A PRACTICAL GUIDE TO:

NORWICH PHARMACAL ORDERS

A Practical Guide from the 2TG Commercial Fraud Team **Summer 2018**

Introduction

The aim of this guide is to provide an outline of the issues to be considered when obtaining *Norwich Pharmacal* disclosure orders.

This guide is in three parts: part 1, an outline of the *Norwich Pharmacal* jurisdiction; part 2, the procedure for applying for *Norwich Pharmacal* relief; and part 3, questions of jurisdiction and foreign proceedings or parties.

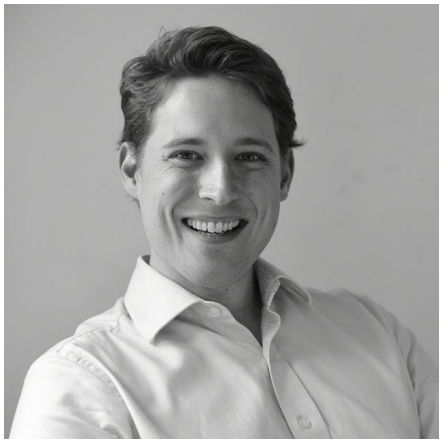
Part 1: An outline of the *Norwich Pharmacal* jurisdiction

The *Norwich Pharmacal* jurisdiction

In *Norwich Pharmacal v. Customs and Excise Commissioners* [1974] AC 133, the House of Lords recognised the equitable jurisdiction which enables the court to require a respondent who is "mixed up" in wrongdoing to provide "full information". This jurisdiction is preserved by CPR r.31.18.

At first, the *Norwich Pharmacal* jurisdiction was limited to ordering information as to the identity of the wrongdoer or information that helped to identify the wrongdoer. This may include, for example, email routing and address data to assist in identifying the sender of an email (see *Campaign Against the Arms Trade v. BAE Systems Plc* [2007] EWHC 330 (QB) at [95]-[96]). It may also include the IP address of a registered user of a website (see *G and G v. Wikimedia Foundation Inc* [2009] EWHC 3148 (QB)).

The jurisdiction subsequently developed to allow applicants to compel provision of a crucial (and specific) piece of information without which liability could not be alleged (*Axa v. Natwest* [1998] PNLR 433; *Carlton v VCI* [2003] EWHC 616 (Ch)); and, exceptionally, information as to whether a wrong has been committed at all (*P v T* [1997] 1 WLR 1309).



Timothy Killen
tkillen@2tg.co.uk
+44 (0)20 7822 1200

William Clerk
wclerk@2tg.co.uk
+44 (0)20 7822 1200

The most significant extension of the *Norwich Pharmacal* jurisdiction came in *Bankers Trust v. Shapira* [1980] 1 WLR 1274 where the court exercised the jurisdiction to allow disclosure against a bank to allow assets to be traced and/or preserved or in support of a proprietary claim. It is now accepted that, where a bank or financial institution is holding or has transferred assets on behalf of a party who is alleged to have obtained those assets as a result of fraud, the court may order disclosure to assist the applicant to find or recover its assets (see *Bankers Trust* per Lord Denning MR at 1281G-1282E, and Hoffmann J in *Arab Monetary Fund v. Hashim (No.5)* [1992] 2 All ER 911). It is worth noting that there is some debate as to whether the *Bankers Trust* order is truly an extension of *Norwich Pharmacal* relief, or instead stems from the rule of equity to allow a claim in order to ascertain the whereabouts of a missing trust fund (on which, see *Murphy v Murphy* [1998] 3 All ER 1), but the foundation of the relief is unlikely to have a practical impact in most cases.

Norwich Pharmacal relief is founded on the court's equitable jurisdiction. It is a flexible remedy and, as the courts have repeatedly emphasised, the jurisdiction is a developing one and there is therefore a need for flexibility and discretion in considering whether the remedy should be granted (see *Rugby Football Union v Consolidated Information Services Ltd* [2013] 1 All ER 928 at [15] per Lord Kerr; *Ashworth Hospital Authority v. MGN Ltd* [2002] 1 WLR 2033 per Lord Woolf CJ at [57]; and the judgment of the divisional court in *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 WLR 2579 at [132]). The courts have also emphasised that the jurisdiction is carefully circumscribed and may not be used to engage in a mere "fishing expedition" (see *Ramilos Trading v Buyanovsky* [2016] EWHC 3175 (Comm) per Flaux J at [46]).

The legal framework in outline

The legal framework is now well-established, and the most commonly cited summary is that given by Lightman J in *Mitsui v. Nexen Petroleum* [2005] 3 All ER 511 at [21]:

> "The three conditions to be satisfied for the courts to exercise the power to order *Norwich Pharmacal* relief are:
>
> 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 wrongdoer to be sued."

Wrongdoing

The requirement for wrongdoing is broad. The wrong in question may be a crime, tort, breach of contract, equitable wrong or contempt of court (see Popplewell J in *Orb A.R.L v. Fiddler* [2016] EWHC 361 (Comm) at [83] and [84]). It is not necessary that the applicant intends to bring legal proceedings in respect of the wrong; any form of redress, such as disciplinary action or the dismissal of an employee will suffice (*RFU* at [15]; *Ashworth*; *British Steel Corp v. Granada Television Ltd* [1981] AC 1096 at 1200). The wrongdoing may also consist of a judgment creditor attempting to make himself judgment proof by putting his assets out of reach (*Mercantile Group AG v. Aiyela* [1994] QB 366).

The wrongdoing on which an applicant relies must be clearly identified, albeit it may be identified in general terms (per Lord Woolf CJ in *Ashworth* at [60]).

It has recently been clarified (per Flaux J in *Ramilos Trading* and Birss J in *Santander UK plc v. National Westminster Bank plc & ors* [2014] EWHC 2626 at [40]) that the test for establishing wrongdoing is the same test of "good arguable case" used for freezing orders deriving from *Ninemia Maritime Corp v. Trave Schiffahrts GmbH & Co KG (The Niedersachsen)* [1983] 1 WLR 1412. An applicant for *Norwich Pharmacal* relief must show a case on wrongdoing that is more than barely capable of serious argument but not necessarily one which has a greater than 50% chance of success at trial.

Need

The applicant must demonstrate that they need the information to enable action to be brought against the ultimate wrongdoer (*Ashworth* per Lord Woolf CJ at [36] and [57]). The requirement for necessity is a threshold condition, and not simply a matter of the court's discretion (per Maurice Kay LJ in *R (Omar) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112 at [30]).

Where the information sought can be obtained via other practicable means, the court will not grant *Norwich Pharmacal Relief* (per Lightman J in *Mitsui v. Nexen* at [24]). However, the bar of necessity is not high and the test of necessity does not require the remedy to be one of last resort (see *RFU* at [16] citing the judgment of the divisional court in *R (Mohamed)* at [94]).

Nevertheless, if the information which is the subject of the application can be obtained via a different route (e.g. a CPR r.31.16 application for pre-action disclosure; or a CPR r.31.17 application for third-party disclosure) the applicant should explain to the court in its evidence in support of its *Norwich Pharmacal* application what efforts have been made to obtain the information by alternative means and/or why it is not feasible to get disclosure other than by way of the *Norwich Pharmacal* jurisdiction.

Mixed up and able to provide information

The third condition is that the respondent is "mixed up" in the wrongdoing. A respondent can be (and most usually is) mixed up in wrongdoing innocently; there is no requirement that the respondent even be aware of the wrongdoing (see *Norwich Pharmacal* at 188 per Viscount Dilhorne).

An applicant must show a good arguable case that the respondent is involved in the wrongdoing in a way which distinguishes them from being a mere witness. The requirement of involvement in the wrongdoing is important because it distinguishes the respondent from a mere onlooker or witness, against whom disclosure will usually not be ordered (see Lord Reid in *Norwich Pharmacal* at 173H-174E) – a party may not obtain disclosure against a person who would in due course be compellable to give information by oral testimony as a witness, or ordered to produce documents pursuant to a witness summons (see Hoffmann LJ in *Mercantile Group Europe AG v. Aiyela* [1994] QBR 366 at 374C-D). The need for involvement provides a justification for the intrusion upon the respondent (who is not the wrongdoer) that an order for disclosure necessarily entails (see Lord Woolf CJ in *Ashworth* at [35]).

The test outlined by Lightman J in *Mitsui* was that a respondent must be, "mixed up in so as to have facilitated the wrongdoing" (emphasis added), deriving from the classic statement of Lord Reid in *Norwich Pharmacal* at 175. The need for facilitation is, however, disputed: in *R (Omar and others) v. The Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118 the Court of Appeal held that it was wrong to conclude that an applicant for *Norwich Pharmacal* relief must establish facilitation. Conversely, in *NML Capital Limited v Chapman Freeman Holdings Limited* [2013] EWCA Civ 589, the Court of Appeal held that the third party must be involved in the furtherance of the transaction identified as the relevant wrongdoing (see Tomlinson LJ at [25]).

In *Various Claimants v. Newsgroup Newspapers Limited and the Commissioner of Police for the Metropolis* [2014] 2 WLR 756, Mann J heard full argument on the point and held that the facilitation test was not the sole test for the exercise of the *Norwich Pharmacal* jurisdiction, and found that it was not a requirement that the respondent in (the metropolitan police service, "MPS") participated in, facilitated or was involved in the actual wrongdoing – quite clearly, it had not. It was held to be enough that MPS's engagement with the wrong (in acquiring information about it) made MPS more than a mere witness (or metaphorical bystander).

This test has since been applied by Slade J in *The Right Honourable the Countess of Caledon v. The Commissioner of Police for the Metropolis* [2016] EWHC 2214 (QB), and summarised by Popplewell J in *Orb v. Fiddler* at [88] notably without reference to any requirement for facilitation: "[t]he third threshold condition is that the person against whom the order is sought must be involved in the wrongdoing in a way which distinguishes him from being a mere witness."

Mere receipt of confidential documents or information *may* be enough to establish the respondent's involvement in the wrongdoing, depending upon the nature of the wrong and its purpose (see King J in *Campaign Against Arms Trade v BAE Systems plc* [2007] EWHC 330 (QB) at [13]).

Internet service providers and operators of websites may be subject to *Norwich Pharmacal* applications on the basis that they have been mixed up in wrongdoing where their customers have engaged in illegal file-sharing or breaches of contract (see, for example, *Golden Eye (International) Limited v Telefónica UK Limited* [2012] EWCA Civ 1740, and *RFU*).

A telephone company may be mixed up in wrongdoing where the wrongdoer has used the telephone in the course of the wrongdoing (*Coca Cola v British Telecom* [1999] FSR 518).

An applicant must also demonstrate that the respondent is able to provide the information sought.

Discretion

Norwich Pharmacal relief is an equitable remedy and as such the court retains a discretion over whether to grant it, and will only do so where it is a "necessary and proportionate response in all the circumstances" (per Lord Woolf CJ in *Ashworth* at [36] and [57]). Once the three threshold *Mitsui* conditions have been met, the court will then consider whether it should exercise its discretion to grant the relief sought in order to do justice (as set out by Popplewell J in *Orb v. Fiddler* at [88]).

In *Rugby Football Union v Consolidated Information Services Ltd* [2013] 1 All ER 928 at [17], Lord Kerr listed ten factors identified by the authorities which may be relevant to the exercise of the discretion, namely:

(i) The strength of the possible cause of action contemplated by the applicant for the order.

(ii) The strong public interest in allowing an applicant to vindicate his legal rights.

(iii) Whether making the order will deter similar wrongdoing in the future.

(iv) Whether the information could be obtained from another source.

(v) Whether the respondent knew or ought to have known that he was facilitating arguable wrongdoing.

(vi) Whether the order might reveal the names of innocent persons as well as wrongdoers, and

if so whether such innocent persons will suffer harm as a result.

(vii) The degree of confidentiality of the information sought.

(viii) The privacy rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") of the individuals whose identity is to be disclosed.

(ix) The rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed.

(x) The public interest in maintaining the confidentiality of journalistic sources, as recognised in Section 10 of the Contempt of Court Act 1981 and Article 10 of the Convention.

The court will also have in mind any public interest which militates against disclosure (*Campaign Against Arms Trade v BAE Systems plc* [2007] EWHC 330 (QB)).

In applications against banks and professional advisors, the court will probably consider specifically the potential detriment to the person against whom the order is sought, in terms of the cost of complying with the order (against which the respondent is usually indemnified by the applicant) and any potential invasion of privacy and/or any breach of obligations of confidence to others (see Hoffmann J in *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911 at 919j, and Sir Anthony Clarke MR in *Koo Golden East v Bank of Nova Scotia* [2008] QB 717 at [49]).
Any applicant would be well advised to address the *RFU* discretionary factors expressly as part of its application for *Norwich Pharmacal* relief.

Part 2 – the procedure for applying for *Norwich Pharmacal* relief

Part 8 claim
If there are existing proceedings, the respondent should be joined as a party to the claim "*for the purposes of disclosure pursuant to the principle set out in Norwich Pharmacal v Customs & Excise [1974] AC 133*". The claim or application should then set out the basis of the jurisdiction, namely wrongdoing, need, involvement, the information sought, and discretion.

If there are no existing proceedings (as is often the case), a Part 8 claim form should be issued with the respondent as a Defendant. Where previously it had been possible to bring *Norwich Pharmacal* applications by a standalone CPR Part 23 application, following *Towergate Underwriting Group Ltd v. Albaco Insurance Brokers Ltd* [2015] EWHC 2874 (Ch) and *Santader UK Plc v. Natwest* [2014] EWHC 2626 it now appears settled that the correct procedure is to issue a Part 8 claim.

Level of Court and Judge
Norwich Pharamcal proceedings are usually most suitably considered by the High Court (per Birss J in *Santander UK plc v. National Westminster Bank plc and ors* [2014] EWHC 2626 (Ch) at [37]-[42]). In some cases, where there is little factual or legal complexity and where the quantum of the ultimate claim is small, it may be appropriate to bring the proceedings in the County Court. Judges, Masters and District Judges all have power to exercise the *Norwich Pharmacal* jurisdiction.

Although the application is now made by Part 8 claim form rather than Part 23 application, CPR r.23.2(4) continues to provide sensible guidance: "if an application is made before a claim has been started, it must be made to the court where it is likely that the claim to which the application relates will be started unless there is a good reason to make the application to a different court."

With or without notice?

A *Norwich Pharmacal* application may be made with or without notice to the respondent, although it should normally be made on notice unless there is a need for the proceedings to be kept secret from the respondent (rather than from the suspected wrongdoer).

Even where the respondent is not involved in the wrongdoing, there may be a real risk that they will inform the wrongdoer of the application. The respondent may even believe that they have a duty to do so. In those circumstances it may be justifiable not to inform the respondent. An alternative is to first obtain a without notice gagging order against the respondent preventing them from informing the alleged wrongdoer of the application, followed by a *Norwich Pharmacal* application (see below).

If there is extreme urgency (but no need for secrecy), informal notice should still be given to the respondent if possible (see CPR 23A PD 4.2).

Full and frank disclosure

Where an application is made without notice the applicant has a duty to make full and frank disclosure of matters which might count against it on the application. The duty is important, and *Orb v. Fiddler* is an example of a *Norwich Pharmacal* application being set aside at a return date by reason of an applicant's failure to comply with the duty of full and frank disclosure.

In the context of *Norwich Pharmacal* relief it is important to note that the duty to make full and frank disclosure extends not only to the respondent to the application, but also to the party whose (potentially confidential) information is sought, and particular attention should be given to any potential issues which might arise out of the disclosure of a third party's confidential information and damage which might arise from such information becoming public.

The duty of full and frank disclosure also applies where an application is made on short notice (see *CEF Holdings Ltd v. Mundey* [2012] EWHC 1524 (QB) per Silber J at [183] and *Re BC Softwear Ltd, Cooke v. Parker & Ors* (unreported) 4 May 2017). The duty is outside the scope of this guide, but was authoritatively summarised by Ralph Gibson LJ in *Brink's Mat Ltd v. Elcombe* [1998] 1 WLR 1350 at 1356F to 1357G. (And see also 2TG's Practical Guide to Freezing Orders).

Gagging order

Gagging orders restraining those served from informing third parties of the proceedings or of the fact that an order has been made may on occasion be appropriate. Such orders are often made to give the applicant time to use the information obtained to identify and secure assets or preserve evidence or property elsewhere and/or pursue further wrongdoers. Possible wording for a gagging order might be:

"Except for the purpose of obtaining legal advice, the respondent must not directly or indirectly inform anyone, in particular xyz, of the application or this order or warn anyone that proceedings have been or may be brought against him by the applicant until [date] without the consent in writing of the applicant's solicitors or the permission of the court."

Consideration should also be given, where appropriate, to orders:

- That the hearing be held in private.
- To seal the court record.
- For permission to delay serving any documents that would otherwise disclose the existence of the application or order.
- That the parties be referred to by cipher.

The price of disclosure

An applicant will normally be expected to indemnify the respondent in respect of costs – both of the application and of complying with the order – unless the respondent is itself a wrongdoer or has acted unreasonably (see *JSC BTA Bank v. Ablyazov & Ors* [2014] EWHC 2019 (Comm) per Flaux J at [70] to [82]). These costs can, in principle, subsequently be recovered against the wrongdoer (see *Totalise Plc v The Motley Fool Ltd* [2002] 1 WLR 1233, 1240 – 1241; and *JSC v. Ablyazov* at [75]).

In addition, where an application is made without notice (or on short notice) an applicant will be expected to provide a cross undertaking in damages to the respondent, and to any innocent third parties who might foreseeably suffer loss as a result of the order (such as a party whose confidential information may become public). The reality is that the likelihood of any loss being caused to a respondent (over and above the costs of compliance with the order) is negligible – a respondent will only have provided information having been ordered to do so by the court, and so it is unlikely that they will be exposing themselves to a liability as a result. An applicant should consider, however, whether there is any special risk of damage to the respondent, or any third parties, arising from the special confidentiality of the relevant documents and, if applying without notice, disclose this to the court.

The documents obtained will be subject to an implied undertaking that, without the permission of the court, they will not be used for any purpose other than in the proceedings in question. If the applicant wishes to use the documents for other purposes (including proceedings abroad), they must obtain the court's permission. Such an application should normally be made on notice.

Evidence and draft order

The general rule is that evidence in support of the application should be by witness statement rather than affidavit (if an affidavit is used where a witness statement would have sufficed there may be a costs penalty per CPR r.32.15(2)). The witness statement should state:

- The relevant factual background, including evidence of wrongdoing i.e. the cause of action (or potential cause of action) against the wrongdoer.
- Full particulars of any allegation of dishonesty (whether against the respondent or against the wrongdoer).
- If applicable, the reason why the application is without notice or on short notice (such as secrecy, and/or urgency).
- The evidence that the respondent has been mixed up in the wrongdoing.
- The relevant information the respondent is believed to have.
- The reason why the disclosure is necessary. An applicant must be careful to establish that disclosure is necessary for a legitimate purpose (per Lord Woolf CJ in *Ashworth* at [60]). In *Orb v. Fiddler* Popplewell J held at [95] that the "failure to state the intended use of the information sought, on affidavit, is fatal to the Claimant's application for *Norwich Pharmacal* relief".
- Any other factors which would support the court exercising its discretion favourably.
- A summary of the position of the respondent, and the owner of any confidential information/other innocent third parties, in relation to the application, including any correspondence – e.g. the most common position of a bank is that it neither consents to nor opposes the application.

- Any facts which need to be set out to satisfy the obligation of full and frank disclosure. It should be noted that simply including a prejudicial document in an exhibit will not usually be sufficient. Unless it is expressly drawn to the judge's attention either by the advocate or in the body of the affidavit, it will be treated as not having been disclosed (*Siporex Trade SA v. Comdel Commodities* [1986] 2 Lloyd's Rep 428, 437). The safest course is to include it in the body of the witness statement itself.

- Evidence as to the applicant's ability to meet the cross-undertaking if called upon to do so.

A draft order should be included in the application bundle. The terms and scope of the draft order will depend on the facts of the case.

The scope of the order, however, should not be wider than necessary to achieve the aim. The terms should be clear and precise, so as to make it plain to the respondent what they have to disclose.

If it is envisaged that disobedience of the order is to be dealt with by an application to bring contempt of court proceedings (this will be rare), the order itself should have a penal notice prominently endorsed on it (per CPR 81 PD 1).

Practicalities

An applicant should normally issue a Part 8 claim and pay the appropriate court fee before the application is heard (or undertake to do so following the hearing if time constraints makes this impossible). The witness statement should be filed together with the claim form (per CPR r.8.5(1)) and, where the application is made on notice, served together with the claim form (per CPR r.8.5(2)). At the hearing, the court should be provided with original copies of the sealed claim form.

Where the hearing is to be held in private, it is good practice for the court to order this pursuant to CPR r.39.2(3) at the outset of the hearing and to record the same as a recital to any order made. Any order made following a hearing in private must include the words after the name of the judge, "sitting in private" (see CPR 39A PD 1.13) the effect of which is to require the court's permission before a transcript of judgment or a copy of an order can be obtained by a non-party.

If an applicant wishes the court record to be sealed (pursuant to CPR 5.4C PD 4), the request for this relief should be formally included in the Part 8 claim and it is good practice to also record this in the recital to any order made.

The hearing

Even if the case is urgent, if possible, send papers to the court in advance, along with any skeleton argument from counsel (which should be prepared in nearly every case).

Confirm that the judge has read the statement and skeleton.

After taking the judge through the jurisdictional requirements of the *Norwich Pharmacal* order and demonstrating that these have been met, the focus of the advocate should be firmly on persuading the judge that, as a matter of discretion, the order is appropriate. The advocate must present the case fairly and ensure that any full and frank disclosure has been made, if the hearing is without notice.

Make sure (especially if the hearing is without notice) that there is someone at the hearing to take a full note of what is said. Where the hearing is without notice, a copy of the note will need to be provided to the respondent after the hearing.

Be prepared to politely decline suggestions from the judge on a without notice hearing if they appear to be oppressive to the respondent. If the applicant accepts such suggestions, he will not be able to blame the judge (*Bank of Scotland v. A Ltd* [2001] 1 WLR 751).

Following the hearing, a perfected copy of the order should be typed and emailed (or provided in hard copy where required) to the relevant court officer without delay in order that it can be sealed.

Part 3 – Questions of Jurisdiction: Foreign Proceedings and Parties

Norwich Pharmacal relief in support of foreign proceedings

One particular question which has vexed the courts on more than one occasion is whether use can be made of the *Norwich Pharmacal* jurisdiction in support of foreign proceedings.

In *Ramilos Trading* the court considered the relevance and impact of the Evidence (Proceedings in other Jurisdictions) Act 1975 (the "1975 Act") on its jurisdiction to grant *Norwich Pharmacal* relief in support of foreign proceedings. Flaux J held that the jurisdiction to order *Norwich Pharmacal* relief was ousted by the 1975 Act and, in doing so, construed narrowly the ratio of an earlier High Court decision of Coulson J, in which it had been suggested that the 1975 Act and *Norwich Pharmacal* relief could be pursued as alternatives (*Shlaimoun v. Mining Technologies International Inc* [2011] EWHC 3278 (QB)).

In construing the decision in *Shlaimoun* as he did, however, Flaux J left open the possibility that *Norwich Pharmacal* relief may be available to a party where, although there might be an argument for a foreign jurisdiction, there was a real possibility that proceedings may be issued in England and Wales.

Given the tension between the decisions in *Ramilos* and *Shlaimoun*, it would clearly be desirable for the issue to be considered by the Court of Appeal.

As matters stand at present, any applicant for *Norwich Pharmacal* relief in support of a claim which may potentially be subject to the jurisdiction of a foreign court would be well advised to set out in its application the basis on which it is said that there is a "real possibility" of proceedings being issued in this jurisdiction. If the application is without notice, an applicant should deal with the *Ramilos Trading* and *Shlaimoun* judgments as a matter of full and frank disclosure.

Service out of the jurisdiction of a Norwich Pharmacal application

Where the putative claim is arguably subject to the jurisdiction of the English courts, but the non-party against whom *Norwich Pharmacal* relief is sought is out of the jurisdiction, the question arises as to whether the court will grant permission for service of the application out of the jurisdiction.

This issue was addressed in *AB Bank v. Abu Dhabi Commercial Bank* [2016] EWHC 2082 where the claimant sought to obtain information from the defendant bank in the United Arab Emirates concerning missing funds from a transaction which was subject to English law and jurisdiction.

Teare J refused permission to serve out, holding that a *Norwich Pharmacal* application did not fall within any of the gateways in CPR PD6B as the relief was not an "interim remedy" (PD 6B, para 3.1(5)), the act sought from the bank was a search within the UAE, and so it could not be said that the court was ordering an act "within the jurisdiction" (PD 6B para 3.1(2)), and the bank was not a "necessary and proper party" (PD 6B para 3.1(3)), as there would be no claim against the bank.

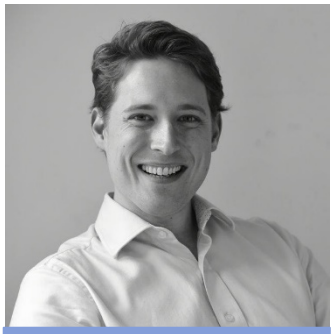
If the non-party is a foreign bank (as will often be the case), investigations should be made into whether service can be effected on a branch within the jurisdiction. In *Credit Suisse Trust v. Banca Monte Dei Pasche Di Siena* [2014] EWHC 1447 (Ch) an application was made against certain Italian banks for information pertaining to a fraud which was the subject of Guernsey proceedings. Service out was not directly considered, but the Court did

address the question of whether it was appropriate for relief to be granted by the English courts where the activity in respect of which information was sought occurred in Italy. In considering that it was appropriate for relief to be granted, emphasis was placed on the fact that certain information held by the Italian respondent banks could be accessed from their London branches. This said, it was noted by the Court that such an order would be "exceptional and should be granted only with care" (on which, see the decision of Hoffmann J in *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] 2 WLR 453).

The recent decision of *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) provides a potential alternative route to gaining information from persons outside of the jurisdiction. *CMOC* concerned an application for a freezing injunction which arose out of fraudulent payment instructions made through a hacked email account. The money was paid out to various banks across the world from CMOC's account held with the Bank of China in London.

HHJ Waksman QC (sitting as a judge of the Commercial Court) granted permission to serve the freezing injunction against "persons unknown", out of the jurisdiction, by way of alternative service. Interestingly though, for present purposes, is that provision was made in the order for the international receiving banks to provide information in relation to the fraud. The Judge held that there was jurisdiction to grant such an order pursuant to the *Bankers Trust* principles (discussed above) and/or CPR 25.1(1)(g). In respect of those banks out of the jurisdiction, it was held that they were a "necessary and proper party" to the claims which had been brought against the perpetrator defendants, although there was no discussion in the judgment of how such a requirement was satisfied, and *AB Bank* was not referred to in the judgment. The limits of the decision in *CMOC* will no doubt be tested in due course.

ABOUT THE AUTHORS



Timothy Killen
tkillen@2tg.co.uk
+44 (0)20 7822 1200

Timothy Killen

Tim is an established commercial practitioner, with particular experience of actions in the insurance, construction and financial sectors.

Many of Tim's cases involve issues of jurisdiction and choice of law arising out of cross-border litigation, and Tim is experienced in obtaining urgent and injunctive relief in support of such proceedings.

Tim regularly appears in cases and arbitrations involving GCC countries and has appeared before both the DIFC and ADGM Courts.

Tim is praised in Chambers & Partners 2018 as having "*quite simply superb knowledge of the law*" and being "*very hard-working and very bright*".

William Clerk
wclerk@2tg.co.uk
+44 (0)20 7822 1200

William Clerk

Will's practice has a focus on commercial and insurance law.

He deals with a ride range of commercial work including general contractual disputes, commercial fraud, commercial agency, insurance and reinsurance, professional negligence and sports disputes.

Will has particular experience of claims involving urgent interim applications and injunctive relief (most recently arsing out of "cyber fraud" claims) and has a strong interest in claims involving issues of fraud or exaggeration.

CONTACT US

Lee Tyler
Senior Clerk
ltyler@2tg.co.uk
+44 (0)20 7822

Paul Cray
Deputy Senior Clerk
pcray@2tg.co.uk
+44 (0)20 7822 1208

Matthew Moylan
First Junior Clerk
mmoylan@2tg.co.uk
+44 (0)20 7822 1210

Billy Hammonds
First Junior Clerk
bh@2tg.co.uk
+44 (0)20 7822 1213

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FIND US

Address
2 Temple Gardens
London EC4Y 9AY

Telephone
+44 (0)207 822 1200

Fax
+44 (0)207 822 1300

Tube
Temple (Circle & District
Blackfriars (Circle & District and Thameslink rail)

DX
134 Chancery Lane

Rail
Blackfriars
City Thameslink