

Dispute Resolution Department

# Know your enemy

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## Know Your Enemy

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*“It is said that if you know your enemy.....you will not be imperilled in a hundred battles...”*  
Sun Tzu: The Art of War

Before we can know our enemy we must first be able to identify him.

It is not uncommon for individuals and companies to suffer loss as a result of wrongdoing committed by unidentified persons or entities.

The internet is increasingly host to a proliferation of websites where users can freely make anonymous comments about people, companies, products and services. Individuals may be defamed on anonymous Facebook pages or by unidentified posters in internet chat rooms, bulletin boards or other social networking sites. It is common for individuals and companies to receive malicious emails anonymously and to have defamatory emails sent to customers, suppliers, investors and so forth. Other scenarios involving unidentified wrongdoers commonly arise with patent and copyright infringement.

### The Norwich Pharmacal Order

The Norwich Pharmacal case (a House of Lords decision) introduced an effective remedy to parties whose rights have been breached by an unidentified party. In that case the company sought to discover the identity of an entity which was importing products into the UK, in breach of its patent rights.

Norwich Pharmacal was granted a court order compelling the UK's HM Customs & Excise department to disclose to it the name and address of the importer of the offending products. While HM Customs & Excise were an innocent party, the House of Lords found that they were facilitating the wrongdoing of the unidentified entity and so were under a duty to assist Norwich Pharmacal by disclosing wrongdoer's identity. Orders of this type are commonly referred to as Norwich Pharmacal orders (NPOs).

### So, can I get one?

Yes, but there are a few matters an applicant must demonstrate to the Court in order to succeed in an application for a NPO:

- There is a good arguable case that the applicant had suffered a wrongdoing;
- The respondent has facilitated, is involved in or has become mixed up in the wrongdoing, innocently or otherwise;
- The respondent is not a 'mere witness' i.e. the respondent is not merely someone that could be called as a witness to give evidence or produce documents but has, in fact, assisted or been in some way involved in the wrongdoing;
- The respondent is likely to have the relevant information which is being sought and the information is not available elsewhere;
- The granting of the Order is necessary in the interests of justice. This is a broad concept; however the Court will take into account the probable consequences if the order is refused,

whether any alternative remedies are available to the applicant and how burdensome compliance with the order would be.

### **I don't want to release that information; what are my options?**

There are a limited number of defences available to an application for an NPO such as:

- **Privilege against self-incrimination:** If the disclosure of the identity of the wrongdoer gives rise to a real and appreciable risk of a criminal prosecution of the respondent then it may be refused;
- **Duty of Confidentiality:** If the information or documents required are subject to duties of confidentiality such as information held by a bank about an account holder. The Applicant can convince the court to allow disclosure of confidential information if the court is convinced disclosure is in the interests of justice;
- **Privilege:** If the documents sought are subject to legal professional privilege a Court will be slow to order disclosure unless there are allegations of fraud surrounding those documents.
- **Issues of Human Rights:** A Journalist may refuse to disclose his or her source of information and in so doing rely on Article 10 of the European Convention on Human Rights.

### **Commentary**

In the past not very many applications for NPOs came before the Irish Courts. However the development of the internet has made it much easier for anonymous persons to engage in defamatory comment, breaches of privacy rights and harassment. In addition it is now much easier for anonymous persons or corporate bodies to sell or distribute unauthorised copies of copyrighted material such as music, books, clothing etc. As a result, in recent years, applications for NPOs have become more commonplace in this jurisdiction and we can only expect to see the volume of such applications continue to rise.

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