PROFESSIONAL LIABILITY CLAIMS: NORWICH PHARMACAL PROCEEDINGS AND HUMAN RIGHTS

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INTRODUCTION

1 The subject matter of this presentation is the inter-relationship between Norwich Pharmacal orders and human rights in professional liability claims. However, before that relationship is addressed, it is necessary to set out the nature and present scope of the Norwich Pharmacal jurisdiction.

DISCLOSURE ORDERS

The Norwich Pharmacal jurisdiction

2 The remedy is equitable and takes its name from the order made in the well-known case of Norwich Pharmacal Co. v Commissioners of Customs and Excise [1974] A.C. 133. At that time, the order was only available against a person who, albeit innocently, became *"mixed up in the tortious acts of others so as to facilitate their wrongdoing"*. In those circumstances, the facilitator was placed under a duty to assist the person who had been wronged by giving that person full information and disclosing the identity of the wrongdoer.

3 Like the remedies provided by freezing injunctions and search and seizure orders, the Norwich Pharmacal jurisdiction has been developed by the courts to the extent that in appropriate cases it is now an important, and on occasions the only, remedy. CPR 31.18 recognises the specific procedural existence of the Norwich Pharmacal jurisdiction.

4 The court may make an order compelling a person to provide information identifying a wrongdoer if:

(1) the respondent has become mixed up in the wrongdoing whether or not this has taken place innocently and regardless of whether he has knowledge of any wrongdoing or

(2) the respondent has facilitated the wrongdoing, again whether or not this has occurred innocently or with knowledge of the wrongdoing and

(3) the applicant has sufficient interest[1] and

(4) the court exercises its discretion in favour of making an order.[2]

5 An order will not be made against a respondent who has the status only of a witness in respect of a wrongdoing[3].

6 There is no restriction according to the legal nature of the wrongdoing. In relation to professional liabilities it may be a:

(1) tort (Norwich Pharmacal (supra), including fraud Kensington International Ltd v (1) Republic of Congo & (2) Vitol Services Ltd[4]);

(2) breach of contract; (Ashworth v MGN Ltd (supra));

(3) breach of confidence (British Steel v Granada Television Ltd (supra));

(4) breach of statutory duty; e.g. breach of privacy under the Data Protection Act 1989 (Nikitin v Richards Butler LLP & Ors[5], Hughes v Carratu International plc[6]);

[1] This may, but need not necessarily, be demonstrated by evidence that the claimant has a genuine intention to bring legal or internal disciplinary proceedings against the wrongdoer; e.g. as his employer; see Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29, [2002 1 WLR 2033 ("Ashworth v MGN"). The remedy is available *"whether or not the victim intends to pursue an action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice"*, per Templeman LJ in British Steel v Granada Television [1981] A.C. 1096. *"It is clear that if the information is necessary, it is not a condition that the person seeking the documents needs them for a civil action."* The Queen (on the application of Binyan Mohamed) v Secretary of State for Foreign & Commonwealth Affairs [2008] EWHC 2048 (Admin) at [96].

[2] The usual means of satisfying this criterion is to show that the applicant has no other means of obtaining the information (e.g. by an application for pre-action disclosure under CPR 31.16 or non-party disclosure under CPR 31.17).

[3] For an example of the distinction see e.g. Harrington v Polytechnic of North London [1984] 1 WLR 1293 and generally Ashworth v MGN at [35] where Lord Woolf LCJ used the term *"involvement"* of the respondent as a distinction from mere witness cases saying that the requirement of involvement was *"still a significant requirement"*.

[4] [2007] EWCA Civ. 1128 ("the Republic of Congo" case)

(5) defamation; e.g. by publication of information online (Smith v ADVFN Ltd[7], Totalise plc v The Motley Fool Ltd[8].

A remedy of last resort?

7 A number of first instance decisions have indicated that the increased availability of pre-action disclosure (CPR 31.16) and non-party disclosure (CPR 31.17) operates to limit the residual scope for Norwich Pharmacal orders and that the Norwich Pharmacal jurisdiction is one of "last resort".

8 In Mitsui & Co Ltd v Nexen Petroleum UK Ltd[9], Lightman J said at [36]:

"The power to grant Norwich Pharmacal relief continues to subsist but in accordance with the established principles governing its exercise in cases where its exercise is no longer necessary, it no longer should be invoked. In short, the existence of the new powers conferred by CPR 31.16 and 17 may limit substantially the need for exercise of the Norwich Pharmacal jurisdiction and (in the circumstances such as present where there is no such need) on established principles its exercise is precluded. This situation is entirely consonant with CPR 31.18.

…….

The necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information."

9 In 2007 in Nitikin, Langley J said:

"The questions are whether such information is vital to a decision to sue or an ability to plead and whether or not, even if it is, it can be obtained from other sources. The purpose of an order is to enable an applicant to take action could not otherwise effectively be taken."

10 However in The Queen (on the application of Binyan Mohamed) v Secretary of State for Foreign & Commonwealth Affairs[10] Thomas LJ and Lloyd-Jones LJ disapproved the last resort dicta above and approved the approach of King J

[5] [2007] EWHC 173 (QB)
[6] [2006] EWHC 1791 (QB)
[7] [2008] EWCA Civ. 518
[8] [2001] EWCA Civ. 1897
[9] [2005] EWHC 625 (Ch)
[10] [2008] EWHC 2048 (Admin) ("Binyan Mohamed")

in Campaign Against Arms Trade v BAE Systems plc[11] concluding as follows at [94]:

"It seems to us that the observations of Lightman J in Mitsui and Langley J in Nikitin put an undue constraint upon what is intended to be an exceptional though flexible remedy. The intrusion into the business of others which the exercise of the Norwich Pharmacal jurisdiction obviously entails means that a court should not, as Lord Woolf in Ashworth made clear, require such information to be provided unless it is necessary. But in our view, there is nothing in any authority which justifies a more stringent requirement than necessity by elevating the test to the information being a missing piece of the jigsaw or to it being a remedy of last resort."

Exceptional but flexible

11 In the Bank of Nova Scotia case the Court of Appeal approved the re-formulation of the test for a Norwich Pharmacal order set out in Mitsui (supra) viz, that for the grant of an order.

(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;

(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 to ultimate wrongdoer to be sued.

12 Further at para [37] the Court of Appeal specifically endorsed the description of Norwich Pharmacal relief as *"a flexible remedy"*.

[11] [2007] EWHC 330 (QB) - In determining whether an applicant could, in practice, obtain the required information by other means, the court was entitled to consider:
"all the circumstances prevailing in the particular case, including for example the size and resources of the Applicant as an organisation, and the urgency of its need to obtain the information it requires, and any public interest in it having its need."
The Court of Appeal did not discuss necessity or last resort in Koo Golden East Mongolia v Bank of Nova Scotia & Ors [2007] EWCA Civ. 1443 "the Bank of Nova Scotia" case.

13 These developments may be synthesised in the following conclusions:

(1) the Norwich Pharmacal jurisdiction is exceptional;

(2) the remedy must be necessary but need not be one of last resort[12];

(3) the remedy is and should remain a flexible one[13].

The terms of an order

14 In the conventional case, the order requires the respondent on oath to identify the wrongdoer by name. Such an order will not be time-consuming or costly in terms of compliance.

15 The order is equitable and the terms will be adapted to fit the justice of the case.

16 Developments in relation to the scope of the remedy have changed the potential content of an order. Lightman J said in Mitsui (supra) at [18] that[14]:

"The required disclosure may take any appropriate form. Usually it takes the form of production of documents, but it may also include providing affidavits, answering interrogatories or attending court to give evidence."

17 In The Bank of Nova Scotia case (supra at [51]) the Court of Appeal displayed a more restrictive approach. At first instance an order was made which required the respondent to serve on the claimants a signed witness statement answering a number of specific questions. On appeal, the Court of Appeal declined to make an order on the ground of state immunity but said

[12] Binyan Mohamed (supra) at [94].
[13] Bank of Nova Scotia (supra) at [37].
[14] In that case the judge declined to make the wide-ranging non-party disclosure type order sought but to require the respondent to answer on oath (by interrogatories) a number of specified questions.

that, had it not so decided, it would have limited the order to a question relating to the identity of certain relevant parties.

18 The order cannot become the proverbial fishing expedition. In Arab Satellite Communications Organisation v Saad Faqih & Anr[15] a Middle Eastern intergovernmental organisation sought from a Saudi political dissident the identity of individuals who "may have been involved" in broadcasting political material via its satellite broadcasting system. There was therefore uncertainty as to whether the order sought would achieve the identification purpose at the heart of the Norwich Pharmacal procedure. The application was dismissed, even before consideration of freedom of expression principles, on the basis that:

> *"it was not right in principle that a party should be ordered to make a judgment about who "may have" done such-and-such a thing* [18]….
>
> *"Norwich Pharmacal does not give claimants a general licence to fish for information that will do not more than potentially assist them to identify a claim or a defendant."* [24]

19 Nonetheless, in an appropriate case the court will order substantial disclosure of documents under the Norwich Pharmacal procedure. The most recent example is BNP Paribas v TH Global Ltd[16] where the court ordered substantial disclosure of "all documents within the possession, custody or control" of the respondent relating to a number of commercial transactions by which the claimant suspected it has been defrauded (see [22]). The court did, however, refuse to make an order requiring the respondent to set out by affidavit its "knowledge of and involvement with" these transactions (see [51]-[52]).

[15] [2008] EWHC 2568 (QB)
[16] [2009] EWHC 37 (Ch)

Costs

20 In the normal course of events, an applicant for a Norwich Pharmacal order will be obliged to pay the respondent's costs, including the compliance costs of making the disclosure[17].

21 The basis for this presumptive rule is the same as for applications for pre-action disclosure; see Totalise plc v (1) Motley Fool Ltd (2) Interactive Investor Ltd[18]. It is established that the presumptive costs order will apply to cases where:

(1) The respondent has a genuine doubt that the applicant is entitled to the disclosure order sought;

(2) The respondent is under an appropriate legal obligation not to reveal the information, where the legal position is not clear, or where he has a reasonable doubt as to the obligation;

(3) The respondent could be subject to proceedings if disclosure is voluntary;

(4) The respondent would or might suffer damage by voluntarily giving the disclosure;

(5) The disclosure would or might infringe a legitimate interest of another.

22 The costs payable to the respondent may be recovered as part of the claim against the wrongdoer; Smith Kline and French Laboratories Ltd v R.D. Harbottle (Mercantile) Ltd[19].

23 There will however be situations in which this normal rule is displaced and a respondent is ordered to bear his own costs or even to pay the applicant's

[17] See e.g. Sheffield Wednesday FC Ltd v Hargreaves [2007] EWHC 2375 (QB)
[18] [2001] EWCA Civ. 1897 at [29]
[19] [1980] RPC 363

costs. Such cases would include the position where there is compelling evidence that the respondent supported or was implicated in a crime or tort or has actively sought to obstruct justice for no justifiable reason. An extreme case would be where fraudulent involvement of the respondent has already been proved; see Republic of Congo (supra).

HUMAN RIGHTS

PRIVACY

24 Art 8 of The European Convention on Human Rights ("the Convention") provides as follows:

(1) *"Everyone has the right to respect for his private and family life, his home and his correspondence.*

(2) *There shall be no inference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Legal professional privilege

Generally

25 The right to consult and obtain legal advice confidentially is an important human right[20]. The general rule is that the court will not order production of information and documentation protected by legal professional privilege. This follows from application of established English procedural law and Art 8 of the Convention.

[20] R v Derby Magistrates Court ex p. B [1996] A.C. 487
"The principle which runs through all these cases ….. is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests…"

The fraud exception

26 Information and documentation that is prima facie covered by legal professional privilege loses that protection if it is the product of fraud. In Finers v Miro, Dillon LJ said:

"The privilege cannot, in my judgment, apply if the solicitor is consulted – even though he does not realise this and is himself acting independently – to cover up or stifle a fraud."

27 In The Queen (on the application of Revenue & Customs Prosecution Office) v W[21] this fraud exception was considered and applied in a Norwich Pharmacal application for banking and financial details made against an innocent firm of solicitors in circumstances where the information was confidential but not legally privileged. The court accepted that, where information is held in confidence by solicitors (and one assumes by similar reasoning by other professionals), it should exercise greater caution when considering whether to order disclosure. However no such caution was required or merited in a case of fraud.

Privilege against self-incrimination

Generally

28 A party has the right in civil proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose him (or spouse) to criminal proceedings in the UK; S14 Civil Evidence Act 1968[22]. The respondent to a Norwich Pharmacal order may therefore rely on this privilege against self-incrimination in an appropriate case.

The fraud exception

29 Section 13 Fraud Act 2006 came into force on 15.01.07. It provides the following exception to this protection:

[21] [2008] EWHC 2780 (Admin)

"A person is not to be excused from –

(a) answering any question put to him in proceedings relating to property, or

(b) complying with any order made in proceedings relating to property,

on the ground that doing so may incriminate him … of an offence under this Act or a related offence."

30 A respondent to Norwich Pharmacal proceedings may therefore no longer refuse to answer the order on the ground that in doing so he may incriminate himself of the offences referred to. Section 13(3) provides a wide definition for "proceedings relating to property". "Property" includes money as well as real and personal property. A "related offence" is (a) conspiracy to defraud or (b) "any other offence involving any form of fraudulent conduct or purpose".

31 The Republic of Congo case (supra at [44]) decided that this section was capable of referring to the substantive proceeding in respect of which a Norwich Pharmacal order is obtained provided those proceedings have been started[23].

Commercial confidentiality

32 In The Bank Nova Scotia case (supra at [49]), the Court of Appeal indicated that the courts should exercise caution when asked in Norwich Pharmacal proceedings to break the established rules of confidentiality in a banker-customer relationship saying that:

"A court should be very reluctant to make a Norwich Pharmacal order which involves a breach of confidence as between a bank and its customer".

[22] See generally Sociedade Nacional v Lundqvist [1991] 2 QB 310 @ 324-5

[23] In The Republic of Congo case the self-incrimination arose in respect of claims that the respondent oil trading companies had bribed parties in Hong Kong to secure oil trades by the state of Congo. The offence of bribery was within the ambit of Fraud Act 2006 on the grounds that bribery is a form of fraudulent conduct that necessarily involves deception.

33 This guidance is a potentially important restriction in all cases including professional liability cases. The strong indication is that the courts will (or at least should) take care to protect the confidentiality of the banker-customer relationship by exercising its discretion to decline to make any order or, alternatively, by making the least intrusive order possible.

34 In cases where the respondent owes a duty of confidence to third parties in respect of the information or documentation in question, the appropriate course of action, for an applicant or a respondent, is likely to be to request the court, where it is realistic and proportionate, to impose a condition in the order that those third parties shall have the right to intervene, if so advised, to prevent disclosure of information they say is protected; see e.g. BNP Paribas v TH Global Ltd [2009] EWHC 37 (Ch) at [53].

Protected personal data

35 The respondent to a disclosure application may well owe third parties independent legal duties to maintain confidentiality in the information/data sought. The paradigm example is the duty of the data controller under the Data Protection Act 1998 to the data subject.

36 A data controller respondent may well take the view that it will be protected from liability if it submits, but does not consent to, a disclosure order. However the court considering the disclosure application must consider the broader picture and take into account the effect of an order on the protected rights of third parties.

37 In cases where the third parties are identifiable, the productive approach, for an applicant or a respondent, is again likely to be to request the court, to impose a condition in the order that those third parties shall have the right to

intervene, if so advised, to prevent disclosure of information they say is protected.

Health data - medical records

38 The Court of Appeal in the Merseycare NHS Trust v Ackroyd[24] case repeated with approval the principle that the English courts *"regard the protection of medical records as of considerable importance in carrying out the balancing exercise required"* in a freedom of expression case[25].

39 An application by way of Norwich Pharmacal proceedings for data from personal medical records (e.g. for the name of treating medical or health practitioners or related information) will be scrutinised particularly carefully and by reference to both limbs of Art 8 of the Convention. An applicant will, in practice, have to satisfy the Court that the information sought is essential to serve his legitimate interest and the medical records are the only source of such information. It is unlikely that documentation, as opposed to identities, will be ordered to be disclosed.

Freedom of expression

The editorial media

40 Art 10 of the Convention provides as follows[26]:

> *(1) "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

[24] [2007] EWCA Civ. 101 at [28]

[25] i.e. between Art 8 and Art 10. The Court of Appeal's final decision in the Ackroyd case does however create uncertainty as to whether medical records remain in the special category previously indicated by the Ashworth v MGN case and it is arguable that the decision has the effect that medical records are to be treated in the same manner as any other confidential (e.g. commercial) information.

[26] Art 10 protects freedom of expression of those within Convention countries and not elsewhere: see e.g. in relation to Norwich Pharmacal proceedings, Arab Satellite Communications Organisation v Saad Faqih & Anr (supra at [28]).

(2) *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

41 Section 10 Contempt of Court Act 1981 ("S10 CCA") was enacted in response to the decision in British Steel Corp. v Granada Television (supra) and has been found to be consistent with Art 10 of the Convention. It provides as follows:

"No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

42 S10 CCA provides a general protection for a journalist's sources and has been authoritatively considered in Ashworth v MGN[27]. It applies despite any proprietary claim for delivery up of stolen documents if the documentation could lead to identification of the source; Secretary of State for Defence v Guardian Newspapers Ltd [1985] A.C. 339. It also applies even if there has been no publication of the information, provided that the information was supplied with a view to publication; X Ltd v Morgan-Grampian (Publishers) Ltd [1991] 1 A.C. 1. However, it does not apply where the respondent has no editorial control over or responsibility for the content published; see Totalise plc v Motley Fool Ltd (supra) - where the respondent operator of an online discussion site had no control over its content.

43 Like Article 8, Article 10 of the Convention and S10 CCA are express fetters where it is found that the Norwich Pharmacal jurisdiction is engaged. These

fetters are not themselves absolute and are subject to the qualifications contained in 10(2) and S10.

44 In applying Article 8 or 10 the approach of the English Courts is to adopt a two-stage test. First, they decide whether in the case under consideration the 'interests of justice' are engaged. Secondly, 'whether, on the facts of the particular case, disclosure of the source is 'necessary' to achieve one of 'legitimate aims' set out in Article 8(2) or 10(2).

45 In relation to Article 10 cases, the court will consider whether *"the achievement of the legitimate aim on the facts of the instant case is so important that it overrides the public interest in protecting journalistic sources in order to ensure free communication of information to and through the press'*: Ashworth v MGN[28]. The European Court of Human Rights has characterised *'necessary'* as requiring proof of a *'pressing social need'*.[29]

46 In X Ltd v. Morgan Grampian Ltd [1991] A.C. 1 at 41d-f, Lord Bridge summarised the task of the judge in deciding whether disclosure is "necessary" to pursue a legitimate aim under Article 10(2) as follows:

> *"It follows then that, whenever disclosure is sought, as here, of a document which will disclose the identity of a source within the ambit of section 10, the statutory restriction operates unless the party seeking disclosure can satisfy the court that "disclosure is necessary" in the interests of one of the four matters of public concern that are listed in the section. I think it is indisputable that where a judge asks himself the question: "Can I be satisfied that disclosure of the source of this information is necessary to serve this interest?" he has to engage in a balancing exercise. He starts with the assumptions, first, that the protection of sources is itself a matter of high public importance, secondly, that nothing less than necessity will suffice to override it, and thirdly, that the necessity can only arise out of concern for another matter of high public importance, being one of the four interests listed in the section."* [emphasis by underlining added]

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[27] Court of Appeal [2001] 1WLR 515 and House of Lords [2002] UKHL 29
[28] [2001] 1WLR 515 at [9]

47 In general terms, an order requiring a journalist to disclose information which tends to reveal a source or compromises his freedom of expression engages Article 10 of the Convention and S10 CCA. Art 10 has a public interest dimension in a democratic society and in general trumps other considerations. The circumstances in which an order should be made against a journalist for disclosure of his sources are very much the exception rather than the rule.

Bloggers and the online world

48 Individuals publish from time to time information on blogs, online bulletin board and social networking sites which may assist a party in identifying a wrongdoer or formulating his cause of action against that wrongdoer or other wrongdoers. A large amount of this information is published by those using pseudonyms thereby preserving their anonymity. In many cases the true identities of the writer is obtainable through his internet service provider if the relevant IP address is disclosed.

49 The online writer is exercising a freedom of expression under Article 10. In most instances, at least in this jurisdiction and excluding whistle-blowing cases, disclosure of his identity will not inhibit this freedom. The first question however is whether the anonymous/pseudo-named online writer is entitled to protection of his privacy.

50 The recent decision in The Author of a Blog v Times Newspapers Ltd[30] indicates that, a blogger[31] does not have a reasonable expectation of anonymity:

[29] Ashworth v MGN [2001] 1WLR 515 at **[**85]
[30] [2009] EWHC 1358 (QB) (Eady J)
[31] A serving police officer using the online name of "Night Jack"

"… The mere fact that the [blogger] *wishes to remain anonymous does not mean either that he has a reasonable expectation of doing so or that* [a third party] *is under an obligation to him in that respect [6]*
blogging is essentially a public rather than a private activity". [11]

51 In a professional liability (and regulatory) context this decision will assist an applicant who wants to establish the identity of the blogger to obtain his evidence or to establish that identity to discipline the blogger either internally or externally[32].

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[32] "….. it has always been apparent that if his employing police authority became aware (as it now has) that one of its officers was communicating information and opinions to the public at large about the conduct of police operations, there would be a significant risk of disciplinary action. …. Indeed, this would appear to be one of the main reasons why he was keen from the outset to maintain his anonymity." (Ibid at [14])