

The road to East Anglia

Andrew Beck outlines Norwich Pharmacal and explains the two tactical options recently highlighted which can be of both assistance and concern to those within data-sensitive industries



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'Norwich Pharmacal jurisdiction dictates that the applicant must establish that the order sought is necessary to enable it to seek legal redress for a wrongdoing, and that any disclosure given must be restricted to that purpose.'

The Civil Procedure Rules (CPR) provide a process by which a disclosure order can be sought, pre-action, against a person who is likely to be party to subsequent court proceedings. A *Norwich Pharmacal* disclosure order (so called following the leading case of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1973]), however, can be granted against a person who will not be party to subsequent proceedings, so as to identify another person (for example a wrongdoer or a potential beneficiary) or so as to identify the nature of a wrongdoing, who or which will be the subject of subsequent proceedings. A *Norwich Pharmacal* order can also require the disclosure of information needed to seek redress, as opposed to merely the disclosure of documents as per CPR disclosure provisions.

However, *Norwich Pharmacal* orders involve an invasion of privacy and place a burden on the receiver, who may have become involved inadvertently and innocently. They must not be used as a 'fishing expedition' and they are an equitable remedy, which means they are issued entirely at the court's discretion.

Norwich Pharmacal principles require:

- that there is already a good arguable case that a wrongdoing has occurred;
- that the person against whom the disclosure request is sought be involved, albeit possibly innocently, in the wrongdoing as more than a mere witness;

- that the order is necessary and proportionate, in the overall interests of justice and in all the circumstances of the case, to enable the applicant to bring legal proceedings or obtain legitimate redress;
- that no other CPR provisions can achieve the necessary end; and
- that the respondent is likely to have the information sought.

General equitable principles require:

- that anyone looking to equity for a remedy must be free of wrongdoing him/herself ('clean hands');
- that where fairness requires, a remedy will be provided even if one does not exist by right at law; and
- that 'laches' (delay) can cause unfairness in itself and so an equitable claim must be brought within a timely manner.

Without-notice applications

It is often necessary or prudent for a party to make a court application against another, and to obtain an interim court order, without giving prior notice that such action is being taken. A good example is where a party seeks a freezing order (for further information, see 'Coming in from the cold' by Gwendoline Davies and Andrew Beck, *CLJ*64, November/December 2015): giving notice would be tantamount to tipping off, which could give an untrustworthy respondent the time

they need to place assets out of reach, thereby rendering the freezer useless. However, with a respondent being absent and therefore unable to make representations at the relevant hearing, the applicant and its legal advisors are under a duty to ensure that all material facts are brought to the court's attention.

That duty is known as the duty to give full and frank disclosure. It is an onerous, strict and continuing duty. (For further detail of the principles surrounding the duty of full and frank disclosure, see *Brink's Mat Ltd v Elcombe* [1988] paras 1356F to 1357G.) In particular, it is not for the applicant to decide what information the court might need. The applicant must disclose all facts and information, consideration of which would enable the court to properly exercise its discretion when deciding whether to grant the application made to it in the particular case. That includes any facts which may adversely affect the applicant's own case, and any relevant facts which might not necessarily have been within the applicant's or its advisors' actual knowledge, but which they could have discovered had they made reasonable enquiries.

Orb ARL v Fiddler

In this recent case (*Orb ARL v Fiddler* [2016]), a *Norwich Pharmacal* order had been made against the defendants pursuant to a without-notice application. The order had been made against the background of ongoing multimillion-pound litigation between the claimants and another individual whom they believed had instigated a computer-hacking scheme against them. The claimants alleged that the defendants had colluded with the hacker, both to extract financial gain and to discredit them. In making the *Norwich Pharmacal* application, the claimants sought information about the scheme's instigator and any contact between that person and the defendants, but they did not include evidence of the use to which the *Norwich Pharmacal* disclosure would be put. Following the making of the order, the defendants applied for it to be discharged on the basis that the claimants had not complied with their duty of full and frank disclosure and that their aim was not to obtain redress for an alleged wrongdoing, but rather to 'fish' for evidence to obtain an advantage in the main action.

The High Court agreed with the defendants and discharged the order. In doing so, the court held:

- On the evidence there were various breaches of the duty of full and frank disclosure. For example, the claimants had failed to draw to the attention of the court both an earlier finding that they had used court proceedings improperly and abusively as 'instruments of oppression' (para 42) to try to force the alleged hacker to settle the main litigation, and the refusal, by virtue of their 'lack of clean hands'

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(para 49), of another discretionary remedy previously sought by the claimants. The claimants also failed to disclose details of discussions in which one of their employees had indicated that the *Norwich Pharmacal* order was being sought to bring the main litigation to a conclusion in their favour.

- The breaches were of sufficient gravity to discharge (and refuse regranting) of the *Norwich Pharmacal* order, regardless of any merit otherwise in the claimant's application.
- *Norwich Pharmacal* jurisdiction dictates that the applicant must establish that the order sought is necessary to enable it to seek legal redress for a wrongdoing, and that any disclosure given must be restricted to that purpose (*Ashworth Security Hospital v MGN Ltd* [2002]).
- Here, no evidence was adduced as to the purpose for which the order was sought and that was fatal to the application.
- Furthermore, evidence suggested that the real purpose behind the application was for the claimants to acquire information with which to gain an advantage in the main litigation. That was not a legitimate purpose for *Norwich*

Pharmacal disclosure (and in fact was another example of the claimants improperly abusing court processes).

Conclusion

The case is a good reminder of the principles governing both without-notice and *Norwich Pharmacal* applications – in particular the underlying fairness required for these, and other, equitable remedies.

For those involved in the retail financial services industry, there can often be real practical benefits to using without-notice and *Norwich Pharmacal*

applications, for example to discover assets and beneficiaries. However these tactics are somewhat draconian and should not be embarked upon lightly. Applicants should have good evidence in place of the alleged wrongdoing; the respondent's involvement; why any orders sought and/or tactics deployed are essential; and the specific purpose to which disclosure gained will be put.

Equally, financial institutions are custodians of other people's data, and as such they can frequently be on the receiving end of disclosure orders. Where a *Norwich Pharmacal* order has been made, the court has undertaken to strike the delicate balance between interfering with an individual's human rights and personal data, and ordering disclosure in the interests of justice. While data protection is embedded in modern society and culture, it is not absolutely sacred and the *Norwich Pharmacal* equitable jurisdiction provides, in appropriate cases, that it can and should not be used as a veil for wrongdoing. ■

Ashworth Security Hospital v MGN Ltd [2002] UKHL 29

Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350

Norwich Pharmacal Co v Customs and Excise Commissioners [1973] UKHL 6

Orb ARL & ors v Fiddler & anor [2016] EWHC 361 (Comm)