SELADORE LEGAL

Disclosure of Information

Norwich Pharmacal and Related Principles

Third Edition

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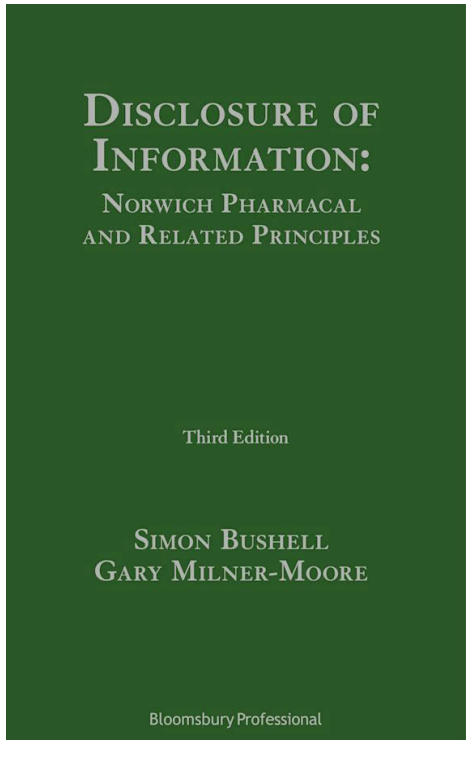

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FOREWORD

Simon Bushell and Gary Milner-Moore's excellent book on disclosure of information filled an important gap when it was first published in 2013. Until then, it was hard to find a sufficiently detailed or comprehensive treatment of the *Norwich Pharmacal* jurisdiction. However, with their customary understanding of the importance of the jurisdiction, particularly to the commercial fraud litigator, the authors drew together the essential principles into this single text. What was then a useful new work has become, in its third edition, an essential point of reference. The success of this book – and the rate of development of the legal landscape which it discusses – is reflected in the fact that it has warranted a full update twice in only nine years. Mercifully, no updating supplements – instead all the material in one place.

To my mind, there are three key ingredients that make this book so useful.

The first is its clarity of expression and organisation. A real effort has been made to express the law and procedures clearly and to order the history, building blocks and practical uses (and limitations) of the *Norwich Pharmacal* and associated information disclosure jurisdictions in a way that makes easy reading and complete sense to the busy practitioner. A small example is seen in the careful (emboldened) cross-referencing of key concepts to the places in later chapters where there are developed and discussed.

The second is its highly practical usefulness for litigators. In fraud cases, for example, the *Norwich Pharmacal* jurisdiction – together with its close cousins (i) injunctive ancillary relief, (ii) CPR 25.1(g), (iii) pre-action disclosure, and (iv) the *Bankers Trust* jurisdiction – is perhaps the most important tool for uncovering what has become of misappropriated assets, where they or their product might now be found, who may have been involved in taking them and who may have assisted. It is difficult, costly and slower to find out who to sue and what to sue them for without the information that a disclosure order can produce. This book sets a clear and easy to follow route map for the litigator to follow as they work against time to secure the position of the client, launch an action and obtain all necessary interim remedies.

Thirdly, as I know not least from acting both for and against them, the authors' longstanding, busy practices as disputes solicitors, specialising in cross-border litigation and international arbitration, are reflected in the special treatment these tricky areas receive in the new edition. To this end, there is an important and significant updating of Chapter 14, which addresses the extra-territorial scope of the *Norwich Pharmacal* and associated jurisdictions. One of the key points of focus here is on what many saw as a wrong turn in the law in England in 2016, running against developments in other common law jurisdictions (and perhaps even the CPR themselves). The problem was the English case of *AB Bank v Abu Dhabi Commercial Bank* [2016] EWHC 2082 (Comm), which appeared to decide that the *Norwich Pharmacal* jurisdiction had no extra-territorial

application. This led to real difficulties in international fraud cases, particularly where misappropriated money or digital assets were moved quickly across borders. It seemed impossible in the light of *AB Bank* to obtain permission to serve *Norwich Pharmacal*-type disclosure orders on banks, digital exchanges or other financial institutions out of the jurisdiction. Together with others, I have been involved in developing a way out of this bind. First, we found a work-around in *CMOC v Persons Unknown* (subsequently applied in other cases) whereby the Claim Form was issued not in the ordinary way against named defendants but instead against 'Persons Unknown' and an application made for service-out as well as for a worldwide proprietary injunction and freezing order together with an order for ancillary disclosure under the *Bankers Trust* and the CPR 25.1(g) regimes. Later, we proposed and drafted a new service-out 'Gateway' – adopted on 1 October 2022 as CPR PD 6B, para 3.1(25) – which expressly empowers the court to permit service-out of a claim for disclosure only of information to identify the identity of a potential defendant or 'what has become of the property' of the applicant. The authors offer a detailed survey of the benefits of these and other developments in the international application of the disclosure jurisdiction both at court and in the context of international arbitration. Practitioners looking to challenge such orders in due course should note that the text also suggests limitations that might be exploited.

This, then, is an intelligently written, mature work that understands its purpose and who it is aimed at. I have no doubt that in its established place as a go-to work of reference it will prove even more successful than the well-received first two editions.

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November 2022

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Overview

This chapter provides a brief overview of the subject and the contents of this book and enables the reader to grasp the key concepts at an introductory level. It begins with a summary of the tests that are now applied, before providing a brief summary of each element.

The principles described in this book exist alongside and were preserved by the Civil Procedure Rules. Since the previous edition, CPR 31 on disclosure has been substantially rewritten for the Business and Property Courts by Practice Direction 51U. However, this practice direction continues to preserve *Norwich Pharmacal* and related jurisdictions.[1]

2.1 STARTING POINTS

2.1.1 The context

The *Norwich Pharmacal* case firmly established that the Court has the power (or jurisdiction) to require a third party to provide information in defined circumstances. It also inevitably began the process of developing and refining the circumstances in which that power might be exercised. There remains an active debate about which elements are conditions for the jurisdiction and which merely inform the balancing exercise or discretion once jurisdiction is established.

Subsequently, other powers have been established or developed under which similar orders can be made.[2] The principles governing the limits of the *Norwich Pharmacal* and *Bankers Trust* jurisdictions have been influential, even where the Court is exercising those other powers. One of the main parallel developments concerns disclosure in support of an injunction, typically but not always a freezing injunction. This includes the so-called *Chabra* jurisdiction under which a freezing injunction may be obtained against a third party.[3] Such injunctions

1 Where it applies, PD 51U provides that CPR 31 does not apply to the proceedings, save as set out in Section II. This section restates a number of provisions, including CPR 31.18 preserving any other power to grant disclosure before proceedings or against third parties.
2 See Chapters **5** and **15**.
3 See Chapters **5.6.1** and **15.7**.

may be supported by an order for disclosure. In one sense, the jurisdiction for such orders is clear: the Court has the power to grant injunctions wherever just and convenient.[4] Nonetheless, the breadth of that jurisdiction is circumscribed by precedent and its operation has in practice been developed alongside *Norwich Pharamacal* and in particular *Bankers Trust*, even though those cases are not required to establish the power.

A more recent procedural innovation, now recognised by the Supreme Court, is the ability to initiate proceedings against an unknown person.[5] If the facts of *Norwich Pharmacal* arose again today, this procedure might be used. Together with the statutory power to order disclosure against a third party (reflected by CPR 31.17) this might provide an alternative route to ordering disclosure from a third party. Nonetheless, it seems likely that the principles underlying *Norwich Pharmacal* would still govern.

2.1.2 The principles

The principles for granting relief on *Norwich Pharmacal* grounds may be summarised as follows:

1 There are at least two *threshold* conditions (sometimes referred to as limits on jurisdiction) which must be satisfied:
   (a) a 'good arguable' case of wrongdoing; and
   (b) sufficient involvement by the respondent.

2 There is one other significant factor which has at times been regarded as a threshold condition and which is, in any event, of particular significance for discretion: necessity. This is generally linked to the objective for which the relief is sought.

3 There may, in addition, be requirements specific to particular contexts. An example is the set of statutory constraints imposed upon disclosure of journalistic sources (also phrased in terms of necessity). In particular contexts, there may also be considerations relating to fundamental rights

4 If all threshold conditions are met, the court has discretion whether or not to grant relief. In this context it will consider the range of interests involved. Factors including necessity and proportionality are often addressed in this context. The strength of the case on wrongdoing may also be of significance.

5 There are a number of procedural considerations which impact upon the application of the various criteria, including costs and issues around ensuring all interested are represented.

6 In an international context, there may be limits upon national jurisdiction and on the extra-territorial reach of any relief.

4 Now Senior Court Act 1981, s 37.
5 Chapter **6.5**.

The parallel *Bankers Trust* jurisdiction has its own set of guiding principles, dealt with in Chapter **5**. Those guiding principles may be regarded as an application of the more general points set out above. The possibility of a broader 'equitable jurisdiction' alongside *Norwich Pharmacal* and *Bankers Trust* is also addressed in that same chapter.

2.1.3 Judicial summaries

In relation to *Norwich Pharmacal* relief, an influential summary of the various ingredients was provided by Lightman J in *Mitsui v Nexen Petroleum*,[6] which was often cited as the starting point in subsequent cases.[7] Most then tend to focus upon one or more individual ingredients.[8]

More recently, the summary by Saini J in *Collier v Wood*[9] has been variously adopted.[10] This is as follows:

- The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person ('the Arguable Wrong Condition').
- The respondent to the application must be mixed up in so as to have facilitated the wrongdoing ('the Mixed Up In Condition').
- The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued ('the Possession Condition').
- Requiring disclosure from the respondent is 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').

This summary is certainly a useful starting point though, as explained in the chapters that follow, there remain issues over a number of aspects such that it is necessary to treat even such a high-level summary with caution.[11]

6 [2005] EWHC 625 (Ch). A decision of Lightman J. As described in the text (Chapter **9**), the approach to necessity in the case is not authoritative.

7 For example: *Campaign Against Arms Trade v BAE Systems plc* [2007] EWHC 330 (QB); *Nikitin v Richards Butler* [2007] EWHC 173 (QB); *Hughes v Carratu International* [2006] EWHC 1791 (QB) (at para 19); *BNP Paribas v TH Global* [2009] EWHC 37 (Ch); *Clift v Clarke* [2011] EWHC 1164 (QB); *Zeinal-Zade v Mills* (27 July 2012 (Ch) unreported) and *Ramilos v Buyanovsky* [2016] EWHC 3175 (Comm).

8 Of all the relevant cases, *Rusal v HSBC* [2011] EWHC 404 (QB), *RFU v Viagogo* [2011] EWCA Civ 1585; [2012] UKSC 55 and *Golden Eye v Telefonica* [2012] EWHC 723 (Ch), all referred to below, are the most comprehensive. Nonetheless, as will appear in the following chapters, there is uncertainty surrounding some of the propositions they contain.

9 [2020] EWHC 1884 (QB) at 35

10 See for example *Zeus Investors v HSBC* [2020] EWHC 3273 (Comm) at 61, *Rowland v Stanford* [2021] EWHC 988 (Ch) at 43; *Oldknow v Evans* [2021] EWHC 1028 (QB) at 59.

11 In particular, there are issues relating to the 'good arguable case' threshold, at least in cases concerning the so-called 'missing piece'; and it is suggested that forms of involvement besides facilitation will suffice: see Chapters **7** and **8**. Also, whilst pursuing a wrongdoer remains the paradigm, other forms of redress short of such pursuit remain possible: see Chapter **9.2**.

One point that it is worth mentioning at the outset is that there remain differences of view over whether certain elements are properly to be regarded as thresholds or simply as elements that contribute to the ultimate balancing exercise. In this summary, Saini J characterised the first three as thresholds and the fourth as a balancing exercise. On the other hand, it has been suggested that there is room for the view that there might be just one true prerequisite as to whether the respondent was mixed up in wrongdoing, followed by a broad balancing exercise to assess whether, if so, justice requires that assistance be provided.[12] There is much to recommend such an approach, which would operate to exclude cases where the respondent really was simply a 'mere witness' but otherwise allow a broad balancing exercise. There is however a tension in the authorities which might preclude such a simplification.[13]

2.2 AVAILABILITY OF RELIEF

The origins of the jurisdiction are considered in Chapter **3**. This attempts to lay out the principles as they stood immediately prior to the landmark decision in the *Norwich Pharmacal* case itself. This includes consideration of the long-established 'mere witness' rule. This rule had generally been thought to prevent discovery being obtained from someone who could be compelled in due course to give evidence at trial, either by oral testimony or by producing documents. The landmark decision itself is considered in Chapter **4**, which examines the modern-day revival of the equitable duty to assist imposed on a third party who has become 'mixed-up' in another's wrongdoing. In particular, the chapter examines the varying reasons given in support allowing discovery in each of the five speeches in the House of Lords.

One of the most significant applications of principles derived from *Norwich Pharmacal* has been in addressing the specific needs of the victim of fraud. Chapter **5** looks at *Bankers Trust Co v Shapira*[14] which adopted *Norwich Pharmacal* principles in this sphere, allowing potentially broad disclosure of bank accounts and other material, principally for purposes of asset tracing. These cases are of particular interest because of the emphasis on the obligation imposed on the third party respondent (usually a bank) to provide 'full information' to the victim, overriding the duty of confidence that would otherwise apply. These cases, which are sometimes referred to as involving 'lifting the latch of the banker's door', are of course as much of interest to banks themselves, who must at all times remain mindful of their duties of confidence and the limited circumstances in which such duties can be overridden.

Over subsequent years, there have been further developments in the *Norwich Pharmacal* jurisdiction, as described fully in Chapter **6**. First, it was extended to post-judgment enforcement, then to the so-called 'missing piece of the jigsaw',

12 *Burford Capital v London Stock Exchange Group Plc* [2020] EWHC 1183 (Comm) at 42, Baker J
13 This principally focuses upon the necessity element: see Chapter **9**.
14 [1980] 1WLR 1274.

before being transformed into a flexible remedy. As Lord Woolf CJ remarked in the leading case of *Ashworth Hospital Authority v MGN*:[15]

> 'New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised before. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.'

This flexibility was endorsed by the Supreme Court in the case of *Rugby Football Union v Consolidated Information Systems (formerly Viagogo) (In Liquidation)*.[16]

The breadth of the jurisdiction has been affirmed in two later cases, most notably the *Mohamed* decision. Those cases dealt with detainees held at Guantanamo Bay who sought and obtained broad discovery from the Foreign Secretary to enable submissions to be made to relevant authorities in the US. They appear to confirm that former limits, such as the old 'mere witness' rule, no longer constrain the availability of relief and, in appropriate cases, that the principles are sufficiently flexible to allow for extensive relief to be obtained. In the context of foreign proceedings (addressed in Chapter **14**), the Court of Appeal in *Omar*[17] qualified the breadth of *Mohamed* in light of a point not addressed there. This does not appear to impact upon the more general principles as exemplified by that case.

The application of *Norwich Pharmacal* principles to the so-called 'missing piece' situation is one of the most exciting, yet challenging, developments in the evolution of the jurisdiction and thus it merits a more detailed introduction to the more complete treatment in Chapter **6**. This aspect may be thought to jar most with the established procedures provided under the Civil Procedure Rules, which include defined powers of pre-action disclosure (CPR 31.16) and third party disclosure (CPR 31.17). The first shift towards allowing relief for the missing piece of the jigsaw came in *Axa Equity & Law Life Assurance v National Westminster Bank*,[18] just before the CPR. The claimants were seeking information to determine whether to sue a firm of auditors, but ultimately failed because they already had sufficient material to plead a case and the respondents could therefore be witnesses in due course. Morritt LJ ushered in a new phase in the evolution of *Norwich Pharmacal* principles when he expressed the view that a claimant seeking a vital piece of information from a third party would not infringe the 'mere witness' rule. This has been developed since *Ashworth* in cases such as *Carlton Film Distributors v VCI and VDC*.[19]

15 [2002] UKHL 29.
16 [2012] UKSC 55, judgment of 21 November 2012.
17 *R (on the application of Omar and others) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA 118. The Divisional Court had reached a similar conclusion, albeit on the basis of slightly different reasoning; [2012] EWHC 1737 (Admin).
18 [1998] CLC 1177.
19 [2003] EWHC 616 (Ch).