed the Report in litigation and explained that they had obtained it from the Consultancy. Therefore, revealing the identity of the Consultancy itself would not reveal anything about the Chernukhin Parties' litigation strategy, as that strategy had already been laid bare.

QE's back up argument involved expressions of concern about the physical safety of the employees of the Consultancy if its identity was revealed to the Deripaska Parties. In support of this allegation QE produced evidence that Mr Deripaska had been involved in various violent incidents in the past, including an armed raid of an office building in 2010. Calver J found though that the evidence produced by QE regarding Mr Deripaska's allegedly violent tendencies was either inadequate or related to events that occurred

over a decade ago. Therefore, there was "*insufficient evidence from which the court could infer a present-day risk of harm to the Consultancy*".

With these arguments disposed of, Calver J had little trouble in finding that the overall justice of the case required the NPO to be granted. There was a strong arguable case that the Report had been created for the purpose of causing serious financial harm to the Deripaska Parties and perverting the course of justice. The Deripaska Parties were therefore pursuing a legitimate objective by attempting to identify the sources of the Report, and obtaining the identity of the Consultancy was the only clear means of enabling them to achieve this objective.

Conclusion

For the above reasons, Calver J granted the NPO and ordered QE to reveal the identity of the Consultancy to the Chernukhin Parties.

In regard to costs, ordinarily where a Norwich Pharmacal is made the general rule is that the applicant should pay the respondent's costs for both responding to the application and complying with the disclosure order. However, in a subsequent judgment delivered on 30 October 2024,[5] Calver J departed from this general rule and ordered that the costs to be paid to QE in relation to its attempt to resist the application be reduced by 30%. This was on the basis that, while it was reasonable in principle for QE to resist the NPO application, its prior failure to make urgent enquiries to ascertain the authenticity (or otherwise) of the Report had led to an unnecessary increase in costs.

Commentary

The obvious question is whether this case is likely to open the floodgates to a new world in which Norwich Pharmacal orders are routinely sought against law firms. Our view is that it will not.

It remains the case that where a solicitor obtains documents (either from its client, or from a third-party investigator) for litigation purposes, but has not deployed those documents, then an attempt by a third party to obtain disclosure of those documents from the solicitor through an NPO will fail due to legal privilege. Likewise, even where a solicitor is in possession of documents or information regarding very serious

[5] *Filatona Trading Limited v Quinn Emanuel Urquhart & Sullivan LLP* (Re Costs) [2024] EWHC 2751 (Comm).

wrongdoing, as long as the solicitor was not actively involved in the wrongdoing (or "mixed up" in it), it should be immune from a *Norwich Pharmacal* application. In the present case, the NPO application likely would have failed if either:

- QE had not played an active role in the procurement of the Report (e.g. the Chernukhin Parties had obtained the Report themselves) and QE had not attempted to legitimize the Report by reference to its purported analysis of the Report (as this would have meant the Mixed Up Condition would not have been satisfied); or

- The Chernukhin Parties had decided not to file the Report in the Section 68 Application (as in that case legal privilege would have applied).

A further reason why this case may not have opened the floodgates for NPO applications against solicitors is that it involved the rather unique fact that the information QE possessed had not been disclosed to its own clients. This is unusual as English solicitors are subject to an express duty to make their client aware of all information material to the matter of which the solicitors have knowledge. It is unclear why QE had not communicated the identity of the Consultancy to the Chernukhin Parties, but if QE had done so it is possible that the Deripaska Parties' NPO application would have been directed at the Chernukhin Parties rather than QE.[6] We expect that if analogous cases arise in the future then a key point of difference will be that the solicitor's client also possesses the information being sought, and in such cases the target of the NPO application will be the client itself rather than its solicitors.

What this case highlights though are the risks involved with deploying spurious documents in litigation, and that ultimately these risks cannot be mitigated by using a solicitor as the means by which such documents are provided to the Courts. In particular:

- **Litigants** need to understand that while there are various advantages to using their own solicitor as a witness in legal proceedings, they cannot assume that the solicitor on their side will be able to use its professional status as a means of avoiding demands for answers if things go awry. Likewise, litigants cannot assume that their solicitor can be used as a 'black box' for storing information that the client does not wish to reveal.

- **Private intelligence agencies** need to be aware of the risks that they become exposed to once they share their intelligence with their clients. As a consequence of

[6] In that regard we note that although the Chernukhin Parties are not English entities, a new jurisdictional gateway for obtaining disclosure orders against foreign entities has been inserted into Practice Direction 6B, at paragraph 3.1(25).

the NPO being issued, the Consultancy is now at risk of having legal action taken against it and — if QE's evidence is to be believed — the Consultancy's employees and sources are also in physical danger. If a private intelligence agency is unsure about the legitimacy of any documents or other information it has provided to its client then it needs to ensure that the client understands this so that it uses the material appropriately (e.g. by using the material as a starting point for further investigations rather than blindly filing it as evidence in legal proceedings).

- **Solicitors** need to appreciate that although they can usually use legal privilege to resist demands for disclosure of documents, once they decide to deploy a document in litigation, and use their own professional status as a means of legitimizing that document, then all bets are off. Likewise, if a solicitor discovers that it may have inadvertently deployed false or misleading evidence then it must act quickly to investigate the issue or else run the risk of being sanctioned with financial consequences.

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