

Guernsey Third Party Disclosure.

Last reviewed: July 2018

Introduction

Disclosure / discovery in civil proceedings in Guernsey is broadly similar to that in other commonwealth jurisdictions; save that there is no pre-action protocol and pre-action disclosure is generally not available outside of personal injury cases. Disclosure is limited to the parties to the dispute in question. What therefore are a party's options if it is seeking disclosure from a non-party?

This Guide considers the principal mechanisms by which third party disclosure can be sought in Guernsey. Specifically:

- Norwich Pharmacal Orders, aka Third Party Disclosure Orders;
- Anton Piller Orders aka Search and Seizure Orders;
- Bankers Trust Orders; and
- Bankers' Books Orders.

These may be used for pre-action disclosure; ancillary orders for injunctions and as standalone applications within wider actions both in Guernsey and in aid of foreign proceedings.

Norwich Pharmacal Relief

The principles underlying the English case of *Norwich Pharmacal Co. v Customs and Excise Commissioners*¹ have been adopted in Guernsey and developed in the common law of other jurisdictions from which the Guernsey courts may draw guidance. It has been over a decade² since the Guernsey courts have issued a judgment considering this form of relief and the principles are well established.

Norwich Pharmacal Orders are a form of disclosure order principally used where a party has been wronged but does not know the identity of the wrongdoer. They provide a mechanism for the injured party to seek disclosure from a third party which is likely to hold relevant information or documentation about the wrongdoing so that, among other matters:

- the wrongdoer may be identified;
- to enable the injured party to plead its case; and/ or
- to trace the proceeds of the wrongdoing.

Guernsey's financial services industry can be a target for such orders. It is rarely alleged that the Guernsey financial services business is involved in the wrongdoing as a perpetrator. But such businesses are required to hold information on matters such as the identity of account holders, ultimate beneficial owners of structures, details of transactions and asset movements. This information can be hugely beneficial to a party seeking to construct their case and pursue recoveries.

¹ [1974] AC 133

² The last detailed consideration being in *Garnet Invs. Ltd. v. BNP Paribas (Suisse) S.A.* (Royal Ct.), 2007–08 GLR 73

The Principles

The principles for granting Norwich Pharmacal relief were approved by the Guernsey Court of Appeal in the 2005 case of *Systems Design Ltd. v. Equatorial Guinea (President)*.³

The eight principles drawn from that case are:⁴

- **The Mere Witness Rule.**

Where a person is not or will not be party to the action, but could be called as a witness, discovery should not be ordered against them if it is only to get advance disclosure of the witness evidence they might give at a later date.

- **The Third Party Must Be Involved In the Wrongdoing.**

This principle is yet to be the subject of challenge in the Guernsey courts but has been subject to review in other jurisdictions.

For example in the 2015 BVI case *JSC BTA Bank v Fidelity Corporate Services Limited and others* it was held at first instance that merely acting as a registered agent in the normal way was insufficient for a party to be said to be 'involved in the wrongdoing'. This was overturned on appeal with the Court of Appeal finding that registered agents used by corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them. It is unclear whether the same view would apply in allegations other than fraud.

The English courts, in *Santander UK plc v The Royal Bank of Scotland plc and others* [2015] EWHC 2560 (Ch), queried whether providing information such that a restitutionary claim for money paid away by mistake concerned a 'wrong' such that the Norwich Pharmacal jurisdiction was engaged.

- **Identified Wrongdoing Must Be Involved.**

The applicant must identify the wrongdoing, at least in general terms.

Historically the jurisdiction was limited to tortious acts only. It has now been extended to include both tortious and contractual claims. It is sufficient to show that the disclosure is required to ascertain whether a specified wrong has occurred, such as fraud, diversion of profits etc.

- **The Subject Matter of the Order May Be Wide Ranging.**

The classic jurisdiction of Norwich Pharmacal Orders was to identify your wrongdoer, but the scope has since expanded and the orders may be applied to a greater number of purposes.

- **A Legal Wrong Is Required.**

The impugned conduct has to be wrong in the eyes of the law, whether a civil or criminal infringement. Moral wrongs or distasteful conduct is insufficient.

- **Proceedings Beyond The Application Are Not Required.**

To engage the relief there is no requirement to have started or intend to start proceedings. It is sufficient that there is legitimate interest to protect. In many cases that is the point of the action: to enable you to consider whether or not you can bring proceedings and against whom.

- **Applicants Must Identify The Purpose/s For Which Disclosure Obtained Will Be Used.**

The court is to be informed of the purpose to which disclosure obtained will be put and within which jurisdiction. This may not be known at the time that the order is sought, or the disclosure obtained may indicate that it would be desirable to put it to other purposes. In such cases the applicant must return to court to seek permission to apply the material to these broader purposes.

- **It is A Discretionary Remedy.**

³ (C.A.), 2005–06 GLR 65

⁴ *Ibid*, paras 66–67

Even where the above principles are satisfied, the court may refuse the application if it is of the view that it is in the interests of justice to do so. The applicant must establish that the disclosure is necessary. If there are other means of getting the disclosure needed, applicants will be expected to have attempted them or should explain why those means are not practical.

Conversely, if threatened with a Norwich Pharmacal application, respondents may consider whether it is possible and advantageous to disclose just enough to kill the application without compromising their position.

In addition, the court will not permit applicants to conduct a fishing expedition. Applicants can therefore expect their applications to be tested and scrutinised. The court may refuse an application in its entirety if it views it as fishing, or make an order on far more restricted terms.

Anton Piller Orders

These are a form of civil search and seizure orders. Like Norwich Pharmacal orders, in Guernsey these too are an extension of the common law being based upon the English case which founded them, *Anton Piller KG v Manufacturing Processes Limited & Ors*.⁵

These orders allow the applicant to enter the respondent's premises in order to search for, inspect and seize material, documents and other property infringing the applicant's rights or otherwise relevant to the prospective claim. Historically such orders were most frequent in instances of IP infringement, passing off or breach of confidence. Their use is however expected to increase in matters regarding data breaches, cyber fraud and cryptocurrencies.

Requirements

Anton Piller orders may be obtained on an ex parte application where the applicant can show:

- An *extremely* strong prima facie case; and;
- That the actual or potential damage would be a very serious matter for the applicant; and
- There is clear evidence that the respondent has in his possession incriminating evidence; and
- There is a real risk that this evidence would be destroyed before an on-notice application could be made and enforced; and
- The likely harm to the respondent and/ or his business resulting from the order is not disproportionate to the legitimate object of the order.

Because of the extreme nature of the remedy, these orders are granted rarely. They will however be made where the court is satisfied that the applicant would otherwise be denied justice, say by reason of an order for delivery up or preservation of documents being likely to be ineffective. However the price is that applicants will usually be required to provide a cross undertaking in damages to afford the respondent some protection.

Enforcement

The Guernsey courts will rely upon the English Civil Procedure Rules procedures regarding search orders. The search will be carried out by the applicant's advocate/s. The search is to be supervised. The Civil Procedure Rules requirement is that the supervisor be an independent solicitor. In Guernsey this role may be taken by an independent advocate and/ or HM Sergeant.

The respondent can take legal advice before the search commences, with HM Sergeant staying on site to ensure nothing is destroyed. The respondent may apply for a quashing or variation of the order. The applicant's advocate is to make a report to the court on the execution of the order.

⁵ [1975] EWCA Civ 12

Bankers Trust Relief

This disclosure order allows a bank, or other entity with similar obligations of confidentiality, to provide disclosure normally protected by the duties of confidentiality.

These orders again originated in an English case: *Bankers Trust Co. v Shapira*.⁶ It is an order that requires parties who are not defendants to a substantive action to make full disclosure of facts which would enable assets which are property of the applicant to be located and protected from dissipation before the substantive action is concluded.

Requirements

To obtain such an order requires:

- Strong evidence of fraud.
Such orders are not made lightly. It is the risk of fraud which defeats the interest in confidentiality which would otherwise be protected;
- A good ground for thinking that the assets to be traced are assets of the applicant;
- A need for urgent action.

Delay on the part of the applicant may be self-defeating.

In view of the requirements, such orders are comparatively rare. They are most common in clear cases of fraud, but in more marginal actions the court will be less readily satisfied.

A Bankers Trust order should not be confused with Norwich Pharmacal relief. Whilst there is overlap between the two, they remain distinct. Norwich Pharmacal relief is geared towards disclosure of information in order to identify wrongdoers or evidence of wrongdoing, whereas Bankers Trust orders are aimed more specifically at protecting an applicant's proprietary interest in property which is subject to a legal claim. The two forms of relief may however be sought together.

Bankers' Books Orders

Completing our suite of third party disclosure mechanisms are Bankers' Books orders. This disclosure tool is available under The Bankers' Books Evidence (Guernsey) Law, 1954. Such orders allow a party to inspect and copy entries in bankers' books. The court will weigh the interests of maintaining confidentiality in banking matters against the public interest in achieving justice.

The test is statutory and states:

s.9. (1) On the application of any party to a legal proceeding before any court in the Islands of Guernsey and Alderney, the appropriate court may order that for any of the purposes of such proceeding such party be at liberty to inspect and take copies of any entries in a banker's book which is within the said Islands.

Key differences between this relief and the relief considered above are firstly that it requires proceedings to already be afoot and secondly that it is limited to proceedings in Guernsey or Alderney. It is not therefore available to assist pre-action or in connection to foreign proceedings.

The definition of "*bankers' books*" is "*day books, cash books, account books and all other books used in the ordinary course of business of the bank.*" This was last updated in 1984 and as such is somewhat anachronistic in view of banks current record keeping practices. Nevertheless the court is usually practical in its application of this wording.

⁶ [1980] 1 WLR 1274

Common Considerations

When to Apply

In Guernsey such applications often form part of wider international litigation. The timing of the Guernsey application ought to be considered in that context.

If the application is in aid of action in another jurisdiction, applicants should consider whether the application has the best chances of success if made before that other litigation commences. For example, the classic Norwich Pharmacal relief is to enable a party to bring its case. If an application is made in support of foreign proceeding already afoot the court may find that the route for disclosure more properly lies through those proceedings.

Well Considered Applications

All of the above remedies require court orders. As such precisely drafted and carefully pitched applications, affidavit evidence and draft orders are required.

Save for Bankers' Books applications, these applications will typically be made ex parte, in which case applicants are subject to an onerous duty of full and frank disclosure. Applicants should consider whether secrecy is truly necessary. Where it is not, an on notice application carries fewer burdens for the applicant and may have better prospects of success.

In terms of how applications are pitched, there is a balance to be struck between seeking maximum disclosure with the risk of the court clamping down on the application as fishing, weighed against a very tightly scoped application which may give the court more comfort but miss valuable information.

Undertakings

Save for Bankers' Books applications, applicants should expect to be required to provide a cross undertaking in damages and to meet a respondent's costs in complying with the order. Such costs may be reclaimed from the wrongdoer on the subsequent claim. The court may require any such undertaking to be fortified.

Gagging Orders

In appropriate cases, an order can include restrictions on communications, or "gagging orders". Gagging orders restrain the third party respondent from revealing the existence of the disclosure order to others. Gagging orders can be very useful but are exceptional and should only be used where necessary.

In the event that a gagging order is sought it would also be expedient to seek to have the court's file sealed to avoid the parties appearing in listings and the disclosure of pleadings etc.

Penal Notice

Save for Bankers' Books orders, these orders invariably carry a penal notice. This is a notice to the effect that if the order is disobeyed the recipient may be held in contempt of court and subject to criminal sanctions. The risk of criminal sanctions provides a useful pressure point for otherwise recalcitrant respondents.

Conclusions

The suite of third party disclosure mechanisms in Guernsey are extremely useful evidential tools for domestic and international actions. However the orders which may be made under them are draconian and oppressive, overriding legitimate expectations of confidentiality and privacy. As such, while these tools are available, applicants can expect the Guernsey court to be exacting in considering applications seeking them. There is no guarantee of success, but aspects which will be viewed favourably by the court are parties acting promptly, adducing strong evidence of fraud, making applications open and on notice where appropriate, demonstrating the impossibility of obtaining the evidence elsewhere, limiting the disclosure sought by document type and time range, and being entirely transparent regarding what you will do with the disclosure obtained.

Contacts



Abel Lyall

Partner & Advocate, Mourant Ozannes
Guernsey
+44 1481 731 418
abel.lyall@mourant.com



Sally French

Senior Associate & Advocate
Guernsey
+44 1481 739 341
sally.french@mourant.com