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Avenues to disclosure

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The proliferation of electronic documents in business has had a serious impact on commercial litigation: in many cases, dealing with electronic disclosure is one of the most costly elements of trial preparation. In fraud cases, electronic evidence is often paramount. The parties' respective witness evidence is often completely contradictory and contemporaneous documents can be key in assisting the Court to reach a conclusion as to the correct factual position. Ros Prince of Stephenson Harwood compares disclosure under the Civil Procedure Rules with Norwich Pharmacal relief.



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Disclosure under the Civil Procedure Rules

In most civil litigation, the parties to the proceedings will be ordered to give disclosure at a reasonably early stage, under CPR 31.5. Although recent reforms have introduced the possibility of limited disclosure, this is unlikely to be appropriate in fraud litigation. Therefore, it is likely that a defendant will have to disclose documents on which he relies, as well as documents which (a) adversely affect another party's case, (b) adversely affect his case, or (c) support another party's case.

A potential claimant can seek disclosure prior to commencing proceedings under CPR 31.16, provided that the respondent is likely to be a party to subsequent proceedings (and the applicant is likely to be the claimant). Disclosure can only be sought of documents which would fall to be disclosed under the standard disclosure rules

(summarised above). Furthermore, disclosure will only be granted if it is desirable in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings or save costs.

Finally, it is possible to seek disclosure against third parties, albeit not prior to the commencement of proceedings, under CPR 31.17. Disclosure will be limited to documents which are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and the Court will only grant the order if disclosure is necessary in order to dispose fairly of the claim or to save costs.

In the vast majority of cases, the provisions of the CPR offer all the tools a claimant needs to obtain proper disclosure. However, there are some circumstances in which the claimant must turn to other remedies.

What if the claimant needs information, not documents?

Disclosure under CPR 31 applies to documents, as defined by the CPR. The definition is broad, being "anything in which information of any description is recorded" and thus it covers things such as electronic documents (including metadata), voice recordings and video evidence. However, disclosure under the CPR does not apply to information. The information must be recorded somewhere in order to fall within the rules.

When granting *Norwich Pharmacal* relief (discussed below) the Court can order the production of documents. However, it can also require the respondent to provide an affidavit setting out answers to specified questions. Therefore, if the claimant requires information rather than disclosure of documents, it will be the more appropriate relief.

What if the claimant needs the information or documents to start a claim?

One situation where the disclosure provisions of the CPR do not assist is where the claimant believes they may have a claim, but needs further information from a third party in order to formulate or bring it. For example, the claimant may not know against whom their claim lies and may require information from a third party to determine this. They cannot claim under CPR31.16, because the respondent is not likely to be a party to the action (indeed, the claimant does not know who is). They cannot claim under CPR31.17, because the information they seek is information – rather than a document – and the other criteria of CPR 31.17 are not satisfied. And if the claimant is unable to commence their claim, CPR 31.5 will never come into action. However, in such cases, *Norwich Pharmacal* relief may assist.

In *Norwich Pharmacal Company v Commissioners of Customs and Excise* [1973] UKHL 6, the applicants owned a patent for a chemical compound. They discovered that unlicensed consignments of the compound had been imported into England, but were unable to discover who the importers were. Thus, they had a prima facie claim for the infringement of their intellectual property rights, but could not bring a claim as they did not know against whom to bring it. The customs authorities were in possession of documents (which had to be filed with them upon the import of the goods) which identified the importers. They were ordered to provide the information to the applicants.

A key requirement for *Norwich Pharmacal* relief is that the respondent must be somehow mixed up in the wrongdoing. They must be more than a 'mere witness', which means there must be some form of action on their part. Having said that, their involvement can be entirely innocent (for example, the role of Customs and Excise in the original case who – entirely innocently – permitted the unlicensed goods to enter England).

The *Norwich Pharmacal* jurisdiction is evolving. In the recent case *Various claimants v (1) News Group Newspapers Limited, (2) Glenn Mulcaire; The Commissioner of Police (respondent)* [2013] EWHC 2219 (Ch), individuals who believed they had been subject to alleged illegal telephone hacking applied for disclosure of documents held by the police. They required the information in order to bring civil claims. The documents had only been passed to the police after the alleged hacking took place, and the defendants to the litigation opposed the disclosure. They argued (amongst other things) that the police were not mixed up in any wrongdoing as their involvement was merely to receive evidence after the events subject to their investigation. The Court granted the disclosure. It held that the police were not 'mere witnesses', on the basis of a combination of factors: the police have a duty to acquire information about matters they investigate; in this case they had already taken steps to reveal some information to the claimants, by informing them that they were victims and revealing limited further information to them (which a 'mere witness' would not have done); and they had indicated they felt some form of obligation to provide the information and had agreed not to resist a formal application for disclosure of the information. This demonstrates that the Court is willing to extend the jurisdiction in the right circumstances.

Norwich Pharmacal relief is not just available to identify a wrongdoer; it extends to a variety of matters. Of particular relevance to fraud litigation is information that shows that a party has committed a wrong, and information required to trace assets.

Norwich Pharmacal relief places a burden on innocent third parties and the claimant must surmount a number of hurdles. The Court will only grant this relief if it is necessary in the interests of justice and thus (as with all discretionary injunctions) the Court will carry out a balancing exercise when considering whether to grant the relief. Furthermore, the claimant will usually be ordered to pay the respondent's costs of complying with the order.

What if the claimant does not trust the defendant?

A common scenario in fraud litigation is that the claimant does not trust the defendant to provide information, or fears that the defendant will dissipate assets if they are put on notice of the claimant's enquiries. Applications for disclosure under the CPR are on notice, so the respondent will be made aware of the application in advance of the hearing. A claimant may fear the defendant will destroy evidence if asked for disclosure. A claimant may also fear that if it approaches third parties for disclosure or information they will inform the defendant, thus tipping them off that a claim may be brought against them. This may be entirely legitimate on the third party's part. There are various options open to such claimants.

One possibility is to seek *Norwich Pharmacal* relief against third parties: most commonly company agents, accountants, trustees or bankers of the defendant. In cases where the claimant fears that the defendant may dissipate assets if told about the enquiries, the Court can be asked to include a gagging provision in a *Norwich Pharmacal* order.

In more extreme cases, a claimant may seek a 'search and seizure' order (also known as *Anton Piller* orders after *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55). These orders allow the claimant's solicitors to search specified premises and seize documents that fall within the scope of the order. However, the hurdle for obtaining such orders is high: the claimant must have an "extremely strong prima facie case"; there must be "very serious" potential for damage to the claimant and "clear evidence" that the defendant has incriminating evidence, with a "real possibility" that they will destroy it. Even if the claimant can show all these factors, the Court will still carry out a balancing exercise. Such orders can be granted both against defendants and third parties. However, it is likely to be difficult to satisfy a Court that there is a real possibility that an independent third party will destroy evidence, unless they are close associates of the defendant or can be proven to be dishonest or have a disregard for Court orders. In cases where the third party is innocent, *Norwich Pharmacal* relief (rather than *Anton Piller* relief), if necessary coupled with a gagging order, is far more likely to be the appropriate relief.

What if the claimant wants information about the defendant's assets, to make sure he does not dissipate them?

Freezing orders usually contain disclosure provisions that require the defendant to disclose information about all his assets above a certain threshold value. The disclosure has to be given on very short notice, and is normally given in the form of an affidavit.

These disclosure obligations exist to allow the freezing order to be policed, and therefore the information sought does not depend on the underlying claim. However, in cases where it is alleged that the defendant has appropriated assets from the claimant, disclosure of the defendant's assets can provide the claimant with valuable information, and put significant pressure on the defendant.

Where a claimant brings a proprietary claim and obtains a freezing order against a defendant, the freezing order will often require the defendant to disclose information in relation to the claim, for example, the whereabouts of assets alleged to have been appropriated from the claimant.

What if the defendant is likely to delay or disobey an order?

If a defendant gives or causes to be made, a false disclosure statement, then proceedings for contempt of Court can be brought against them (CPR 31.23). However, in pursuing disclosure under the CPR, there can be very significant delays before disclosure statements are made and it is difficult to prove that one is wrong. Furthermore, delay itself is not a contempt of Court.

Injunctions usually carry penal notices, which allow a claimant to bring contempt proceedings (with imprisonment as a possible penalty) if the order is breached. Furthermore, they usually require information or documents to be produced within short order (in the case of an *Anton Piller* order, the claimant's solicitor seizes them at the time of the search). In light of the penal notice, defendants will usually have to go to Court to obtain extensions of time, and those extensions will be kept to a minimum. Furthermore, whilst the hurdle for obtaining such relief is high, it is possible to seek orders requiring defendants to attend Court for cross-examination if their responses to injunctions are unsatisfactory.

What is the burden on the claimant?

A key advantage in fraud litigation injunctive relief is it can be sought ex parte, meaning that the counterparty has no advance notice of the initial application. However, there is a cost to the claimant for this advantage. As the claimant is the sole party who appears at the ex parte stage before the Court at the ex parte hearing, it has a duty of full and frank disclosure. This may be particularly difficult for a claimant at the very early stages of its investigations, when it does not yet have a clear understanding of its case.

Of course, on an application for disclosure under the CPR, a claimant must never mislead the Court. But it does not have a duty of full and frank disclosure, as the respondent will be able to make their own representations to the Court at an inter partes hearing.

What is the position on costs?

In the course of normal, inter partes disclosure under CPR 31, each party will bear its own costs of the disclosure exercise. However, where disclosure is sought against third parties (whether under CPR 31.17 or by way of a *Norwich Pharmacal* order), the claimant will generally be required to pay the respondent's costs of complying with the order.

On a practical level, the costs of preparing an application for injunctive relief are generally significantly higher than the costs of a disclosure application under the CPR. The latter will often be raised in correspondence between solicitors, such that the issues can be narrowed. Although such an application must be supported by evidence, this usually has to deal with fewer facts than an affidavit in support of an injunction. In addition, the legal issues which the claimant must deal with on a disclosure application are generally less complex than those involved in *Norwich Pharmacal* relief.

Summary

In most civil proceedings, disclosure under the CPR will provide the most cost effective way of obtaining all the necessary evidence, both from the defendant and third parties. However, there are a number of circumstances where a claimant may need to look beyond the CPR to injunctive relief. The legal hurdles, as well as the costs, of obtaining such orders are generally higher than the costs of an application under the CPR. However, such orders can be extremely effective, particularly in fraud litigation, and information obtained this way can be central to the resolution of the case.

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