



COLLYER BRISTOW

COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

ORDERS IN FRAUD PROCEEDINGS

Disputes in which fraud is suspected involve from the outset important tactical considerations, including identifying, tracing and preserving assets against which to enforce subsequent court orders - at the earliest possible stage. Such court orders are often required at very short notice, sometimes even prior to a letter before claim is sent, and can be obtained in appropriate cases without prior notification to the respondent to the claim.

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Properly applied for and used, freezing property and disclosure orders can put a claimant in the strongest possible position in court proceedings, when seeking to trace, secure and recover the proceeds of the claim or fraud or corruption. This know-how guide briefly covers three main types of such emergency interim relief (i) freezing injunctions, (ii) Norwich Pharmacal orders and (iii) Bankers Trust orders.

FREEZING ORDERS

A freezing order acts to restrain a respondent from dealing with or disposing of their assets and is typically sought to preserve the respondent's assets until a judgment can be obtained by the claimant and satisfied.

Parties can usually expect that a court will only exercise its discretion to grant a Worldwide Freezing Order ("WFO") where it is just and convenient to make the order, and where the applicant has demonstrated that there is a real risk of dissipation of the respondent's assets. A WFO, as the name suggests, extends to assets located anywhere in the world and is a particularly draconian measure.

The court will typically consider a number of factors when deciding whether there is a real risk of dissipation. These factors include (a) whether the respondent has

already taken any steps to dispose of their assets or (b) has shown an intention to do so. Other relevant considerations include the respondent's financial standing, credit history and the ease at which their assets may be moved or disposed of. Evidence of dishonesty can also have a bearing on the court's decision and may prove to be a significant factor.

[For more information see out know how guide to freezing injunctions.](#)

NORWICH PHARMACAL ORDERS

A Norwich Pharmacal Order ("NFO"), named after the relevant case, is an order for disclosure of information and documents against a third party who has been identified as holding information that will enable an applicant to plead its case against the wrongdoer, trace assets or to bring proprietary claims.

There does not need to be a definite intention to commence proceedings against the wrongdoer. However, the court will not allow the equitable NFO doctrine to be used as a "fishing expedition", nor will it allow the information sought to be used for an improper purpose.

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The following hurdles (taken from the judgment of Saini J in *Collier v Bennett* [2020] EWHC 1884 (QB)) must be overcome by an applicant if their application for an NPO is to succeed:

- (i) The applicant must demonstrate a “good arguable case” that a form of legally recognised wrong has been committed against the applicant by a person.
- (ii) The respondent must be involved in it so as to have facilitated the wrongdoing whether innocently or not.
- (iii) The respondent must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued.
- (iv) Requiring disclosure from the respondent is an appropriate and proportionate response in all the circumstances of the case.

Additionally, a NPO will not generally be granted against a respondent who is likely to be a party to the potential proceedings.

BANKERS TRUST ORDERS

The seminal case of *Bankers Trust v Shapira* [1980] 1 WLR 1274 (CA) concerned a defrauded claimant’s equitable right to trace the claimant’s original assets into either the proceeds of sale of the assets or new substituted assets. It was held that, to give effect to the right to trace, the court had jurisdiction to order a bank to disclose the state of, and documents and correspondence relating to, the account of a customer who was, on the face of it, guilty of fraud. It did not matter that the bank itself had not incurred any liability for the fraud.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice.

FOR MORE INFORMATION PLEASE CONTACT



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