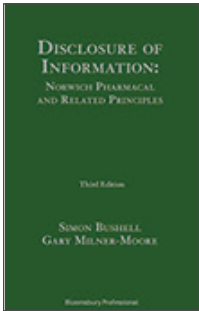


# BOOK REVIEW



## DISCLOSURE OF INFORMATION: NORWICH PHARMACAL AND RELATED PRINCIPLES

**Authors:** Simon Bushell and Gary Milner Moore  
**Publisher:** Bloomsbury Publishing  
**Price:** £215  
**Format:** Hardback



Simon Bushell, a commercial litigator, and Gary Milner Moore, who also specialises in insolvency, tread in the footsteps of great lawyers from Herbert Smith like Dr Mann, and Lord Collins of Mapesbury, the author of Dicey. Immensely knowledgeable, good judgment, practical, and operating internationally cross-border. The subject matter of the book requires all these qualities.

The introduction written by Paul Lowenstein KC describes its importance in fraud cases. These involve searching for and preserving what may be left of what has been taken, or often locating assets controlled by the fraudster. "A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain." (*Mediterranea Raffineria Siciliana Petrolia Spa v Mabanafit GmbH Court of Appeal (Civil Division) Transcript No 816 of 1978*). Bankers Trust concerned an action to retrieve assets obtained by fraud, and held on constructive trust, reversing a too hesitant commercial judge, and ordering a bank which had received the assets to disclose full information to enable the trust assets to be located and preserved (*Bankers Trust Company v Shapira [1980] 1 WLR 1274*). Mustill J had thought discovery was not to be ordered until after the defendants had been served. This mistook the purpose of it which was not to prove the fraud but to trace the proceeds. Bankers Trust relief may be granted in respect

of cryptocurrency, which is a recognised form of property under English law.

Norwich Pharmacal relief is a jurisdiction to obtain information which is "necessary" for a particular justifiable purpose (*Norwich Pharmacal and others v Customs and Excise Commissioners [1974] AC 133*). The book considers what may be the threshold test for this. There is the historical hesitation on lack of a gateway for service out of the jurisdiction of a Norwich Pharmacal application, and the "work around" solutions used in the *CMOC* case (*CMOC Sales & Marketing Limited v Persons Unknown and 30 others ([2018] EWHC 2230 (Comm))*). There is chapter 14 on extraterritorial jurisdiction. This has become all the more important with Brexit and the loss of the recast Brussels Regulation (*1215/2012/EC*) and the Lugano Convention regimes. It considers "subject matter" jurisdiction, the judicial restraint exercised by English courts in relation to making orders against non-parties in respect of their conduct abroad, which more appropriately should be subject to consideration of a court having jurisdiction there. The principle has particular force in relation to business of a branch of a bank situated abroad.

In *Google v Equustek*, the Supreme Court of Canada upheld a worldwide injunction against Google, an innocent non-party, whose facilities were being used by a wrongdoer abroad to do irreparable harm and in *Cartier International AG v British Sky Broadcasting*, internet service providers were required to block websites operated from abroad to sell

goods infringing trademarks (*[2017] 1 SCR 824; [2018] 1 WLR 3259*). There was no cause of action by the applicant against the person restrained, but the interests of justice required their assistance in rendering effective orders of the court which would otherwise have been nugatory. These cases and Norwich Pharmacal can be viewed together as discretionary relief with a historical source in the old High Court of Chancery, being required for the due administration of justice.

There is consideration of whether the proper or necessary party head of jurisdiction for service out can be used to justify a Norwich Pharmacal order. This is troubled by whether Norwich Pharmacal relief is a substantive claim on the merits. There is the new gateway (25) which allows service out of the jurisdiction of an application for disclosure to identify a defendant or what has become of property of a claimant or applicant for the purpose of proceedings in England. There is consideration of when a statute governing the obtaining "of evidence" occupies the whole terrain leaving no gap for Norwich Pharmacal relief.

Norwich Pharmacal established that discovery could be ordered against a respondent against whom the plaintiff had no "cause of action". The reality was that the plaintiff had a perfectly good cause of action against the importers, but it needed some help to get their action off the ground by naming the defendants. There was a hesitation in the Court of Appeal arising from the rule that one had to wait

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until trial before getting evidence under compulsion of a mere witness. This was a rule of convenience to avoid persons being troubled with the litigation of others. But, as Lord Reid pointed out, unless the relief could be granted, there never would be a trial. Although founded on trademark case law (and some textbooks) Lord Reid stated a general principle: the genie was out of the bottle. It planted an acorn which has led to developments alongside a number of closely related jurisdictions including Bankers Trust, pre-action disclosure, ancillary orders to injunctions, injunctions against non-parties and injunctions against persons unknown.

This is an area where much of the case law is at first instance and so less ossified. Cases

can turn on their particular facts or issues, which can be of very narrow application. An example is the Supreme Court decision in *Cameron v Liverpool Victoria Insurance Co Ltd*, a case on the shortcomings of section 151 of the Road Traffic Act 1988 in protecting the innocent against losses caused by a hit and run driver who cannot be served with the claim form ([2019] 1 WLR 1471; considered in “Suing persons unknown: the EC Motor Insurance Directive and *Cameron v Liverpool Victoria*” [2019] JBL 416). The book warns of this obstacle to obtaining a final money judgment. Injunctions are different.

Barriers may be avoided through planning ahead. Part of the joy of this book is that it considers authorities, accurately

mapping the history of developments. It fits sources together in a large jigsaw puzzle, weighing and debating their significance. It is concerned with development of legal principles. There is nothing permanent except change. A great book is not one that simply tells you what you can find in the law reports, valuable and as authoritative as that may be. It is a commentary on what the law may be. It discusses the conflicts the tensions and the uncertainties. It identifies obstacles and possible solutions and above all it looks to the future. That is this book.

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