

THE JUSTICE AND SECURITY BILL 2012

NORWICH PHARMACAL JURISDICTION: COMPARATIVE STUDY

THE ODYSSEUS TRUST¹

19 June 2012

The table below records the way the *Norwich Pharmacal* jurisdiction has been applied in common law jurisdictions. In civil law countries, similar powers are available to their courts.

¹ The Odysseus Trust seeks to promote good governance and the effective protection of human rights. The Trust is directed by Lord Lester of Herne Hill QC, together with two Parliamentary Legal Officers, Joanna Dawson and Sophia Harris, and a Legal Researcher, Caroline Baker. For more information about our work, please visit our website www.odysseustrust.org. We are grateful to Ron Soffer, Axelle Zenati and Zorica Percobic of Cabinet Soffer, 8, rue Magellan, 75008 Paris, France; Laurent Fischer, Avocat, DEA en droit, criminalité et sécurité des nouvelles technologies, Certifié OMPI, Etude Fischer/Bufat, Av. Juste-Olivier 9, 1006 Lausanne, Switzerland, and Sophie Sitter, Chambers of Advocate General Kokott, Court of Justice of the European Union, Rue du Fort Niedergrünwald, L-2925 Luxembourg, for their assistance.

COUNTRY	NORWICH PHARMACAL?	USES	SIGNIFICANT OR RECENT CASES	NOTES
COMMON LAW JURISDICTIONS				
Australia	Yes	Identity of alleged copyright infringers, third party funders of civil litigation, authors of defamatory material	<i>Re Bentley Frangrances Pty Limited and Charles of the Ritz Group Limited v Gdr Consultants Pty Limited and Alimeast Pty Limited</i> [1985] FCA 189	Also available in state jurisdictions including New South Wales (<i>Idoport Pty Limited and Anor v National Australia Bank Limited and Ors, National Australia Bank Limited v Oamps Limited and Ors</i> [2004] NSWSC 695), Queensland (<i>Re Pyne</i> [1996] QSC 128), South Australia (<i>State Bank of South Australia v. Smoothdale No. 2 Ltd</i> [1993] SASC 4352).
Ireland	Yes		<i>Megaleasing U.K. Limited v Barrett</i> [1993] I.L.R.M. 497 <i>EMI Records (Ireland) Ltd & Ors v. Eircom Ltd & Anor</i> [2005] IEHC 233 <i>Ryanair Ltd v Unister GMBH</i> [2011] IEHC 167	<i>Norwich Pharmacal</i> jurisdiction accepted in <i>Megaleasing U.K. Limited v Barrett</i> [1993] I.L.R.M. 497 in which Finlay CJ, having analysed the decision of the (English) House of Lords in <i>Norwich Pharmacal</i> , stated: "I conclude from these speeches that the granting of an order for discovery in an action of sole discovery prior to the institution of proceedings against any defendant is a power which for good reasons must be sparingly used, though, where appropriate, it may be of very considerable value towards the attainment of justice."
Canada	Yes		<i>Glaxo Wellcome PLC v. M.N.R.</i> ,	<i>Norwich Pharmacal</i> jurisdiction accepted in <i>Glaxo Wellcome PLC v. M.N.R.</i> , [1998] 4 FC 439 where the Federal Court of Appeal

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			[1998] 4 FC 439	<p>resurrected its ability to order an equitable bill of discovery applying the same conditions as those set out in <i>Norwich Pharmacal</i>.</p> <p>Normally called <i>Norwich</i> orders or equitable bills of discovery and awarded under subsection 96(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43 which states:</p> <p>96.1 Courts shall administer concurrently all rules of equity and the common law.</p>
Cyprus	Yes	Identity of beneficial owners, money laundering, fraud	<p><i>TBF (Cyprus Ltd), and others v. Emporikis Meleton Shediasmou kai Epihirimatikou Kefalaίου Anonimis Etairias and others</i> (2001) 1 (A) A.A.Δ 153</p> <p><i>Yukos Finance BV and others vs Halebay Holdings Limited</i> Case No. 3578/2008 (23.2.2009)</p> <p><i>Rexel Luxumberg S.A. v SEPI S.A.R.L, Alpha</i></p>	<p><i>Norwich Pharmacal</i> jurisdiction accepted and order granted in <i>TBF (Cyprus Ltd), and others v. Emporikis Meleton Shediasmou kai Epihirimatikou Kefalaίου Anonimis Etairias and others</i> where the Supreme Court stated:</p> <p>"...Cyprus case-law does not shed light on this issue. Nevertheless, we have located English case-law that has clarified the issue...taking a positive stance on this issue".</p> <p><i>Norwich Pharmacal</i> orders are granted in equity under s. 29(1)(c) Courts of Justice Law N.14/60 which retains for the court the power to grant an order as a discretionary remedy: "...in all cases in which it appears to the court just or convenient to do so." S. 32 governs the grant of injunctions.</p> <p>The conditions for award are those set out in <i>Mitsui & Co v Nexen Petroleum UK Ltd</i> (2005) 3 All ER 511, at page 518:</p>

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			<i>Bank Cyprus Ltd</i> Case No. 10046/2010	<p>"the three conditions to be satisfied for the court to exercise the power to order Norwich Pharmacal relief are: (i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; (ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and (iii) 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 the ultimate wrongdoer to be sued."</p> <p>It seems that the grant of a Norwich Pharmacal is not as rare as in the English jurisdiction; they seem to be used fairly often in order to prevent money laundering and fraud as this case comment from 24 May 2011 (Nicosia District Court) shows: http://www.internationallawoffice.com/newsletters/detail.aspx?g=c8f08126-1d8e-4d1d-83f9-fcd8fe93802b#comment</p>
Guernsey	Yes			As indicated in <i>Equatorial Guinea v. Bank of Scotland International & Ors (Guernsey)</i> [2006] UKPC 7, paras. 5& 6.
Hong Kong	Yes	Identity and information in the fields of intellectual property, banking, names from Internet services providers	<i>Easey Garment Factory Ltd v. Attorney General</i> [1979] HKCFI 105 <i>Cinopoly Records Co. Ltd & Others v Hong Kong Broadband Network Ltd</i> (2006) 1 HKLRD 255	<p>Norwich Pharmacal jurisdiction accepted in <i>Easey Garment Factory Ltd v. Attorney General</i> [1979] HKCFI 105.</p> <p>There appears to have been no difficulty in accepting the House of Lords ruling in <i>Norwich Pharmacal</i> and there seems to have been no discussion of the equitable principles on which it is based nor any discovery or rediscovery of the court's equitable jurisdiction, as occurred in Canada. <i>Norwich Pharmacal</i> orders appear to have been adopted quite easily as a tool of discovery.</p> <p>The conditions of grant were summarised in <i>A Co. v. B Co.</i> [2002] HKCFI 1080; [2002] 3 HKLRD 111:</p>

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			<p><i>Dish Network LLC v Zentek International Co. Ltd.</i> (2009) 3 HKC 52</p> <p><i>Chang Wa Shan v Chan Chun Chuen</i> (2009) HKCU 1544</p>	<p>"12. Though founded ultimately on notions of justice, nevertheless, it is important to emphasis the extraordinary nature of this relief because it is not a usual order and is not one that a court would lightly grant in the absence of powerful factors. I emphasis the following characteristics of this type of order :-</p> <p>(1) It is made against an innocent party whose only involvement is to become mixed up in the tortious or wrongful activities of others. There is at that stage no evidence of any wrongdoing on the part of the innocent party.</p> <p>(2) Instead, whatever wrongdoing there is, exists only on the part of a person or persons against whom no relief may be sought at that stage and indeed against whom there is probably insufficient evidence to found an action. In other words, this person or these persons will most probably not be before the court and would not be able to answer what are often very serious allegations made against them.</p> <p>(3) Usually, there will, moreover, exist a legal relationship between the innocent person against whom a discovery order is sought and the alleged wrongdoer and this relationship may involve strict duties to be observed on the innocent party's part. The present case offers what is a common scenario : the innocent defendant is a bank and the alleged wrongdoers its customers. In this situation, any discovery to be made by the innocent party may well, apart from a court order, expose that innocent party to liability, both civil and possibly even criminal. At the very least, a breach of confidentiality is involved.</p> <p>(4) The court, accordingly, in applications for Norwich Pharmacal relief must, in its discretion, balance the competing in interests of the victim of the alleged wrongdoing and an innocent party caught up in the wrongdoing."</p>

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Isle of Man	Yes	Only for information, not evidence but to aid main proceedings in the English Courts		<i>Brittain v Impex Services</i> (J753) 26 January 2004, para. 58: "[...] <i>The Manx courts have granted numerous Anton Pillar orders and Norwich Pharmacal orders [...]</i> "
Jersey	Yes			As indicated in <i>Equatorial Guinea v. Bank of Scotland International & Ors (Guernsey)</i> [2006] UKPC 7, paras. 5& 6.
Malaysia	Yes			Jurisdiction applied but order not awarded in <i>First Malaysia Finance Bhd v Mohd Fathi</i> [1993] Part 3 Case 9 [SCM]
New Zealand	Yes		<i>A v The Internet Company of New Zealand</i> AC54/08 [2009] NZEmpC 3; [2009] ERNZ	<i>A v The Internet Company of New Zealand</i> AC54/08 [2009] NZEmpC 3; [2009] ERNZ 1 - the rules in s. 56A District Court Act 1947 derive from <i>Norwich Pharmacal</i> ; jurisdiction extended from the High Court and District Courts to the Employment Relations Authority. Section 56A of the District Court Act 1947 states: <i>56A Powers of Court exercisable before commencement of proceeding</i> <i>On the application, in accordance with the rules, of a person who it appears to the Court is or may be entitled to claim in the Court relief against another person, the Court shall, in such circumstances as may be prescribed, have power to order any person who appears to be likely</i>

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				<p><i>to have or to have had in that person's possession, custody, or power any document or class of documents, which are relevant to an issue arising or likely to arise out of that claim, -</i></p> <p><i>(a) To disclose to the Court and to any other prescribed person whether the document or documents are in his or her possession, custody, or power; and</i></p> <p><i>(b) If a document has been but is no longer in that person's possession, custody, or power, to disclose to the Court and to any other prescribed person when he or she parted with it and what has become of it; and</i></p> <p><i>(c) To produce such of those documents as are in that person's possession, custody, or power to the Court or any other prescribed person.</i></p>
Singapore	Yes			<p>As indicated in <i>UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and Others</i> [2006] SGHC 142, para. 91 although not awarded.</p>
United States of America	The equitable bill of discovery and Rules 26 & 30, Federal Procedure Rules			<p>Before the adoption of "modern civil procedure rules" the equitable bill of discovery seems to have been an established, if relatively, rare remedy. The equitable bill of discovery does not seem to have been available against third parties but, prior to the combining of equity and law, only against the other party in an action brought in equity. This was subsequently extended by <i>Sinclair Refining co. v. Jenkins Petroleum Process Co</i> to actions brought in law.</p> <p>However, the Federal Rules of Civil Procedure seem to have made the equitable bill of discovery redundant in that they expressly provide for pre-trial discovery against non-parties (Rules 26 & 30). The information discoverable is not limited to that which would be admissible as evidence and there is no</p>

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				<p>requirement to establish a link to the wrong-doing of the defendant. Thus, a potential claimant can obtain any relevant information from any individual/company etc in order to commence proceedings. Discovery under Rules 26 & 30 does not require an order of the court.</p> <p>In relation to foreign proceedings, under 28 USC § 1782 the court may order anyone in the United States to give testimony and provide documents or any other material or thing for use in foreign proceedings. In <i>Intel Corp. v. Advanced Micro Devices, Inc.</i> 542 U.S. 241 (2004) "foreign proceedings" was held to include competition investigations undertaken by the European Commission.</p> <p>It seems that the equitable bill of discovery has survived in some jurisdictions in the US notably in Florida: http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/CD48D82DEB84C04885256E43004F37C7</p>
NON-COMMON LAW JURISDICTIONS				
France	Articles 145 and Articles 249 & seq. and Articles 263 &	Against banks and Internet Service Providers		Article 145 CPC allows the judge, prior to proceedings, order any measure which preserves or establishes factual evidence which will be needed for the resolution of a dispute. The application is made by any interested party. The most frequently ordered measures are:

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	seq. of the Civil Procedure Code (CPC) and Articles R-531-1 & seq. of the Code of Administrative Justice (CAJ)			<ul style="list-style-type: none"> • Measures of formal recording of evidence under Articles 249 et seq. CPC – the judge designates the <i>huissier</i>² to information and/or documents in an official report; • Measures of expertise under Articles 263 et seq. CPC) – the judge designates an expert and precisely delineates the scope of the expert's mission <p>The <i>huissier</i> under Article 249 et seq. CPC will go to premises of the targeted person or entity to collect information and/or documents which are then appended to the official record.</p> <p>Like the <i>Norwich Pharmacal</i> order, Article 145 CPC measures are a last resort – Article 146 CPC limits the use of such measures to situations where the party alleging the fact does not have sufficient elements to prove it.</p> <p>Measures under Article 145 CPC can be ordered against all private law entities and also public law entities where the main proceedings will be heard by the civil judge (as opposed to the administrative judge) and where there is no interference with the functioning of a body with powers under public law or with the public administration.</p> <p>Under Article R531-1 CAJ, where the only requirement is a statement of the facts, the administrative judge can, on request, designate an expert to state the facts which are likely to give rise</p>

² The *huissier de justice* is similar to a bailiff. However, the *huissier* is appointed by the Minister of Justice and is a member of the legal profession. The *huissier* has the monopoly on serving and executing judgments and decisions and other enforceable instruments and formally bears witness to events.

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				<p>to litigation before the administrative jurisdiction.</p> <p>Under Article R532-1 CAJ, the administrative judge can order any measure of expertise or investigation even where there is no prior administrative decision. Article R532-3 CAJ allows the judge to extend the expertise to third parties.</p>
Germany	Articles 142 & 485 - 494a Federal Code of Procedure (ZPO) & Article 99 Administrative Procedure Code (VwGO)			<p>Article 142(1) ZPO empowers the judge to order any party to the proceedings to disclose documents to the other party as a means of proving a material fact. Article 142(2) ZPO provides an exemption to this disclosure obligation for third parties in specified circumstances. However, breach of the order by refusing to disclose documents only allows the civil judge to draw negative inferences against a party to the proceedings (§ 286 Abs. 1 S. 1 ZPO).</p> <p>Articles 485 - 494a ZPO create ancillary proceedings for the taking of evidence (<i>selbstständiges Beweisverfahren</i>) for practical reasons. These proceedings may be undertaken either before or during the proceedings on the merits. Article 485 ZPO provides that a party may seek different kinds of measures from the judge, if the opposing party consents thereto or if there is a risk that the evidence will disappear or that it will become more difficult to use it. The admissibility in the main proceedings of evidence taken in this way is governed by Article 493. Notably, if the opposing party was not present, the evidence will only be admissible in the subsequent proceedings if the opposing party was summoned in a timely manner.</p> <p>The possible measures envisaged are:</p>

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				<ul style="list-style-type: none"> • Inspection of the site or ascertainment of the facts by the Court (<i>Einnahme des Augenscheins</i>); • Hearing of witnesses (<i>Vernehmung von Zeugen</i>); • Assessment by an expert (<i>Begutachtung durch einen Sachverständigen</i>). <p>When proceedings on the merits are not yet pending, an expert's assessment may be sought by a party who has a legal interest that the following be officially established:</p> <ul style="list-style-type: none"> • State of a person, state or value of property; • Cause of a physical injury, cause of damages to property or of defects in property; • Assessment of the costs necessary to recover from damages suffered in cases of physical injury, damage to property or defects in property. <p>Such a legal interest will notably be present whenever the taking of evidence increases the chances of a settlement.</p> <p>The competent tribunal is set out by Article 486 ZPO:</p> <ul style="list-style-type: none"> • If the substantive proceedings are pending, the same tribunal is competent for the independent proceedings of taking of evidence; • If substantive proceedings are pending, the competent tribunal is the one which would be competent to hear the substantive claim;

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				<ul style="list-style-type: none"> • In an urgent case, the request may be filed with the District Court in whose jurisdiction the witness or expert or property is located. <p>Article 487 ZPO lists what the request must entail. Article 490 ZPO deals with the judge’s decision regarding the request. Notably, there is not right of appeal against the judge’s decision. Article 491 ZPO is concerned with the rights of the opposing party, who should be summoned as early as possible so that it may protect its interests. Article 492 ZPO states that the articles relating to the taking of evidence in general are applicable (Articles 355 et seq. ZPO). It also provides that a record will be made of the taking of evidence and kept at the tribunal. If there is a possibility that the parties reach an agreement to settle, the tribunal may summon the parties to an oral hearing.</p> <p>Article 494a ZPO provides that in cases where no proceedings on the merits are pending, the judge will specify the time limit within which the claimant must file its action on the merits. If the Claimant does not respect this deadline, the judge will order costs against the Claimant. This decision may be immediately appealed.</p> <p>In the administrative court, the judge must investigate <i>ex officio</i> all claims. Article 99(1) VwGO sets out the basic principle of disclosure by the Federal Government and permits non-disclosure of documents or information where that disclosure would be detrimental to national security. Article 99(2) VwGO provides that review of the Government's decision to withhold</p>

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				documents is undertaken by the Administrative Court in an <i>in-camera Verfahren</i> where the administrative judge decides, in the absence of the parties, whether the Government was correct to withhold disclosure.
Switzerland	"Preuve à futur" under Article 158 Civil Procedure Code of 19 December 2008 (amendment to 1 January 2012)			Article 158 Civil Procedure Code provides a procedure by which the court can, before litigation is commenced, order the production of all evidence relating to the relevant and contested facts. The court is able to order such production where the law permits a request for such production to be made or where there is reason to believe that the evidence or other interest worthy of protection is in danger.