IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISON

FSD CAUSE NO. 65 OF 2022 (MRHJ)

IN THE MATTER OF AN APPLICATION FOR NORWICH PHARMACAL RELIEF

BETWEEN:

HANGZHOU LINGQIN INVESTMENT PARTNERSHIP ENTERPRISE (LIMITED PARTNERSHIP)

PLAINTIFF

AND:

HARNEYS LIQUIDATION SERVICES (CAYMAN) LIMITED
HARNEYS FIDUCIARY (CAYMAN) LIMITED

DEFENDANTS

Before: Hon. Mrs. Justice Margaret Ramsay-Hale

Heard: On the Papers 7th June 2022

Mr. Hamid Khanbhai of Campbells for the Plaintiff

Mr Nick Hoffman, Ms Anya Allen, and Ms Rhiannon Zanetic of Harneys for the Defendants

HEADNOTE

Civil procedure - Equitable disclosure - Requirements for making *Norwich Pharmacal* Order - Applicant must show an arguable case of wrongdoing, that disclosure necessary to enable it to seek redress and that defendants are mixed up in the wrongdoing and able or likely to be able to provide the information sought.

JUDGMENT

Introduction

1. By Originating Summons dated 24 March 2022, the Plaintiff, Hangzhou Lingqin Investment Partnership Enterprise (Limited Partnership) seeks *Norwich Pharmacal* relief against the Defendants, Harneys Liquidation Services (Cayman) Limited ("HLSC") and Harneys Fiduciary (Cayman) Limited ("HFCL") (the "Defendants"). The Plaintiff contends that the disclosure of certain documents and information in the hands of the Defendants will enable it to seek legal

redress for wrongdoing carried out by Tongfang Investment Fund Series SPC, a Cayman Islands registered segregated portfolio company (the "Company") and its voluntary liquidator, Mr Zhou Hongbin.

Background

2. The factual background to this application is set out in the supporting affirmation of Wu Xichun, the legal representative of a related company. The Company issued a form of debt instrument known as Mezzanine Notes (the "Notes") in the amount of RMB 1,199,500,000 (approximately US$188 million) on behalf of its segregated portfolio, Tongfang M&A Fund SP ("Tongfang SP"). The maturity date of the Notes was in December 2020.

3. Pursuant to a Subscription Agreement dated 8 December 2017 relating to the Notes due in 2020, made between the Company on behalf of Tongfang SP and Abundant Merits Company ("Abundant"), Abundant subscribed for Notes in the sum of RMB 1,000,000,000 (approximately 156 million).

4. Whilst Abundant was the party to the Subscription Agreement and a subscriber to the Notes, it acted as nominee for the Plaintiff who paid the RMB 1,000,000,00 which was used to subscribe for the Notes.

5. The nominee arrangement was reduced to writing and a nominee agreement executed in or around October 2018 between the Company, Abundant and the Plaintiff (the "Nominee Agreement") in which the Company and Abundant agreed, amongst other things, that the Plaintiff was the beneficial owner of the Notes and that Abundant was effectively a bare trustee. In particular, the agreement provided that:

   (a) Abundant was a "*nominee*" for the Plaintiff and would exercise rights in accordance with the Plaintiff's instructions (clauses 1 and 2);
   (b) the Plaintiff was entitled to repayments of principal and interest;
   (c) the Plaintiff had the right to seek transfer of the notes into its own name (clause 4.2); and

(d) the Company agreed that "*when performing any operation of the note units",* prior written authorisation from the Plaintiff was required, otherwise the Company would refuse to execute any instructions from Abundant (clause 4.8).

6. The Segregated Portfolio went into default in relation to the Notes, having failed to make required payments of interest on 11 December 2018 and 11 December 2019.

7. By letter dated 29 September 2019, the Plaintiff (through its PRC lawyers) wrote to both the Company and Abundant and demanded immediate payment of outstanding principal and interest on the basis that there had been an unremedied default on the Notes. The Plaintiff also sought the transfer of the Notes into its name and a termination of the nominee agreement, a request which was repeated by email dated 22 November 2019 to the principal contact of the Company who was also the principal contact of Abundant. No response was received from either the Company or Abundant in relation to these demands.

8. The Company failed to make interest payments on 11 December 2020 and failed to redeem the Notes and repay the principal sum on the maturity date.

9. On 22 November 2021, in an email to the Company, the Plaintiff asserted that the "*triggering conditions"* in the nominee agreement, terminating the nominee relationship, were satisfied and demanded that the Company register the Plaintiff as the owner the Notes.

10. During the preparation for Court proceedings that the Plaintiff intended to file in Hong Kong and the Cayman Islands, the Plaintiff became aware that the Company had been put into voluntary liquidation by resolution of its sole shareholder in July or August 2020, a few months prior to the maturity of the Notes in December 2020, but long after Tongfang SP was in default, and subsequently dissolved.

The Plaintiff's position

11. The Plaintiff asserts that a wrong has been carried out by the Company which was put into voluntary liquidation without notice to the Plaintiff and dissolved without paying the Plaintiff the interest and principal due under the Notes despite the Company's knowledge of the debt due to the Plaintiff and being in receipt of the Plaintiff's letter of demand.

12. The Plaintiff says the Company should never have been dissolved. If the Company were solvent, then the Plaintiff should have been paid before the Company was dissolved. If the Company were unable to pay the Plaintiff - pay its debts - then the voluntary liquidation should have been brought under the supervision of the Court as provided for in section 124(1) of the **Companies Act.**

13. The application to compel disclosure of documents from HFSL and HLSC is made on the ground that they were service providers to the Company who facilitated the Company's wrongdoing, in that HFSL was the Company's Registered Office and HLSC was advertised in the Cayman islands gazette as having been appointed as the Voluntary Liquidator.

The Defendants' Position

14. The Defendants' position is that HFCL's involvement in the voluntary liquidation of the Company was limited to its role as registered office and of filing agent and that HLSCL played no role in the voluntary liquidation at all.

15. Mr. Richard Gordon, Managing Director of HFCL, explained in his affidavit sworn on behalf of the Defendants that a filing agent is a person or corporate body who has rights and access to the Cayman Register of Companies Corporate Administration Platform and the Gazette in order to submit company filings on behalf of an instructing client. In a liquidation, HFCL's role is limited to submitting the required liquidation documents to the Cayman Registrar of Companies and the Gazette. HFCL does not draft or prepare any of the documents it submits on the Company's behalf. The documents are instead prepared by the instructing client or their attorney.

16. Mr Gordon states that, when arranging for the Gazette notice announcing that the Company had been put into voluntary liquidation to be submitted to the Gazette, HFCL inadvertently used a template that contained reference to HLSCL being the voluntary liquidator. The voluntary liquidator was in fact Zhou Hongbin. The error is reflected in the Notice of Voluntary Liquidation which recites in the body that the voluntary liquidator is "Harneys Liquidation Services (Cayman) Limited" but is signed at the foot by Mr Zhou as Voluntary Liquidator. The Gazette notice of the final general meeting of the Company, published on the same date, identifies Zhou Hongbin as the Voluntary Liquidator.

17. The Defendants assert that they have no knowledge of the alleged wrongdoing set out in Wu Xichun's affirmation.

18. In pre-action correspondence, the Defendants stated that as HLSCL did not act as voluntary liquidator of the Company it was not in a position to respond substantively. They also stated that HFCL was not in a position to provide the information and documentation voluntarily as the disclosure sought contains confidential information and they would be at risk of breaching confidentiality.

19. The Defendants, therefore, required the Plaintiff to seek an court order for disclosure. They have adopted a neutral stance in the proceedings and have agreed a form of Order with the Plaintiff in the event the Court finds that the Plaintiff has met the requirements for the grant of the relief.

The Law

20. The jurisdiction of the Court to order a person innocently involved in apparent wrongdoing by another person to disclose information or documentation required for the issuing of proceedings was established in the House of Lords decision in *Norwich Pharmacal Co and others v Customs and Excise Commissioners* [1974] AC 133. Lord Reid explained the basis for the exercise of the Court's equitable jurisdiction to order disclosure from a third party at [175] where he said this:

> "*… if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration*".

21. In *Braga v Equity Trust Company (Cayman) Limited and Others* 2011(1) CILR 402, the Chief Justice observed that the jurisdiction to make a *Norwich Pharmacal* order is broad, flexible and developing, and not limited, as stated in many of the authorities, to discovering the identity of the wrongdoer but could be granted in circumstances in which the wrongdoer's identity was known but information was needed to prove the wrongdoing.

22. In *Essar Global Fund Limited and another v ArcelorMittal USA LLC* CICA (Unrep) 3 May 2021 at Court of Appeal considered the requirements for the grant of a *Norwich Pharmacal* order. Martin JA in his judgment said this at [16]:

> *"It is now well established that the requirements for the grant of a NPO are as follows*
>
> *(i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;*
>
> *(ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and*
>
> *(iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued": Mitsui & Co Ltd v Nexen Petroleum Ltd [2005] 3 All ER 511 at [21], Lightman J."*

23. The Court noted at [17] and [18] that the scope of the jurisdiction had developed *"beyond mere identification of the wrongdoer"* and could be ordered where the identity of the wrongdoer was known but the applicant requires disclosure of crucial information in order to bring its claim or other legitimate redress for wrongdoing.

24. The meaning of *'arguably'* in the context of an application for an *Norwich Pharmacal* order was also considered by the Court which affirmed the test laid down by Mustill J (as he then was) in *The Niedersachsen* [1983] 2 LI Rep 600 at 605 (lhc) which has been applied many times since:

> *"I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success".*

Application to this case

25. I am satisfied on the evidence of Wu Xichun that the Plaintiff has a good arguable case that a wrong has been carried out by the Company and its director and voluntary liquidator, Mr. Hongbin, who were at all times aware of the outstanding debt due to the Plaintiff yet proceeded

to dissolve the Company without giving the Plaintiff notice as a creditor that the Company had been put into voluntary liquidation and without paying the debt due.

26. As Mr. Khanbhai submits in his skeleton, the authorities establish that the Plaintiff may have direct recourse against the voluntary liquidator in an action, *inter alia*, for breach of statutory duty for distributing the Company's assets without taking account of the debt and against any director of the Company that swore an affidavit or declaration of solvency and any person who may have been unjustly enriched at the Plaintiff's expense following a distribution of the Company's assets, including the assets in Tongfang SP.

27. The Plaintiff may also be able to seek redress against the Company through restoration of the Company to the Register of Companies for the purpose of putting the Company into official liquidation notwithstanding it has been dissolved, the Court having the jurisdiction to restore a company to the register when it has been dissolved following a voluntary liquidation, if there was a fraud in respect of the liquidation as recently affirmed by Doyle J in *Enigma Diagnostics Limited v Harvey Eric Boulter* (unrep 24 March 2022).

28. The question which arises is whether the Plaintiff has demonstrated that the information sought is necessary to enable action to be brought against the ultimate wrongdoers. This is not a matter of discretion but a threshold condition of for the grant of the order as stated by of Maurice Kay LJ in *R (Omar) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 11, cited by Kawaley J in *Discover Investment Company v. Vietnam Holding Asset Management Limited And Saigon Asset Management Corporation* 2018 (2) CILR 424.

29. In *Discover*, Kawaley J after reviewing the authorities set out the factors the Court should identify when considering whether a *Norwich Pharmacol* Order is necessary at [20]:

> *"The necessity requirement for obtaining Norwich Pharmacal relief requires first identifying the purpose for which the 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."*

30. The evidence of Wu Xichun is that the disclosure is sought to obtain information relevant to the Company's failure to give the Plaintiff notice of the voluntary liquidation of the Company, given its status as a creditor, and how the declarations of solvency (if any) came to be executed by the

directors of the Company, in the circumstances where the debts due to be paid to the Plaintiff under the Notes had not been paid. The information the Company and the Voluntary Liquidator had in relation to the Mezzanine Notes and the documents that were prepared and filed with respect to the voluntary liquidation would assist the Plaintiff in seeking legal redress.

31. On the question of whether the relief sought is necessary, Kawaley J after a review of the authorities including the decision summarized the principle at [36]

> *"Although the term "necessity" has now become so widely used that modern courts are obliged to now adopt it, the fundamental principle as to what necessity means in this context remains the same. There must be no other "straightforward or available, or any, means of finding out" information that is central to the applicant's ability to obtain relief for proven or suspected wrongdoing. "*

32. He found clear authority in the *"more clearly articulated approach to the necessity requirement"* to be found in the opinion of Lord Bingham and Lord Hoffman in the Privy Council decision in *Equatorial Guinea (President)* v. *Royal Bank of Scotland Intl.* [2006] UKPC 7 (Gue) at para [16]

> *"It is true that in some of the cases the word 'necessary' has been used, echoing or employing the language of O.24, r.13 of the Rules of the Supreme Court. But, as Templeman, L.J. observed ([1981] A.C. at 1132) in British Steel Corp. v. Granada Television Ltd. . . . 'the remedy of discovery is intended in the final analysis to enable justice to be done.' Norwich Pharmacal relief exists to assist those who have been wronged …. If they have straightforward and available means of finding out, it will not be reasonable to achieve that end by overriding a duty of confidentiality such as that owed by banker to customer. If, on the other hand, they have no straightforward or available, or any, means of finding out, Norwich Pharmacal relief is in principle available if the other conditions of obtaining relief are met. Whether it is said that it must be just and convenient in the interests of justice to grant relief, or that relief should only be granted if it is necessary in the interests of justice to grant it, makes little or no difference of substance."*

33. The Plaintiff's application plainly meets that test as it has no other means of obtaining the information and documents it seeks.

34. The Defendants do not dispute they may have been mixed up in wrongdoing or that they are likely to be able to provide, at least in part, the information which is sought.

35. They have agreed a Draft Order with the Plaintiff to ensure that the scope of the information and documents sought is proportionate and limited to such material as relates to the Notes and the voluntary liquidation, and not to the role performed by HFCL as registered office and filing agent more generally on the basis that those documents pre-date the instruction by the Company in relation to the provisional liquidation.

36. I make the Order in terms of the Draft Order.

DATED THE 7TH JUNE 2022

Hon Mrs Justice Margaret Ramsay-Hale
Judge of the Grand Court