

March 2019

How to get documents or information in England during disputes

Information and evidence is key when it comes to winning disputes. However, in civil law systems, it is often very difficult for a claimant to obtain information from the opposing side. In England, there are numerous routes to obtaining evidence, both for English and foreign proceedings – this note compares the key characteristics of these routes.

Disclosure in litigation

Where a case is litigated in England, both parties normally have to disclose documents that help the other side's case, or which damage that party's own case. There have recently been some changes to the rules to make them more flexible, time and cost-efficient, but this general rule is likely to continue to apply.

When is it available?

Disclosure is often a key factor that determines the outcome of litigation, but in order to benefit from these wide ranging rules the case must be in contemplation or proceeding before the English Court. The full suite of disclosure rules is not available in support of foreign litigation.

What are its key advantages?

Disclosure in England is significantly wider than disclosure in most civil law systems. Where a claimant thinks that the defendant is likely to have many documents that will help the claimant's case, England is likely to be a good place to litigate.

What are its disadvantages?

The key disadvantage is that disclosure is reciprocal. Whilst a claimant may receive useful disclosure from a defendant, they will also have to give disclosure of its own documents, including unhelpful ones. Even where a claimant's documents are not problematic, the process of disclosure (i.e. the claimant's lawyers reviewing the documents before giving disclosure) can be expensive.

It is also important to bear in mind that while disclosure always happens before witness evidence is served, it may still take a number of months (and sometimes more than a year) from the time that proceedings start until disclosure is given. However, in certain circumstances it may be possible to obtain disclosure before a claim is issued, from someone who is likely to be a party to future proceedings.

Is there anything else foreign parties should be aware of?

Disclosure is, in most cases, limited to documents which the parties to litigation control. This can extend to documents held by their agents. However, it would not normally apply to third parties. For example, a claimant might be able to get disclosure from a defendant of their bank statements (even if the defendant has to print those from the bank's website); but they would not normally be entitled to disclosure from the bank of its own documents, for example its KYC file about the defendant.

The normal rule in England is that documents disclosed in proceedings should not be used for other purposes (for example, they cannot be provided to criminal authorities abroad, or used in other proceedings). However, it is possible to ask the Court for permission to do this.

Disclosure in support of freezing orders

Where the Court grants a freezing order against a defendant, it will also usually make a disclosure order. This is different to the type of disclosure that normally is given in the course of the proceedings. Typically, a disclosure order requires a defendant to disclose (within a short period of time, usually 3-5 days) a list of all of their assets worldwide. The definition of an asset is very broad and includes assets that are owned by a defendant directly or indirectly, legally or beneficially, or which they have the power to dispose of or deal with.

When is it available?

An asset disclosure order is ordinarily granted as incidental to a freezing order. Normally, no separate or additional requirements need to be met by a claimant. Asset disclosure orders can also be granted by the English Court in aid of foreign proceedings or execution of a foreign Court's judgment.

What are its key advantages?

The key advantage is that a disclosure order obliges a defendant to tell a claimant about their assets. This enables a claimant take steps to prevent the dissipation of assets pending judgment. If a freezing and an ancillary disclosure orders are made in support of a proprietary claim, a claimant can require a defendant to answer questions necessary to trace misappropriated assets.

The sanction for non-compliance with a freezing order (including its disclosure provisions) is contempt of Court, punishable by a fine or a term of imprisonment. Freezing orders have, for this reason, been described by the Court as the 'nuclear weapons' of English law.

What are its disadvantages?

Asset disclosure orders are ancillary to freezing orders. In order to get a freezing order, a claimant will normally have to satisfy onerous requirements: both legal (for example, giving extensive disclosure to the Court about its own case) and commercial (for example, having to pay money into court).

Is there anything else foreign parties should be aware of?

Normally, a claimant is not allowed to use the asset disclosure for any other purposes. For example, if the asset disclosure shows that a defendant has assets in other jurisdictions, the Court's permission will ordinarily be required before the claimant is able to take steps to preserve those assets there.

Norwich Pharmacal orders ("NPO")

NPOs are a type of disclosure order typically obtained against a third party, e.g. a bank or an internet provider, which itself is not party to any wrongdoing and not a potential defendant to a claim, but is likely to have documents and information about the identity of the potential defendant and the circumstances of any wrongdoing.

When is it available?

NPOs are appropriate where a claimant is aware that wrongdoing has taken place, a respondent is likely to have relevant documents or information about it and no other relief is available. NPOs are ordinarily sought prior to the commencement of a claim to enable a claimant to plead the claim or trace stolen funds, but can be applied for at any stage of the proceedings.

What are its key advantages?

The NPO regime allows the claimant to obtain essential information for the progress of the case from a third party that is not a potential defendant to a claim even where there are no ongoing or contemplated proceedings.

Often third party respondents do not resist or take a neutral position in relation to the NPO application.

NPOs are often granted with a 'gagging order': the third party respondent then has to give disclosure to the claimant, but is prohibited from telling the defendants about the order for a fixed period. Put simply, it allows the claimant to investigate in secret.

What are its disadvantages?

An applicant will need good evidence to demonstrate that a third party respondent has relevant documents or information in its possession. An applicant will be subject to the duty of full and frank disclosure. In most cases, an applicant will be ordered to pay a third party respondent's costs of compliance with the order (although in most cases these costs are modest).

Is there anything else foreign parties should be aware of?

Save in exceptional circumstances, the Court will not grant a NPO in respect of a respondent based outside the jurisdiction or in support of foreign civil or criminal proceedings. Requests for mutual legal assistance should be used in such cases. It is however possible to obtain a NPO even if the ultimate wrongdoer is resident outside the jurisdiction, provided a respondent to the NPO is based in England or Wales.

Unexplained wealth orders ("UWOs")

A UWO is a form of disclosure order, which can be made against an individual who is either (a) a Politically Exposed Person (from outside the European Economic Area) or (b) suspected of involvement in serious crime. These orders require the person to explain the source of the funds used to purchase particular assets.

In July 2018, it was reported in the press that a woman was the first subject of a UWO. The press said that she had spent £16 million in Harrods, and later revealed her to be Zamira Hajiyeva, the wife of a former state banker in Azerbaijan.

When is it available?

A UWO can be made in respect of any property valued at more than £50,000, situated anywhere in the world, where there are reasonable grounds to suspect that the subject (i.e. the criminal equivalent of a defendant) would not have been able to obtain that property using their own known assets.

What are its key advantages?

Controversially, a UWO reverses the traditional English burden of proof, i.e. the obligation on the prosecutor in criminal cases to prove guilt 'beyond reasonable doubt'. This is because pursuant to a UWO a respondent is required to prove within a short period of time that specific property was not obtained with the proceeds of unlawful conduct. In almost all cases, when the authorities obtain a UWO they will also obtain an Interim Freezing Order, preventing the dissipation of property while the UWO remains in force.

A respondent to a UWO can be obliged to disclose potentially vast amounts of information and documentation about personal or corporate finances, which may not be obtainable otherwise. When a respondent complies with a UWO, as a practical matter this may mean that they have to bring materials into England from overseas and serve these on the authorities.

Failure to comply with the terms of a UWO gives rise to a presumption that the property in question is "recoverable property". This means that ultimately the authorities can seize the relevant property. Failure to comply may also amount to a contempt of Court.

What are its disadvantages?

UWOs can only be obtained by the UK criminal authorities.

In the *Hajiyeva* case, there was an anonymity order, but this was ultimately lifted by the High Court (i.e. the information became public). This means that interested parties can follow the proceedings and use publically available information generated as a result.

Is there anything else foreign parties should be aware of?

As stated above, only the authorities can ask the Court for a UWO. However, a private individual or company can provide information to the authorities that may prompt an application for a UWO. While the authorities are not obliged to act upon (or even engage with the provider of) such information, where there is a strong case for a UWO this is a route to consider.

While claimants have no automatic rights to information from the authorities, there is some precedent in England to show that they may, in limited circumstances, be entitled to NPOs against some authorities. The combination of a UWO and a NPO could therefore in theory result in (a) a defendant having to bring documents to England about their assets to comply with the UWO and (b) a claimant being able to obtain some of those documents with a NPO against the investigating authority.

So far as we are aware, this has never been tested in the context of UWOs – the existing authorities have been limited to the police giving disclosure to victims. It will be interesting to see whether claimants proceed to test this strategy.

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