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A Guide to Norwich Pharmaceutical Orders

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What is a Norwich Pharmacal Order?

A Norwich Pharmacal Order (“NPO”) is a form of disclosure order that compels a third party to disclose documents or information. Typically, an NPO will be sought in situations where wrongdoing has occurred but the identity of the wrongdoer is unknown and a third party holds relevant information, such as a bank or other financial institution. As such, NPO applications are commonly used in cases involving fraudulent activity. An NPO is typically a pre-cursor to substantive legal proceedings but there is no requirement that the person/entity making the application have a definitive intention to commence proceedings.

What are the requirements to obtain an NPO?

The Court will consider the following factors in determining whether to grant an NPO:

1. Is there any other mechanism under the Civil Procedure Rules (“the CPR”) that could provide appropriate relief?

Generally, an NPO will not be granted if the applicant could have obtained relief under the mechanisms available in the CPR, including via ‘pre-action disclosure’ pursuant to CPR 31.16 or via an ‘order for disclosure against a person not a party’ pursuant to CPR 31.17. The need for an NPO may arise in the following instances:

- CPR 31.16 cannot be used against an ‘innocent’ third party who holds relevant information and generally would require that third party to be a defendant in any underlying substantive proceedings.
- CPR 31.17 can only be used to further a substantive action and often an NPO will be sought before any proceedings are commenced as the identity of the defendant is not yet known.
- CPR 31.16 and 31.17 can only be used to seek disclosure of documents, not to procure the provision of information, which is possible with an NPO.

2. Is the respondent likely to have the relevant information or documentation?

An NPO will only be granted if the applicant can demonstrate that the respondent is likely to have relevant information and documents relating to the wrongdoing and/or the intended claim.

Any application for an NPO should be limited in scope to only request the information/documentation that is required. An application that is drafted too widely, may be challenged and fail.

3. Is there a good arguable case that there has been wrongdoing?

The applicant must establish that there is a good arguable case of wrongdoing, that is 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*” (*Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Ch)).



4. Is the ‘mere witness’ rule infringed?

- The Court will generally not grant an NPO against a party who is not a party to the action but could be called as a witness in the action (*Mercantile Group (Europe) AG v Aiyela* [1994] QC 366).

However, there are established exceptions to the rule including in circumstances where:

- The applicant cannot identify the wrongdoer and no proceedings can be brought unless the respondent provides the relevant information (*Jade Engineering (Coventry) Ltd v Antiference Window Systems Ltd* [1996] FSR 461).
- A claim cannot be pursued and/or proceedings cannot be issued as there is insufficient information to plead the case and the respondent is the only practicable source of the necessary information (*AXA Equity & Law Life Assurance Society plc and others v National Westminster Bank plc and others* [1998] EWCA 782).
- Where the claim involves trust property which may be dissipated (*Aoot Kalmneft v Denton Wilde Sapte (a firm)* [2001] EWHC 1 (Mercantile)).
- If the application is made post-judgment as witness evidence is no longer required at that stage.

5. Is the respondent involved in the wrongdoing?

In most instances, the respondent to an NPO application is not the intended defendant, or indeed a party, in any subsequent proceedings. Often the respondent whilst ‘involved’ in the wrongdoing is an ‘innocent’ third party.

However, an applicant must still show that the respondent, is somehow involved in the wrongdoing. The Court in *Norwich Pharmacal* confirmed that an NPO:

“... is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession”.

It is necessary to show that in relation to the respondent “without certain action on their part the infringements could never have been committed”.

The Court has a broad discretion to determine whether a potential respondent is ‘involved’ and takes a pragmatic view of the position.

6. Is the order necessary in the interests of justice?

The Court can only grant an NPO where it is necessary in the interests of justice. What is necessary will depend on the factual matrix of each case. The Court will conduct a balancing exercise, taking into consideration:

- The purpose of the NPO;
- The consequence if the NPO was refused;
- Whether any alternative remedies are available to the applicant; and
- The advantage to the applicant and any harm to the respondent;
- Whether it will be onerous for the respondent to comply with the terms of any NPO.

Broadly speaking, the Court is in favour of granting NPOs as they are typically sought in cases where they will be the only way for a wronged party to start to work out who to sue.

7. Is the applicant able to provide a cross-undertaking in damages?

Whilst not strictly within the ambit of injunctive relief, an NPO is to some extent analogous with injunctions, given the nature of the order being sought.

As with any injunctive relief, the Court will expect an applicant seeking an NPO to indemnify the respondent for any loss suffered if it is later determined that the applicant was not entitled to the relief granted. An applicant will generally be required to provide evidence of its ability to pay damages if required.

NPO Cost Rules

There are specific cost rules that apply in relation to an NPO. Whilst the issue of costs remains at the discretion of the Court, regardless of the outcome of the application, the applicant will usually be ordered to pay (i) the respondent's legal costs of and occasioned by the application and (ii) the respondent's costs in complying with the order.

However, although it is rare, the Court can make an alternative order in circumstances where issues regarding the respondent's conduct are raised, including for example where an applicant has sought the voluntary pre-action disclosure of the information/documentation and this has been unreasonably refused.

It is possible for an applicant to recover the costs of an NPO application as damages in subsequent proceedings against the wrongdoer, if they are able to show that the purpose of the NPO application was to identify the wrongdoer and the wrongdoer could or should have foreseen that the NPO application would have been a foreseeable consequence of the wrongdoing (*Morton-Norwich Products Inc v Intercon (No.2)* [1981] FSR 337).

How can an application for an NPO be challenged?

Aside from an applicant not meeting the essential pre-requisites for an NPO as outlined above, the following are the more common points that may be relied on by a respondent in challenging the basis for an NPO application either at the hearing of the initial application or thereafter by application to have an NPO set aside:

1. An NPO is an equitable remedy and the Court has a discretion as to whether to grant the relief sought.
2. There is an obligation on an applicant seeking an NPO to make 'full and frank disclosure' and failure to comply with this duty could give rise to an NPO being discharged.
3. If compliance with an NPO would require the disclosure of confidential documents or information, the applicant will need to further demonstrate that the disclosure is reasonably necessary to protect and/or establish its legal rights and that the disclosure is in the interests of justice (*Glidepath BV and others v Thompson and others* [2005] EWHC 818 (Comm)).
4. Privileged documents may be withheld by a respondent under an NPO however, privilege can be waived or lost.
5. An individual can assert a right against self-incrimination, if relevant, to avoid disclosing information and/or documentation. However, this is subject to a number of limitations, the detail of which is outside of the scope of this guide.

A respondent can also seek to vary an NPO, to limit the scope of the information or documents to be disclosed, on the basis of (i) reasonableness (ii) proportionately and/or (iii) costs. A respondent can also seek an extension of time to comply with any NPO if required.

Can I seek disclosure of information and documents held outside of England & Wales?

The law is unclear as to whether Norwich Pharmacal relief can be granted against a respondent in a foreign jurisdiction or in respect of information/documentation held in a foreign jurisdiction. Whilst the Court has in some cases granted permission to serve an NPO application outside of the jurisdiction, it is unclear whether the Court can extend its power, to order relief outside of the jurisdiction, in this way. Ultimately, this is a developing area of the law and the likely success of an 'overseas NPO' application will depend greatly on the specific factual matrix of each case.


If you have any questions or would like to discuss applying for NPO relief please contact Nick Scott the head of our Commercial Dispute Resolution Team.



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