

Third Party Disclosure?

Norwich Pharmacal and Gaggling Order relief



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Victims of fraud often find themselves in a predicament when they are deprived of their assets but unable to seek recovery because they cannot identify the parties responsible. In this regard, a Norwich Pharmacal order is a useful tool for those affected by fraudulent activity in advance of seeking legal recourse against the fraudster.

Norwich Pharmacal orders are frequently used by victims of online scams to obtain sufficient details of wrongdoers such that investigations can be made and recovery proceedings can be commenced. Whether or not the fraudulent activity was picked up prior to stolen monies having already been dissipated from a third party bank account (if the former is the case, appropriate action should have already been taken to seek a Mareva injunction), the Norwich Pharmacal application can seek valuable information from the bank whose accounts have been used to receive or dissipate the wrongfully stolen funds. The information sought often includes the identity of the fraudster and the relevant bank account statements in order to allow the victims to trace their removed funds before issuing recovery proceedings against the culprits.

Norwich Pharmacal relief: Practical Considerations

Whilst the well-established Norwich Pharmacal principles, derived from the landmark case of *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133, are trite the practical aspects of a Norwich Pharmacal application merit closer scrutiny:

a) Whether the Norwich Pharmacal application should be made by way of an *inter partes* or *ex parte* application (i.e. with or without notice)

An applicant may be tempted to seek Norwich Pharmacal relief by way of an *ex parte* application on the grounds that an *inter partes* application may alert the fraudster to such an application. The concern would be that, once alerted, he would most likely take steps to frustrate any claim or investigation which may be made against him, thereby defeating the entire purpose of the application.

However, in the case of *A1 and A2 v. R1, R2 and R3* [2021] HKCFI 650,¹ Coleman J emphasised that it is of paramount importance that *all parties* are to be heard as a matter of natural justice. In particular, the judge pointed out the fact that the bank's client (usually the holder of the bank account in to which the wrongfully stolen funds have been deposited) would be unaware of the Norwich Pharmacal application, and hence could not make submissions to the court to safeguard his own interests.

Accordingly, the ability of the bank to make submissions to the court in this context is one of the important safeguards for the bank's client and a Norwich Pharmacal application made on an *ex parte* basis alone would be difficult to justify.

b) Gagging order on an *ex parte* basis followed by a Norwich Pharmacal application on an *inter partes* basis

In order to strike the right balance between the interests of the victims of fraud and the bank together with its client, Coleman J in *A1 and A2* suggested the correct procedure which an applicant should adopt is as follows:

- (1) First, the applicant should seek a Gagging Order against the bank on an *ex parte* without notice basis, or at the very least *ex parte* with notice, pending an *inter partes* hearing of the Norwich Pharmacal application against the bank. The notice period given to the bank ought to be sufficiently long to allow it to meaningfully make submissions, if any.
- (2) Second, at the *inter partes* hearing of the Norwich Pharmacal application against the bank, the court will then have the benefit of the submissions of the bank, if any, whilst the victim applicant will, on the other hand, already be protected by the Gagging Order until the conclusion of the application.
- (3) Finally, the court can grant a further brief period for the Gagging Order to continue in order to allow the applicant to make such applications as it sees fit to protect its interests.

Accordingly, the interests of both the applicant and the bank would be adequately protected. On one hand, a Gagging Order seeks to prohibit the bank from divulging to anyone (including the fraudster) any information – even though it owes various duties to the account holder – that it has received notice of a Norwich Pharmacal application in relation to a particular bank account whilst, on the other hand, the bank would not be deprived of its right to make submissions, if any.

c) Full and frank disclosure

In *A1 and A2*, Coleman J highlighted the proper way to make full and frank disclosure in *ex parte* applications. In this case, the judge criticised the applicant's approach in placing

¹ Which endorsed another recent decision of the Court of First Instance in *Asiya Asset Management (Cayman) Ltd v Dipper Trading Co Ltd* [2019] HKCFI 1090.

voluminous materials in support of its application before the court without explaining their significance.

Inevitably, among the voluminous materials placed before the court, some information will be much more important than others. By not drawing the court's attention to the important matters, this may amount to material non-disclosure if the court has overlooked the said matters.

In issuing a reminder to the profession, the judge stipulated that the greater the amount of material placed before the court, the more likely the court will require the applicant to draw important matters to the court's attention specifically by way of a summary of the relevant matters in the body of the affidavit or the skeleton argument.

Conclusion

Although the principles surrounding Norwich Pharmacal (and Gagging Order) applications are not new, it is clear that the implementation of these principles has not been consistent such that the courts have seen fit to guide practitioners in this important area. Coleman J's recent decision serves as a useful reminder going forward.

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