



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT, FINANCIAL SERVICES DIVISION**

**CICA (Civil) Appeal 15 of 2019
(Formerly FSD 2 of 2019 (IKJ))**

IN THE MATTER OF AN APPLICATION FOR A DISCLOSURE ORDER

BETWEEN

**(1) ESSAR GLOBAL FUND LIMITED
(2) ESSAR CAPITAL LIMITED**

Defendants/Appellants

AND

ARCELORMITTAL USA LLC

Applicant/Respondent

AND BETWEEN

**(1) ESSAR GLOBAL FUND LIMITED
(2) ESSAR CAPITAL LIMITED**

Defendant/Appellants

AND

ARCELORMITTAL NORTH AMERICA HOLDINGS LLC

Applicant/Respondent

BEFORE:

**The Rt. Hon Sir John Goldring, President
The Rt. Hon Sir Bernard Rix, Justice of Appeal
The Hon John Martin QC, Justice of Appeal**

Appearances:

**Mr. Vernon Flynn QC instructed by Mr. William Jones and Ms Nour
Khaleq of Ogier
Mr. Tom Weisselberg QC instructed by Mr. Paul Smith and Ms. Anya
Park of Harneys**

Date of Hearing: 3 May 2021

Judgment Delivered: 6 May 2021

**JUDGMENT OF THE COURT
ON APPLICATION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL**

MARTIN JA

1. On 3 May 2021 we gave judgment dismissing the appeal in this matter. Handing down of the judgment, which was already much delayed, was postponed to enable us to consider the unsuccessful appellants' application for leave to appeal to the Judicial Committee of the Privy Council ("the JCPC"), and for a stay of the order appealed against pending consideration by the JCPC or reconsideration of the order by the Grand Court. At the conclusion of the hearing of the application, we refused leave to appeal but granted a stay of the order until determination

by the JCPC of any application made by the appellants for special leave. These are our reasons for doing so.

2. The circumstances are set out in full in our substantive judgment, and we do not repeat them here. We use the same abbreviations in this judgment as in the substantive judgment – including using the expression AMUSA to denote the respondent, notwithstanding that the Grand Court has made an order ex parte substituting it as a party.
3. The appeal was against the granting of a NPO designed to elicit information and documents in relation to ESL’s financial affairs, AMUSA contending that it required such information in order to assist it in enforcing the Award and in identifying assets against which it could take enforcement action. The appellants’ principal contentions were that a NPO could not properly be granted to support a foreign award which was not enforceable in the Cayman Islands; that there was no arguable case of wrongdoing by ESL; and that the court had no jurisdiction to make a NPO in support of potential foreign proceedings. We rejected all these contentions.
4. The appellants applied for (a) leave to appeal to the JCPC and (b) a stay of enforcement of the NPO until the later of (i) final determination of the appellants’ appeals to the JCPC (or at least until such time as the JCPC determines that there should be such a stay); or (ii) the Grand Court’s ruling on the appellants’ application to set aside the NPO.
5. As to (a), the appellants claimed to be entitled to leave as of right; but if we decided against them on that point, they sought leave to appeal that decision and discretionary leave to appeal the substantive judgment.
6. Appeals to the JCPC are governed by section 3 of the Cayman Islands (Appeals to Privy Council) Order 1984 (“the 1984 Order”), which so far as relevant is in the following terms:

“3.(1) Subject to the provisions of this Order, an appeal shall lie as of right from decisions of the Court to Her Majesty in Council in the following cases-

(a) final decisions in any civil proceedings, where the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards;

...

(2) Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases-

(b) decisions in any civil proceedings, where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; ...”.

Leave as of right

7. In support of their contention that they were entitled to leave as of right, the appellants made the following points:

- (a) This Court’s decision is a final decision. (This was the view taken by this Court and by Kawaley J. and is not disputed by AMUSA.)
- (b) The case raises (directly or indirectly) a claim to, or questions respecting, rights (including proprietary rights) such as –
 - (i) AMUSA’s right to an order compelling the appellants to produce documents and information;
 - (ii) the appellants’ right to maintain the confidentiality of information about their business which they would not ordinarily be required to produce to a commercial competitor; and
 - (iii) the appellants’ right to deal as they wish with their property (in the form of their documents and document storage systems).
- (c) Although it is difficult (but not in principle impossible) to attribute a specific value to these rights, the court need only be satisfied that their value exceeds the modest threshold of £300.
- (d) The Court should take a pragmatic, broad-brush approach to the valuation of the rights: any other approach would risk creating arbitrary distinctions in the application of section 3(1)(a).
- (e) On that basis, it is clear that the value of the rights in issue exceeds the threshold because:
 - (i) AMUSA claims to need the NPO to assist it in enforcing the Award, which is now worth some US\$1.5 billion;
 - (ii) the costs incurred by AMUSA in obtaining and maintaining the NPO greatly exceed £300;
 - (iii) the appellants have incurred very substantial costs – greatly in excess of £300 – in carrying out the document review exercise necessary to enable them to comply with the NPO.

8. AMUSA made the following points in response:
- (a) The proposed appeal does not involve a claim or question respecting a right of the value of £300 or upwards;
 - (b) The broad interpretation of section 3 (1) (a) contended for by the appellants is strained, not supported by the authorities, and would open the floodgates to claims to the JCPC.
 - (c) The Court should undertake a proper forensic examination, based on evidence, as to the value of the relevant rights;
 - (d) The JCPC has emphasised the need for local courts to be vigilant to ensure that a proposed appeal has not been contrived for the purpose of obtaining leave to appeal as of right;
 - (e) There must be a close, immediate and proximate connection between the claim in question and the right that is to be valued;
 - (f) The correct approach is to consider what right is involved; whether that right is capable of being valued in monetary terms; and, if the right is capable of being valued, what value can be properly attributed to it. As to that –
 - (i) AMUSA is not seeking to enforce a right: it is merely asking the Court to exercise its discretion to compel the appellants to provide information to assist AMUSA in pursuing wrongdoing. Although the appellants have rights of confidentiality and the right to deal with their own property, the claim is not about those rights.
 - (ii) If, contrary to that, there is a right, it is not possible to evaluate it in monetary terms. A claim to documents and information cannot be valued in monetary terms. Legal costs, and the costs of compliance with any order, are not to be regarded as part of the claim for the purposes of the 1984 Order.
9. Two authorities were referred to on this aspect of the matter: Jacpot Ltd v Gambling Regulatory Authority [2018] UKPC 16 (“Jacpot”) and Palladyne International Asset Management BV v Upper Brook (A) Ltd (CICA Appeal 5 of 2019) (“Palladyne”).
10. Jacpot is a decision of the JCPC on an appeal from Mauritius. The case concerned a judicial review of the revocation of Jacpot’s gambling licence. The Mauritian statutory provision governing appeals to the JCPC was in substantially identical form to section 3 of the 1984 Order.
11. The advice of the JCPC was delivered by Lord Sumption. The following points are material.

- (a) At paragraph 1, he said that “*the case provided the occasion for resolving a number of questions concerning the availability of an appeal as of right and the principles on which special leave should be granted*” by the JCPC.
- (b) At paragraph 7, he pointed out that discretionary leave could be sought if leave as of right was not available, and said that for that reason “*the provisions governing appeals as of right are normally to be strictly construed*”.
- (c) At paragraph 11, he stated that the relevant statutory provision “*applies the value threshold to any of (i) the “matter in dispute”, (ii) a “claim to or question respecting property”, or (iii) a “right” of any kind. Provisions in substantially this form commonly appear in constitutional provisions or Orders in Council governing appeals as of right to the Judicial Committee. Probably no other condition has given rise to as much difficulty*”.
- (d) At paragraph 12, he said this: “*The application of the value threshold is straightforward when there is a money claim or a claim to property exceeding the prescribed value. More difficult are cases in which the issue involves property or rights exceeding the threshold value in the broader sense that more than the prescribed sum turns on the outcome, as it almost always will if civil proceedings are to be worth litigating at all*”.
- (e) In paragraph 13, he considered Meghji Lakhmshi & Brothers v Furniture Workshop [1954] AC 80 and Becker v Marion City Corpn [1977] AC 271 (PC), and stated that those decisions were “*authority for the propositions (i) that to pass the value threshold, it is not necessary for there to be a money claim; and (ii) that where an appeal will determine the existence of a proprietary right or a proprietor’s right of disposal over the property, there is an appeal as of right if the property’s value exceeds the threshold*”.
- (f) At paragraph 14, he stated that “*these principles cannot readily be applied to cases where no property is in issue and it is necessary to value the “matter” or “right” at stake on the appeal*”. He then considered the JCPC’s decision in Royal Hong Kong Jockey Club v Miers [1983] 1 WLR 1049, which he said presented the closest analogy to Jacpot. That case concerned an action by a jockey impugning the decision of the Hong Kong Jockey Club’s stewards not to renew his licence. The JCPC held that there was no appeal as of right. Lord Scarman, delivering the advice of the JCPC, held that it was necessary first to identify the nature of the specific civil right involved in the appeal, and then to determine the value of that right. In that case, the grant of licences being discretionary, there was no civil right to a licence, only a civil right to a fairly made decision; with the result that the proceedings did not involve directly or indirectly the right to a licence.

(g) At paragraphs 15 and 16, he said this:

“15. For some purposes, for example the First Protocol to the European Human Rights Convention, a very wide meaning may be given to the concept of property, embracing many kinds of personal legal right. But for the purpose of the value thresholds governing appeals as of right to the Judicial Committee, “property” has always been given its ordinary legal meaning, namely an interest by way of ownership (legal or beneficial) or right to possession in land or personalty, including intangible property such as trademarks or copyrights. That was not, however, the nature of the right asserted by Jacpot in these proceedings. Their gaming licences were not property in any relevant sense, but simply an authority to provide facilities for gaming, which would otherwise have been unlawful. Nor did they have any civil right to receive or retain a gaming licence. Their only relevant right was the right to a fair and lawful decision of the Authority. That right, important as it is, is a public law right which is no different in kind from the right which any person with a relevant interest has to see the law applied. It is incapable of valuation in monetary terms. It follows that the present appeal does not pass the value threshold and is not therefore available as of right”.

16. Before parting with this question, the Board would wish to emphasise that this does not mean that an appeal as of right is never available in proceedings by way of judicial review. Some such proceedings may, at least indirectly, involve property rights of the requisite value, in accordance with the principles considered above. Moreover, beyond the domain of property rights, the decision challenged on an application for judicial review may sometimes have a monetary value, for example where it imposes a civil financial penalty”.

12. Palladyne is a decision of this Court. The substantive issue in the proceedings was whether the terms of an Order in Council implementing a resolution of the UN Security Council requiring the freezing of Libyan state assets prohibited companies whose shares and assets were frozen under the Order from adopting resolutions appointing and dismissing directors and changing the names of the companies. The court refused leave as of right to the JCPC. It said the following:

“Where there is no money claim or claim to property the value of which exceeds the £300 threshold, the question is whether an appeal would determine the existence of a property right or a proprietary right to dispose of property worth more than £300. The

Applicant's right or interest in this case in ensuring that the appointment and removal of directors of the Respondent companies is lawful is not different in kind from the right which any person with a relevant interest has to see that the law is applied, which was held not to suffice in Jacpot.... A director does not have a right to continue to be a director, let alone a proprietary right to do so. Nor does a director have a proprietary right to control and dispose of the Respondents' assets".

13. According to the appellants, Jacpot and Palladyne were cases which concerned only public law rights which were in their nature incapable of being valued in monetary terms, and had no more general application.
14. In our judgment, the appellants were not entitled to leave as of right in the present case. Jacpot indicates that section 3(1)(a) is to be strictly construed. It cannot be said in the present case that “the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards” or that “the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards”. The matter in dispute on the appeal, and the claim or question directly or indirectly involved, all relate to the availability to AMUSA of Norwich Pharmacal relief. The relevant right is accordingly AMUSA’s right on which its claim is based, not the affected rights of the appellants. AMUSA’s claim is not to recover property or money; it is to obtain documents and information which it may use for the purpose of enforcing the Award. It has no proprietary right to the documents or information. It has no entitlement to a NPO even if the conditions for the grant of an order exist: it is still a matter for the discretion of the court as to whether an order is appropriate in all the circumstances. The most that can be said is that AMUSA has a right to seek enforcement of what was described in Norwich Pharmacal as “a duty to assist the person who has been wronged by giving him full information”. The value of that right is not to be determined either by the value to AMUSA of being assisted in enforcing the Award, or by the cost to the appellants of complying with the duty. (We note that the liability for that cost is, in any event, something that under the terms of the NPO is reserved for future determination by the Grand Court.) In its nature, the right appears to us to be no different from the rights considered in Jacpot and Palladyne: AMUSA’s only right is to have its application for Norwich Pharmacal relief properly determined, so that here, as there, the right in question is no different in kind from the right which any person with a relevant interest has to see the law applied. The right is incapable of valuation in monetary terms, and the statutory threshold is not passed.
15. Accordingly, leave to appeal as of right was refused.

Leave to appeal the refusal of leave as of right

16. The appellants did not, and could not, suggest that they are entitled to leave as of right to appeal our decision that no appeal lies as of right. They sought discretionary leave under section 3(2)(a) of the 1984 Order. We refused that application: our decision involves the application to the facts of this case of established principles, and cannot be said to involve a question of great general or public importance, or said to be such that it is otherwise appropriate for us to give leave. If we are wrong about the appellants' entitlement to leave as of right, their remedy is to apply to the JCPC for special leave to appeal.

Discretionary leave

17. We have set out in paragraph 6 above the terms of section 3(2)(a) of the 1984 Order. It is also relevant to quote the test which the JCPC itself applies when considering applications for permission to appeal, which is set out in paragraph 3.3.3(a) of Practice Direction 3 to the Judicial Committee (Appellate Jurisdiction) Rules 2009:

“Permission to appeal is granted – (a) in all cases for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal”.

18. The appellants argued that our substantive decision is wrong in law on two matters:
- (a) what an applicant for Norwich Pharmacal relief must establish in relation to wrongdoing; and
 - (b) the court's jurisdiction to grant such relief in support of foreign proceedings.
19. Much space was devoted, in the appellants' written submissions and in AMUSA's written reply submissions, to elaboration of these points. We see no purpose in investigating the points made: it is not us, but the JCPC, that the appellants have to persuade of the merits of a prospective appeal. Although we see considerable force in AMUSA's contention that, on proper analysis, the first of the matters complained of involves only a question of fact, we are prepared to assume for present purposes that both matters involve arguable points of law.
20. The question then becomes whether those matters are ones which, by reason of their great general or public importance or otherwise, ought to be submitted to the JCPC. In our judgment, they are not.
21. In relation to the first of the matters, the appellants argued as follows:

- (a) The Court’s judgment contains errors going to the heart of the proper limits of the Norwich Pharmacal jurisdiction. The questions are what is necessary to establish a good arguable case of wrongdoing, and “*whether and to what extent it is sufficient to rely upon evidence that an alleged ultimate wrongdoer might be said to have a propensity to engage in relevant wrongdoing*”.
 - (b) Because propensity evidence may be relevant to other issues (such as the existence of a real risk of dissipation), there are important questions about the relationship between the Norwich Pharmacal jurisdiction and other forms of relief, in particular freezing orders and ancillary disclosure.
 - (c) Because of the rejection by this Court of the broad approach adopted in the BVI (a rejection which the appellants accept was correct), there is a material divergence between the Cayman and BVI jurisdictions as to the scope of the Norwich Pharmacal jurisdiction.
22. None of these points in our opinion raises a question of great general or public importance. The first two depend upon a mistaken assumption that the decisions in this Court and below depended upon propensity evidence; but even if that were not so the points involve no more than the application to the facts of this case of established principles. As to the third point, such differences as exist between the Cayman and BVI approach to the Norwich Pharmacal jurisdiction depend upon matters of emphasis, not of substance.
23. In relation to the second matter (the court’s jurisdiction to grant Norwich Pharmacal relief in aid of foreign proceedings), the appellants argued as follows:
- (a) This Court’s decision that there is no conflict between the Evidence Order and the Norwich Pharmacal jurisdiction because the latter cannot in principle relate to evidence is founded on an illusory distinction between evidence and information.
 - (b) Even if that distinction were valid, this Court failed to consider how it should apply, both generally and in relation to the NPO.
 - (c) This Court’s conclusion that the Evidence Order does not apply unless proceedings are on foot in a foreign court or contemplated in a foreign court which has power to order pre-action disclosure is contrary to the weight of English authority,, which demonstrates that the unavailability of a letter of request procedure in a foreign court is not a relevant consideration.
 - (d) Even if the Court were right on that point, it failed to grapple with the more fundamental issue of the extent to which any common law power to order the production of information or evidence in support of foreign proceedings exists at all.

(e) As to the Court’s reliance on section 11A of the Grand Court Act (2015 Revision), the appellants’ primary submission was that the other points were of such importance that they ought to be considered by the JCPC. However, they contended that the court was wrong to hold that the section had application, since Norwich Pharmacal relief does not fall within the description of interim relief in the section, and because the court could not be satisfied that any foreign proceedings would be “*capable of giving rise to a judgment which may be enforced in the Islands*”.

24. None of these points appears to us to satisfy the requirement that they raise questions of great general or public importance. The last of them concerns merely the inference about legislative intention that may be drawn from the existence of section 11A, and that is not of general or public importance. The difficulty in practice of distinguishing between evidence and information was acknowledged in this Court’s judgment, and its decision that the NPO could nevertheless stand does not raise any question of general public importance. The need for statutory authority for the provision of evidence in support of foreign proceedings was likewise acknowledged by this Court in its judgment, and no point of principle arises. As to conflict with the English authorities, Omar and Ramilos are plainly distinguishable both on their facts and because there is in England no equivalent of section 11A.
25. No reason was suggested to us why it would be appropriate for us to give leave even if no question of great general or public importance arose.
26. In our judgment, it should be left to the JCPC to determine, if an application for special leave is made, whether the present case raises issues of general public importance which ought to be considered by the JCPC now. Accordingly, we refused leave to appeal under section 3(2)(a) of the 1984 Order.

Stay

27. The appellants sought a stay of the NPO until the later of (a) determination by the Grand Court of their application to set aside the NPO and (b) determination of their appeal to the JCPC.
28. As the appellants acknowledged, the merits of their application to set aside the NPO are not before this Court. Although an attempt was made to give us some information about the merits, it is plainly not appropriate for us to make any assessment of them. In those circumstances, we declined to order a stay in relation to the set-aside application. If such a stay is to be granted, it must be by the Grand Court.

29. We considered it appropriate, however, to order a stay until such time as the JCPC determines any application for leave to appeal that may be made to it. That is to prevent the appeal being nugatory. Although AMUSA contended that we should insist on at least some compliance with the NPO, on the basis that the position could be unravelled if an appeal succeeded, we declined to do so: the appellants contend that the NPO should not as a matter of principle have been made, and we considered that it would be unjust to require them to comply further with the order while the possibility that it would be overturned remained. The stay was made conditional upon the appellants making their application for leave promptly and pursuing it diligently. Any stay thereafter will be a matter for the JCPC if leave is granted.