



## NORWICH PHARMACAL ORDERS

**In this Client Guide we explain what a Norwich Pharmacal Order<sup>1</sup> (NPO) is, when you might need one, how to obtain it, and arguments to counter an application.**

### What is an NPO?

An NPO is an English disclosure order, which can be used to help identify a wrongdoer, trace assets, and uncover evidence of misconduct. It is used against a third-party who, whilst not a direct party to the litigation, is somehow “mixed up in [the] wrongdoing”, and requires them to disclose information or documentation on the existence and location of the assets and was created by the judgment in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1973] UKHL 6.

### Criteria for obtaining an NPO.

In order to persuade an English court to order an NPO, a party will need to show that:

1. it has a good arguable case that there has been wrongdoing;
2. the order is needed for the claimant to take action against the wrongdoer;
3. the NPO respondent is ‘mixed up’ in the wrongdoing;
4. the NPO respondent is likely to have documents or information which are relevant to the case; and
5. the order is necessary and proportionate.

### Procedure for an application

The procedures differ slightly depending upon whether the NPO is sought pre-or post-commencement of proceedings. Here we explain the difference:

1. If the application is sought before substantive proceedings against the wrongdoer have been started, the procedure under Civil Procedure Rule (CPR) 8 is followed.
2. If the application is sought after the issue of proceedings, the procedure in CPR 23 is followed. (See Figure 1)

### The applicant's obligations

1. Where the application is made without notice to the respondent, the applicant is under a duty to provide full and frank disclosure of all material facts, including those, which may be counter to its case.
  - It is likely that the court will order the applicant to provide a cross-undertaking in damages to the respondent/any innocent third parties. This will compensate those parties for any losses suffered as a result of the NPO, if it is later determined that the order should not have been made.
2. The applicant is likely to be required to:
  - give an indemnity in respect of the costs of the application e.g. a bank will recover its reasonable costs associated with identifying and confirming bank account details.
  - pay all of the costs associated with the application
3. These costs may be recovered against the wrongdoer during later proceedings. However, it should be noted that the usual rule of the loser pays does not apply to NPOs.

<sup>1</sup> *Norwich Pharmacal Co v Customs and Excise Commissioners* [1973] UKHL 6.

**Figure 1**

<b>CPR Part 8 Procedure</b>	<b>CPR Part 23 Procedure (with notice)</b>	<b>CPR Part 23 Procedure (without notice i.e. where there is a risk of assets being dissipated)</b>
File the claim form and evidence at court, and pay the court fee.	File the application notice, evidence, and draft order at court, and pay the court fee.	Liaise with the court to arrange the hearing.
Serve the claim form and evidence on the respondent.	Serve a copy of the application notice on the respondent as soon as possible (and at least 3 days before the court is to consider the application).	If the application is not urgent, file the application notice, evidence, and draft order at court (and pay the court fee).  If the application is urgent, then the order must include an undertaking to do this after the hearing.
The court will fix a hearing date or give directions for disposal of the hearing.	The court will determine the application – either at a hearing or on the documents.	If the hearing is held without notice and interim order will be made, and a full note of the hearing must be served with the supporting documents.
The court determines the claim (with or without a hearing).		A second hearing on notice to the respondent will then take place where the court will decide whether to continue, vary, or discharge the order.
	The NPO is served on the respondent.	
	The respondent must provide the information required by the NPO by the deadline in the order, usually 28 days or less.	

### **Preserving confidentiality over the proceedings**

Where there is a need to prevent the wrongdoer from finding out about the proceedings and any orders made as a result, the applicant can seek the following orders:

1. for the hearing to be held in private;
2. for public access to the court files to be restricted;
3. an order preventing the respondent from informing third parties of the proceedings/of the order made;
4. anonymity, so that parties are only referred to by initials in the court records;
5. permission to delay serving any documents, which could disclose the existence of the application or order.

### **The hearing**

The timing of the hearing will depend on the urgency of the matter.

The hearing itself will often take as little as half an hour and rarely longer than half a day.

The court can in certain situations determine an NPO application on paper and avoid the cost of a hearing.

When will the court make an order?

The court will determine whether or not to grant an NPO on a case-by-case basis. The court will take into account:

1. the applicant's size and resources;
2. the urgency of the situation; and
3. the level of public interest



## Defending an NPO

The respondent can seek to oppose the order on the grounds listed below:

<b>Improper Purpose</b>	The purpose of the application can be challenged e.g.; the respondent can argue that the documents are not actually required for the applicant to access the information required.
<b>Insufficient evidence</b>	Challenging the adequacy of the evidence provided by the applicant.
<b>Disproportionate burden</b>	Where complying with the NPO may place unreasonable burden on them (e.g., time, costs).
<b>Privilege or confidentiality</b>	<p>The respondent can assert that the information sought is protected by legal advice privilege, or litigation privilege; the court may decide not to grant an NPO where information is privileged or otherwise confidential.</p> <p>In <i>Hickox</i><sup>2</sup>, the court determined that confidentiality of information need not be a defence to an NPO application, where confidentiality is a custom, rather than a legal obligation.</p>
<b>The 'mere witness' rule</b>	<p>The court is unlikely to grant an NPO against a party who is a mere witness to the action (rather than being a party to the action itself)<sup>3</sup>.</p> <p>However, the court can make an exception where proceedings cannot be brought unless the respondent provides the relevant information, or where the respondent is the only practicable source of the information.</p>
<b>Discretionary factors</b>	These might include factors such as potential harm to the respondent's reputation.

Rather than opposing the NPO, a respondent could seek to vary the NPO e.g., by limiting the scope of the information required.

## Using the information

Information obtained via an NPO must be used solely in connection with the proceedings in question, and the applicant is required to give this undertaking. Breaching the undertaking is a serious matter, and can lead to contempt of court, for which the sanctions are:

1. a custodial sentence for a maximum of two years where ordered by a superior court, or one month if ordered by an inferior court;
2. a fine – there is no statutory limit for the amount unless imposed by an inferior court (maximum £2,500 in this case); and/or
3. confiscation of assets.

If the information is subsequently required for other proceedings, an application to the court should be made for permission to use it in this way.

## NPOs against foreign parties

An applicant can serve a claim form against a foreign party, with the court's permission where:

- a. the application is made in order to obtain information regarding:
  - the true identity of a defendant or a potential defendant; and/or

- the existence and location of the claimant's property; and

- b. the application is made for the purpose of proceedings already commenced, or which are intended to be commenced either by service in England and Wales or outside of the jurisdiction pursuant to the CPRs

## Alternatives to NPOs

This a complex area and legal advice should be obtained. However, there are a number of alternatives to the NPO which might be better suited to the circumstances of individual cases, one alternative if the third-party against whom an order is sought is a financial institution, then a **Bankers Trust Order**<sup>4</sup> (BTO) might be preferred.

A BTO is an order that requires a financial institution, to disclose information that would help the applicant locate assets before they are dissipated.

A BTO is available in the following circumstances, where:

1. there is a strong case of fraud – where the relevant funds belonged to the applicant and the applicant has been fraudulently deprived of them;
2. there is a real prospect that the information may help in tracing or preserving the assets; and

the claimant is seeking disclosure of confidential documents from the financial institution to support a proprietary claim to trace assets.

<sup>2</sup> *Hickox v Dickinson* [2022] EWHC 2520 (Ch),

<sup>3</sup> *Mercantile Group (Europe) AG v Aiyela* [1994] QC 366,

<sup>4</sup> *Bankers Trust Company v Shapira and Others* [1980] 1 WLR 1274

**This client guide was produced by the HFW Disputes Knowledge Management team, should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact them, at [KM@hfw.com](mailto:KM@hfw.com), or your usual HFW contact to discuss.**



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