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# 'Bang for your buck' – FAQs, myths and truths regarding Norwich Pharmacal orders

All litigators should have a good grasp of Norwich Pharmacal orders (NPO) granted by the courts of England and Wales to compel pre-action disclosure. For fraud litigators a detailed understanding is essential.

There are several common myths about NPOs – perhaps not surprisingly because they are constantly being developed and their boundaries constantly being pushed, given the flexible nature of this civil remedy.

In practice, a NPO is quick to obtain and is an effective way of compelling disclosure. It is not a remedy of last resort and, indeed, in the right circumstances it is one of choice, as you can get plenty of 'bang for your buck'. It should, however, be handled with care as it can, if misused, inflict damage to an applicant's case and reputation.

Often the NPO is made secretly so as not to forewarn defendants. The price to be paid for this advantage is that the applicant must be candid with the court about all the relevant facts and circumstances of the application.

**Question 1: Is NPO disclosure limited, for example, to the identity of the wrongdoer?**

**Answer:** No.

A NPO will provide information/ documents to help applicants identify who to sue but will also:

- identify if a wrongdoing has in fact taken place;
- show the wrongdoer has committed the wrong;
- help decide whether to bring a claim or to take other steps to protect the applicant (eg, dismiss an employee or amend internal procedures);
- help a case to be pleaded; or
- trace money and other misappropriated assets.

**Question 2: Does an applicant need to show it intends to bring proceedings or the information is necessary to allow it to do so?**

**Answer:** No.

The applicant can seek the information to allow it to take steps to determine what to do which may include commencing proceedings.

In *Orb ARL and others v Fiddler and another (2016) EWHC 361*, Popplewell J emphasised the importance of an applicant for a NPO identifying the purposes for which the information disclosed would be used. This was necessary so that the court could determine whether the information was to be used for a legitimate purpose (eg, in this case, Popplewell J found the NPO application had been improperly used in the hope of acquiring evidence that would discredit the respondent and enable the applicants to attain an advantage in the main proceedings).

**Question 3: What about the nature of the wrongdoing? Is a NPO possible if the wrongdoing is a crime?**

**Answer:** Yes.

This is a wide relief and it is possible to get disclosure regarding a crime. A NPO is also possible for other kinds of wrongdoing including:

- breach of contract; or
- 3rd parties becoming mixed up in a judgment debtor evading enforcement of a judgment.

There is no need to allege dishonesty.

**Question 4: Can a NPO be sought to aid foreign proceedings?**

**Answer:** Yes.

If a respondent is subject to the English court's jurisdiction, a NPO can be granted to aid foreign civil proceedings. However, a NPO cannot be granted in aid of foreign criminal proceedings.

**Question 5: How do you get an order against a 3rd party if it is outside the jurisdiction?**

**Answer:** With difficulty.

The applicant faces a potential problem where the respondent, and the information or documents that the applicant seeks, are outside the jurisdiction using a NPO. The English court has, on occasion, exercised its discretion to grant permission to serve a NPO outside of the jurisdiction. However, the law in this area remains unclear.

Teare J in *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC (2016) EWHC 2082 (Comm)* set aside a NPO that had been granted against a UAE bank, finding that none of the 'jurisdictional gateways' permitted the application to be served out of the jurisdiction. This judgment, therefore, suggests that the Court will not exercise its jurisdiction to grant NPOs against respondents overseas.

However, NPOs may be obtained against subsidiary companies registered in the UK. This would have application to internet service providers, such as:

- Google UK Limited;
- Yahoo UK Limited; and
- Microsoft Limited.

In *CMOC v Persons Unknown (2017) EWHC 3602 (Comm)* the court has been willing to order disclosure against persons based abroad.

**Question 6: What does an applicant have to show to get a NPO?**

**Answer:** Three threshold conditions must be satisfied.

The three conditions to be satisfied for the court to exercise its power to grant Norwich Pharmacal relief are summarised by Flaux J in *Ramilos Trading Ltd v Buyanovsky (2016) EWHC 3175 (Comm)*:

1. 'a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
2. there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
3. 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 ultimate wrongdoer to be sued.'

Even where the three threshold conditions are satisfied, the court still has to exercise its discretion as to whether to grant the order sought, weighing relevant factors which

the Supreme Court, in *RFU v Consolidated Information Services Ltd (Viagogo) (2012) UKSC 55*, said include:

1. the strength of the possible cause of action;
2. the strong public interest in allowing an applicant to vindicate his legal rights;
3. whether the making of the order will deter similar wrongdoing in the future;
4. whether the information could be obtained from another source;
5. whether the respondent knew or ought to have known that he was facilitating arguable wrongdoing;
6. whether innocent persons will suffer any harm as a result;
7. the degree of confidentiality of the information sought;
8. privacy rights under Article 8;
9. the rights and freedoms under the EU data protection regime; and
10. the public interest in maintaining the confidentiality of journalistic sources.

**Question 7: Is a NPO is a remedy of last resort and exceptional?**

**Answer:** No.

The amount of NPOs obtained shows that it is not an exceptional remedy and you do not have to show the court that you have exhausted all other routes first – just that the respondent is a practical source for the information sought.

**Question 8: In a fraud case, would you apply for a NPO at the same time as seeking freezers and disclosure orders?**

**Answer:** Yes.

Those whom you cannot sue (eg, because you do not have the evidence) but who have facilitated the wrongdoing you can NPO to get information and documents. Typically, that includes banks, financial advisors and accountants but could also include potential wrongdoers.

**Question 9: What is the price for this disclosure to the applicant?**

**Answer:** It is well known that the price for this disclosure is that the applicant has to pay the reasonable costs of the respondent complying with the order. It is sometimes hard to advise an applicant what their cost exposure will be.

If you NPO an individual who seeks legal advice, the costs exposure could come to tens of thousands of pounds, especially if the NPO questions to be answered in an affidavit are complex. Costs are one reason why you

should be specific about the information and documents you seek. In our joint experience, when banks are targeted they do not *usually* charge – or if they do, it is a few hundred or thousand pounds as they are well used to dealing with such applications. However, we also know of cases where a bank's costs have been tens of thousands, proving it is hard to give an exact budget to the applicant.

**Question 10: Should you always apply without notice?**

**Answer:** No.

On the whole, we prefer to give notice to banks or internet service providers (ISPs), not least because the courts usually expect that they be given an opportunity to object. In our experience, the banks and other institutional respondents tend not to appear at a hearing. Their usual response is to 'neither consent nor oppose' an application.

**Question 11: How should this notice be given?**

**Answer:** First, ensure the bank or ISP agrees not to tip off the target. Then, you can reveal the target information.

Otherwise, only give them the form of the order that you are seeking, the justification for the order and seek their comments on that format. If the bank or ISP company agrees to keep the application confidential then you can give them fuller information and make the application on notice. If it does not, then that is a valid reason for making an application without notice.

If a NPO is directed at a potential suspect or individual, be very careful about how that person is described and of the fact that they may alert the target. It is usually no good trying to tie them into a voluntary gagging agreement before the order. In this case, the application should likely be made without notice and a long gagging order against them sought so they are restrained from tipping off the target.

**Question 12: Is there a duty of full and frank disclosure even when making an on notice NPO application?**

**Answer:** We assume that there is a duty to be candid even when giving notice of a NPO application based on the fact that respondents tend to be passive even if notified.

The case of *Orb ARL and others v Fiddler and another* is an example where a NPO was discharged on the basis of a failure to be candid.

**Question 13: What about costs?**

**Answer:** The applicant usually pays the costs of the respondent dealing with the application, as well as compliance with a NPO. The respondent is entitled to the costs of the application and in providing the disclosure (this includes advice on the rights to vary, etc).

**Question 14: What is it like acting for a respondent to a NPO?**

**Answer:** When acting for individual or corporate respondents who have been actively involved in impugned transactions we suggest you advise with extreme care.

We have seen:

- the courts willing to restrain a NPO respondent from leaving the jurisdiction until they have provided full disclosure;
- the court requiring continuing disclosure even when the NPO respondent has become a defendant; and
- where claimants have asserted serious deficiencies in the disclosure, the NPO respondent has been subject to a cross-examination order ahead of trial. The court has held such orders can be obtained even if the claimants have not pursued other less intrusive ways of obtaining the missing information.

With the court's permission, the resulting testimony can found a contempt claim. We have seen respondents pursued for contempt for failing to comply (at all or adequately) with a NPO.

When so much is at stake, if you are acting for a respondent to a NPO you need to draft any response with care. It is important to resist being bullied into providing a deposition, which under time pressure and with limited information can cause future problems. Therefore, ensure that the disclosure given is accurate and responsive to the questions only.

Ensure that your drafting reflects the likely reality, that is that the disclosure has been done under time pressure and likely with limited information. The court acknowledges that people cannot be expected to remember all details after a lapse of time.

It is important to stress to your client to read their statement and be accurate. Many business people take signing a witness statement too lightly. Inaccuracies are gifts to the claimant. There is too much at stake to 'just get it done' – you need to get it right.