

Norwich Pharmacal orders in Ireland: helpful clarity from the Irish Courts

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Two judgments handed down by the High Court and Court of Appeal, respectively, in late 2023 helpfully summarise the current scope of the Norwich Pharmacal jurisdiction in Ireland.

In particular, the Court of Appeal took the opportunity to review the development of the jurisdiction in Ireland and, cognisant of the “significant debate (and attendant uncertainty)”, provided a very useful summary of the Irish position, which differs to other common law jurisdictions.

While the Court of Appeal confirmed that Norwich Pharmacal relief is exceptional, it deemed the test set out in *Salesian Secondary College [2021] IEHC 287* that the plaintiff must establish “very clear proof” to be too high a barrier. However, the Court of Appeal did not accept that the position in Ireland was the same as that in England and Wales (i.e. that the plaintiff must simply demonstrate a “good arguable case” against the alleged wrongdoer) and instead confirmed that appropriate test in Ireland is whether the applicant can demonstrate that it has a “strong case” against the alleged wrongdoer.

The High Court decision in ESB

The case of *Electricity Supply Board & Anor v. Richmond Homes & Anor [2023] IEHC 571* (“ESB”) involved allegations of fraud against certain ESB employees, who allegedly took improper payments in return for preferential treatment of certain customers.

The decision of the High Court in ESB is significant as it is the first time Norwich Pharmacal relief in Ireland has been extended to include information beyond information identifying the alleged wrongdoer(s). In this case, the applicants sought information relating to the allegedly improper payments.

The High Court found that Norwich Pharmacal relief should be limited only to what is necessary

to allow a party to issue its intended proceedings and particularise its claim. While ordinarily that purpose might be achieved by requiring the disclosure of the identity of the alleged wrongdoer, there could be circumstances where further information is required. In particular, because of the strict requirements for pleading fraud, Norwich Pharmacal relief must allow applicant obtain information such as the dates of the payments and the amounts, which are necessary to allow the applicant issue its intended claim.

The Court of Appeal decision in Blythe

In *Blythe v. The Commissioner of An Garda Síochána* [2023] IECA 255 ("Blythe"), the Commissioner of An Garda Síochána (the Irish police force) sought to appeal a Norwich Pharmacal Order granted by the High Court. The plaintiff had sought disclosure of the identity of members of the Gardaí who had been involved in the exchanging of messages, which the plaintiff alleged were defamatory of him.

In its judgment, the Court of Appeal was eager to clarify the parameters of the Norwich Pharmacal jurisdiction in Ireland, in light of recent developments in Ireland and by reference to the expanding relief available in England and Wales. In particular, the Court noted that "the parameters of the disclosure jurisdiction have expanded significantly in England and Wales but it is not clear whether developments there can or should be followed here".

In a departure from the High Court's previous approach, Court of Appeal confirmed that threshold of a "very clear proof of the existence of a wrongdoing" is incorrect. The Court of Appeal also explained that the generally accepted threshold in England and Wales of requiring a plaintiff to demonstrate a "good arguable case" against the alleged wrongdoer, is too low.

The Court of Appeal set out the following principles:

- The test set out in *Salesian Secondary College* [2021] IEHC 287 that the plaintiff must establish "very clear proof" of wrongdoing is too burdensome and is incorrect;
- Conversely, the test in England and Wales of requiring a plaintiff to demonstrate a "good arguable case" against the alleged wrongdoer, is too permissive;
- The correct test in Ireland is whether the applicant has demonstrated that it has a "strong case" against the alleged wrongdoer: i.e. has the applicant shown that it is likely to succeed at trial;
- The Court must be satisfied that: (i) the information sought is likely to be in the possession of the respondent and that the information sought is necessary in order to bring the contemplated proceedings or to pursue another legitimate remedy; and (ii) the plaintiff has no other practicable means of obtaining the information sought.
- Even if these tests are met, Norwich Pharmacal relief is not automatic. The Court must

balance the rights of the plaintiff against those of the defendant and the rights of the party about whom the information is sought. Norwich Pharmacal relief is not available 'as of right' and is an exceptional form of relief;

- Because Norwich Pharmacal relief is ordinarily sought *ex parte*, the plaintiff is subject to the duties of candour and good faith (akin to the duty of "full and frank disclosure" in England and Wales). Notably, the Court added that although the normal remedy for a breach of such duties (the discharge of the order) will not be available in the context of Norwich Pharmacal Orders, "that does not mean that the duties are empty or that the Court would be powerless to sanction a breach of them";
- The Court confirmed that the Norwich Pharmacal jurisdiction should be "strictly limited" to disclosure sought for the purpose of bringing a claim, as opposed to material required to prove that claim. In rare cases, such as fraud, a Norwich Pharmacal Order may be granted to gather additional information needed to plead the claim against prospective defendants.

Conclusion

As a go-to jurisdiction for global tech firms, against whom Norwich Pharmacal Orders provide an avenue to identify wrongdoers, Ireland is likely to continue to see growing numbers of applications for Norwich Pharmacal relief.

Against that backdrop, the Court of Appeal summary is a very helpful confirmation of the relevant tests and parameters of the relief. While there appears to be scope for further evolution, the Court has made clear that the Irish jurisdiction has diverged from the flexibility and permissiveness of the Courts in England and Wales.

Those parameters appear certain to be tested by the increasing demand for complex and bespoke relief to deal with new issues in an era of social media defamation, crypto asset fraud, AI news scraper/aggregators and a host of other tech related issues which frequently involve anonymous or unknown wrongdoers.

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