



Norwich Pharmacal Relief – The Perfect Ointment for Victims of Fraud?

Introduction

Norwich Pharmacal¹ relief has long been an essential part of the fraud fighting toolkit, allowing parties to begin to identify the perpetrators and the flow of assets, in pursuit of a remedy. Other pre-action disclosure options include pre-action disclosure and Bankers Trust orders.²

In this article, we consider the background to and the test for Norwich Pharmacal relief, the effect of *Green v CT Group*³ and *Davidoff v Google*⁴ on the availability of relief under the jurisdiction and potential future implications.

Norwich Pharmacal Relief: Background and Test

In the Norwich Pharmacal case (from which the relief takes its name), Customs and Excise publicised that consignments of a chemical, patented by the Norwich Pharmacal Company, had been imported into the UK. The Norwich Pharmacal Company subsequently issued an application against Customs and Excise, seeking disclosure of the traders' identity so that a patent infringement claim could be commenced.

There have been various iterations of the requisite elements of the test for Norwich Pharmacal relief, which were recently summarised in *Collier v Bennett*:⁵

1. The applicant must demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person (**the "Arguable Wrong Condition"**);
2. The respondent must be mixed up in, so as to have facilitated, the wrongdoing (**the "Mixed Up Condition"**);
3. The respondent must be able, or likely able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued (**the "Possession Condition"**); and
4. Requiring disclosure from the respondent must be an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction (**the "Overall Justice Condition"**).

It is important to note that when considering an application for Norwich Pharmacal relief, the first three conditions above are threshold hurdles to each be passed, before the Overall Justice Condition can be considered. However, factors considered at the Arguable Wrong phase will often feed into the Overall Justice Condition considerations – e.g. the strength of the evidence of the underlying wrong complained of (as was the case in *Green*).

Provided the above conditions are satisfied, and the *RFU/Viagogo*⁶ factors considered (see below), then the Court has discretion to make a Norwich Pharmacal order. We consider each of these factors in further detail below.

¹ *Norwich Pharmacal -v- Customs and Excise Commissioners* [1974] 1 AC 133

² *Bankers Trust Company v Shapira and others* [1980] 1 WLR 1274

³ *Linda May Green v CT Group Holdings Limited* [2023] EWHC 3168 (Comm)

⁴ *Davidoff & Ors v Google LLC* [2023] EWHC 1958 (KB)

⁵ *Collier v Bennett* [2020] EWHC 1884 (QB), [35] (Saini J), as subsequently approved by the Privy Council in *Stanford Asset Holdings Ltd v Afrasiab Bank Ltd* (Mauritius) [2023] UKPC 35

⁶ *The Rugby Football Union -v- Consolidated Information Services Limited (formerly Viagogo Limited)* [2012] UKSC 55, [17]

Green v CT Group: Background

In *Green*, the applicant was a party to separate proceedings in the Channel Islands, during which it was said that she had misstated her financial means. The respondent was instructed to investigate the applicant's finances and obtained documents suggesting that she had misled the trustees and the Court, including as to €125m of dividends from three Lichtenstein entities.

The applicant averred that the documents were falsified⁷ and asked that the respondent reveal their source; the information was from "Person A" (said to have been based in Russia) who obtained documents from "Persons X and Y". The applicant sought an order for the disclosure of the identity of Person A. The evidence as to the forging or falsification of the documents was noted by the Judge to be very strong⁸ – for instance, the Lichtenstein entities from whom the applicant was alleged to have received funds did not exist on the corporate register.

Despite the strong underlying case, the Judge declined to grant Norwich Pharmacal relief, following the *Omar* line of reasoning (discussed further below) concerning the question of legitimate purpose. The judgment confirms that Norwich Pharmacal relief is only available in support of domestic civil proceedings. Requests for evidence for use in foreign and/or criminal proceedings are subject to separate legislation and where the proceedings are civil, should be made through the state-to-state mechanisms, including (where appropriate) letters of request.

Davidoff & Ors v Google: Background

In the case of *Davidoff*, the two applicants were operators of a property business and were, they said, the victims of critical but fake reviews posted on Trustpilot (the "Reviews"). They argued that the Reviews were damaging to their business and sought to identify those parties by way of Norwich Pharmacal relief against Google, with a view to bringing proceedings for libel and malicious falsehood.

In receipt of preceding Norwich Pharmacal relief against Trustpilot, the applicants had identified Gmail addresses used to post the Reviews and sought subsequent relief to identify the individuals behind the accounts. The Court declined to grant such relief on the grounds that Google was not said to be properly "mixed up" in the arguable wrong (the posting of the Reviews) against the applicants. *Davidoff* is a reminder of the strict need to establish a direct link between the facilitator of wrongdoing and the wrong itself when seeking Norwich Pharmacal relief – further discussed below.

The "Arguable Wrong" Condition

The first limb of the test for Norwich Pharmacal relief is whether a wrong has been committed, or arguably committed, by an ultimate wrongdoer. The applicant must be a victim of the wrong and be able to demonstrate a good arguable case it has been committed. The test for a "good arguable case" is the same as that applied on an application for a freezing order, namely a case which is more than barely capable of serious argument yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success.⁹

The subject matter of the "good arguable case" is the existence of a legally recognised wrong, and that this is so whether or not the Claimant is aware of sufficient material to enable it to plead out a full cause of action – a point said to underpin the basis for Norwich Pharmacal relief, since it is aimed at revealing information pertaining the wrong complained of, including the identities of perpetrators.

7 As at the date of this article, there are fresh allegations made against CT Group for the production of forged documents for use in Court proceedings: <https://www.ft.com/content/512d879c-1e98-44be-822e-1efd46b15ca3> - in *Green* the Judge noted that the evidence before the Court did **not** suggest any wrongdoing or improper behaviour by CT Group.

8 Additionally, *BNP Paribas* - said to be one of the transacting banks - could find no records of the alleged SWIFT transactions in its system. Further, the ECB observed that some of the SWIFT references were fundamentally wrong - including the wrong characters and numbers.

9 See *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) at [14], per Flaux J, citing from *The Niedersachsen* [1983] 2 Lloyd's Rep 600, at p 605

In *Green*, it was suggested that a purely criminal offence could not be an arguable wrong¹⁰ – this followed conflicting judgments on the point in *Financial Times v Interbrew* (relief could not be used for a victim of crime) and *Ashworth v MGN*, (relief could be used in such a way). In *Green*, the Judge was satisfied that there was at least a good arguable case that a civil wrong had been committed.

The “Mixed Up” Condition

The respondent to an application must also have facilitated the wrongdoing to the extent that they are “mixed up” in the wrong complained of, albeit not necessarily a knowing participant. In *Ashworth*, a distinction was drawn between someone involved in the wrong, and a “mere onlooker or witness”.¹¹ The test to be applied to this limb is whether the respondent has been involved in the furtherance of the wrongdoing.¹²

As regards the respondents to the application, there is no formal bar to seeking Norwich Pharmacal relief against potential defendants to the anticipated claim.¹³ However, in such circumstances the Court will generally not allow for the Norwich Pharmacal jurisdiction to be used to attempt to sidestep the requirements of pre-action disclosure, as set out under CPR 31.16, and indeed the attempt to use the jurisdiction against potential defendants, will usually be a relevant consideration when deciding whether the Overall Justice Condition is met.

The position is slightly different where the applicant seeks Norwich Pharmacal relief against a respondent on the basis that there is no cause of action envisaged against it at the point of making the application. In that scenario it is not uncommon to find that any resulting order made will include an undertaking not to use the documentation for the purposes of a claim against the respondent. This was the case in *IFT SAL v Barclays*¹⁴ where the disclosures revealed a claim against Barclays. IFT had to apply to have the undertaking set aside, which they succeeded in doing on public interest grounds.¹⁵

In *Davidoff* the applicants argued that Google were mixed up in the wrong since they “enabled” the Reviews. Nicklin J refused the request as Google were not said to be “involved in the furtherance”, nor had they a “connection with the circumstance of the wrong”. The wrongdoing was the subsequent use of the account, not the initial creation – a point which proved fatal to the applicant’s case.

The “Possession” Condition

For this condition to be satisfied, the information sought must be available, or likely available, to the respondent. In *Green*, it was noted that Person A (the provider of the information to the respondents) was not the originating source of the allegedly forged information – that information had been obtained from Persons X and Y. However, the Judge was not persuaded by this argument, since the threshold for this limb is comparatively low and relief will be granted where an order is likely to assist in identification of the wrongdoer.

The “Overall Justice” Condition

The grant of Norwich Pharmacal relief must be appropriate and proportionate in all of the circumstances of the case. In *RFU v Consolidated Information Services* Lord Kerr¹⁶ identified ten factors¹⁷ that it was relevant to have regard to during the judiciary’s balancing exercise. These factors include, the strength

¹⁰ Following the decisions in *Financial Times Ltd v Interbrew SA* [2002] EWCA Civ 274 and *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29

¹¹ *Ashworth*, [35]

¹² See *NML Capital –v– Chapman Freeborn Holdings Ltd* [2013] EWCA Civ 589 [2013] 1 CLC 968, [25] and *Campaign Against Arms Trade –v– BAE* [2007] EWHC 330 (QB), [12].

¹³ *AQR Capital Management LLC and Ors v The London Metal Exchange and Anor* [2022] EWHC 3313 (Comm)

¹⁴ *I.F.T. S.A.L. Offshore v Barclays Bank Plc* [2020] EWHC 3125 (Comm)

¹⁵ (1) Public interest in a just resolution of civil proceedings, citing *Jackson LJ in Tchenguiz v Director of the Serious Fraud Office* [2014] EWHC 1315 Comm at [18]; and (2) Public interest in the prevention and detection of fraud.

¹⁶ *Rugby Football Union*

¹⁷ *Ibid*, [17]

of the applicant's case, whether the information could be obtained from another source and whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing. In *Green* the Judge was satisfied that a strong underlying case existed and that there was a strong public interest in allowing the applicant to vindicate her legal rights, including as against the respondent who was the only party in possession of the information sought. There was, essentially, a strong argument that the respondent ought to have known that it was facilitating arguable wrongdoing, given the inability to explain how the documents had been obtained lawfully.

The terminal issues for the applicant lay in the *Omar* line of authorities, which the Judge noted either formed part of the Overall Justice Condition, or in itself formed a new Fifth Condition to the grant of Norwich Pharmacal relief.

A Fifth Condition? The "Proper Purpose" Condition

In *Regina (Omar) v Secretary of State*¹⁸ the applicants were arrested in Kenya on suspicion of having been involved in a bombing in Uganda. They were subsequently transferred to Uganda and charged with murder, before contending that their prosecution was an abuse of process and their rendition to Kenya, unconstitutional. They sought Norwich Pharmacal relief in England and Wales for information pertaining to their rendition and ill-treatment, for use in their defence in the Ugandan criminal case against them.

The Court of Appeal refused their application noting that the statutory regime in the Crime (International Co-Operation) Act 2003 (for the obtaining of evidence for use in foreign criminal proceedings) was exclusive and that the Norwich Pharmacal jurisdiction could not cut across this. The policy reason for this was cited by Marica Kay LJ in *Omar*:¹⁹

"The statutory scheme accords ministerial discretion, national security and Crown service a paramountcy which the Norwich Pharmacal remedy does not. The statutory scheme enables the Secretary of State to regain a degree of control over sensitive information or evidence which the Norwich Pharmacal remedy would loosen or might deny."

This new "fifth limb", that the order must serve a legitimate purpose, has the effect of excluding Norwich Pharmacal relief where a statutory scheme exists, such as the Crime (International Co-Operation) Act 2003. This is to be contrasted with the position in the Cayman Islands, where a statutory regime exists alongside the Norwich Pharmacal jurisdiction and where Norwich Pharmacal relief can be granted in aid of foreign proceedings.

Since the relief sought in *Green* was in aid of proceedings which were (a) foreign, and (b) criminal in their nature (both elements being individually terminal to the grant of relief), then there was no legitimate purpose to the applicant's claim for Norwich Pharmacal relief. The Judge further noted that the case had nothing to do with England and Wales, save for the respondent's domiciliation. Additionally, Person A was said to be in Russia – even if relief were granted against the respondent, further relief in Russia against Person A to obtain the sources of the forged information, was said to be fraught with problems.

Looking Forwards

Recent case law underlines the importance of correctly framing an application for Norwich Pharmacal relief as regards the identity of the respondents, the information they are said to hold and the overarching purpose of the application, including the future use of any information disclosed.

Where a fraud spans multiple jurisdictions, it is important to engage local counsel promptly to advise on domestic relief equivalent to that afforded by Norwich Pharmacal. Seeking to enforce an English court order for disclosure on foreign respondents is a high-risk strategy (despite the streamlined service offered

¹⁸ *Regina (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112

¹⁹ *Omar*, [25]

²⁰ *Daniel Carlos Scenna and Anor v Persons Unknown and Ors* [2023] EWHC 799 (Ch)

by the new Gateway 25), since such an order may breach domestic privacy laws. It will be a relatively low bar for a foreign party to set aside an English court order for disclosure where there is equivalent relief under local law – see *Scenna*.²⁰ With this in mind, parties should consider carefully the jurisdictions within which respondents and the relevant information may be located before issuing proceedings.

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