THE LAW RELATING TO NORWICH PHARMACAL ORDERS

Abstract: This article provides a comprehensive overview of the law relating to Norwich Pharmacal Orders. It traces the development of the law in this jurisdiction since they were first considered by the superior courts in Megaleasing UK Ltd v. Barrett in 1993. It comprehensively considers the recent decisions of the superior courts and the proofs required before Norwich Pharmacal relief is granted. This article also examines some of the seminal decisions in England and Wales, where the Norwich Pharmacal principles have underwent significant extension. The aim of this comparative analysis is to examine some of the seminal decisions of the English and Welsh courts which are likely to prove highly persuasive in the future decisions of the superior courts in Ireland. The issues underpinning the prohibitive costs of obtaining Norwich Pharmacal relief and proposals for reform are also considered.

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Introduction

The Norwich Pharmacal Order is a powerful and versatile remedy that assists to identify wrongdoers who seek to hide behind the mask of anonymity. [1] It has been the subject of considerable attention from the superior courts, particularly in the past 5 years or so. The increased focus appears to have been spurred predominantly by applications for relief by plaintiffs who have suffered harm as a result of the actions of anonymous or pseudonymous online wrongdoers. However, it can also be deployed to remedy a wide variety of wrongdoings unconnected to the use of the World Wide Web. Several recent judgments of the superior courts provide a useful insight as to the considerations undertaken by a court before granting Norwich Pharmacal relief, and clarify the evolution of the law in this area since the Supreme Court first confirmed the jurisdiction of the superior courts to grant such orders in *Megaleasing UK Ltd v. Barrett* 28 years ago. [2]

Definition

A Norwich Pharmacal Order is a particular type of disclosure order where the only cause of action is discovery. [3] Essentially, the order compels a defendant, who has become mixed up in the alleged wrongdoing of a third party in some manner, either knowingly or innocently, to disclose information that would assist to identify this third party wrongdoer to the plaintiff. The purpose of the order is therefore to place a plaintiff in a position to identify and seek redress against a previously unknown wrongdoer.

The authority to grant Norwich Pharmacal relief is founded on the court's equitable jurisdiction, derived from a 'contemporary incarnation of the equitable bill of discovery'. [4]

[1] The concept of a Norwich Pharmacal Order first emerged in the eponymous matter of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. See (n 5) for a discussion on the particular facts of this matter.
[2] [1993] ILRM 497.
[3] Brid Moriarty, *Evidence in Civil Law - Ireland*, (Lex Localis 2015) 23.
[4] Marie-Andree Vermett and Nikiforus Iatrou, *Norwich Orders in Canada – A Tool for Twenty First Century Litigation.* (The Canadian Legal Expert Directory, 2010) <https://www.weirfoulds.com/assets/uploads/6790_Reprint-NorwichOrders-Original.pdf> accessed 14 November 2020. In *Munema v Facebook Ireland Limited* [2018] IECA

Therefore, it is a versatile remedy, granted at the discretion of the court, when deemed to be a proportionate and necessary response in all of the circumstances of a matter.

Origin of the Norwich Pharmacal Order

The concept of the Norwich Pharmacal Order first emerged in the House of Lords, in the eponymous matter of *Norwich Pharmacal Co v Customs and Excise Commissioners*.[5] In this matter, the claimant alleged that an unknown wrongdoer had unlawfully been importing pharmaceutical drugs manufactured in contravention of its patents. The defendant had innocently assisted the wrongdoer to breach the claimant's patent by permitting the importation of these products into the United Kingdom. The claimant issued proceedings against the defendant seeking discovery of the documents received by the defendant from the wrongdoer, with the specific purpose of identifying the wrongdoer. The House of Lords held that while the defendant had unwittingly become mixed up in the tortious act, it nevertheless had a duty to disclose the identity of the wrongdoer to the claimant. Lord Reid, delivering what was to become the foundation of the threshold test criterion, stated that:

> if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong doers.[6]

It was with this decision that the concept of the Norwich Pharmacal Order first emerged as a potent equitable remedy. Almost twenty years later, the superior courts in *Megaleasing UK Ltd* endorsed the application of Lord Reid's principles into Irish law.[7]

Evidence of Wrongdoing

In *Megaleasing UK Ltd,*[8] the plaintiffs alleged that in the years 1989 and 1990, four invoices totalling IR£500,000 were raised by some of the defendants against the plaintiff. These invoices were authorised for payment by servants or agents of the plaintiff and subsequently were discharged. The plaintiff conducted an investigation into these payments and could not find any satisfactory explanation of any value for goods or services had actually been provided to the plaintiff. The plaintiff in this matter sought a Norwich Pharmacal Order seeking discovery of fuller facts surrounding the authorisation and payment of the four invoices against some of the defendants on the basis that they had either wittingly or unwittingly been involved in the tortious acts of others, by either making or facilitating the payments of these invoices. In effect, the plaintiff was alleging that the transactions were fraudulent, and thus this amounted to theft. Costello J, as he was then, in the High Court

104, Peart J at [3] noted 'the Court's equitable jurisdiction to grant an order for disdosure of the identity of an alleged wrongdoer finds its origin in *Norwich Pharmacal Co. and ors v. Commissioner of Customs and Excise [1974] AC 133'*. The power to grant Norwich Pharmacal Orders is not specifically mentioned in the current Rules of the Superior Courts. McCarthy J in *Megaleasing UK Ltd* (n 2) traced the origins of the power to grant relief back to Rule 24 of the Rules in the Schedule to the Supreme Court of Judicature (Ireland) Act 1877.

[5] Norwich Pharmacal Co v Customs and Excise Commissioners (n 1).

[6] ibid 175.

[7] *Megaleasing UK Ltd* (n 2).

[8] ibid 503.

found that it was, 'unnecessary for the plaintiffs to do more than to establish a *prima facie* case' of wrongdoing.[9] On the basis of the information put before him by the plaintiffs, he was satisfied that they had reached this threshold requirement. He granted Norwich Pharmacal relief compelling a number of the named defendants to assist the plaintiff by providing further information about the impugned transactions together with confirmation of the involvement of certain other named individuals with the impugned transactions. A number of the defendants appealed the order of the High Court to the Supreme Court. At the appeal hearing, it came to light that that the plaintiff had sold all of its assets and was no longer trading by the time of the appeal hearing. More importantly, it transpired that the plaintiff had previously dismissed the four individuals who they suspected had authorised the invoices. These four individuals had then pursued unfair dismissal claims and each of them had been paid substantial sums in compensation by the plaintiff, less that one month after Costello J delivered his judgment in the High Court. This information appeared to have been influential to the court. However, Finlay CJ ultimately preferred to base his final decision on other considerations. The Supreme Court, in recognising that the jurisdiction to grant Norwich Pharmacal Orders vested with the superior courts, held that its power to award this relief should be 'sparingly used' and confined to matters where 'a very clear proof of a wrongdoing exists'.[10] Finlay CJ specifically noted that the identity of the four individuals who processed the invoices had at all times been known to the plaintiff. Thus, the plaintiff's claim that wrongdoing had occurred had been on the basis that the plaintiff could not find, by means of investigating these invoices, a satisfactory reason for the payments. He was satisfied that 'such a case falls far short indeed of the clear establishment of a wrongdoing, though a wrongdoing may possibly have occurred'.[11] Finlay CJ allowed the appeal and set aside the order of the High Court.

Similarly, the plaintiff in *O'Brien v Red Flag Consulting Limited* had been unable to make out a case of wrongdoing against him.[12] In this matter, the plaintiff came into possession of a USB memory stick, in the most unusual of circumstances.[13] This memory stick had allegedly been left in an envelope in the plaintiff's Dublin office by an anonymous individual. The USB stick contained a dossier on him which was prepared by the defendant on behalf of an unknown client ("client"). The dossier was comprised of memoranda, drafts of a speech by a TD and various media articles. The plaintiff claimed that the information in the dossier had been compiled as part of a conspiracy to damage his reputation. The plaintiff pleaded his case in conspiracy to cause loss by unlawful means. He also pleaded that he had been defamed by the dossier. The plaintiff sought a Norwich Pharmacal Order directing the disclosure of the name of the defendant's client, so that it could join them as a co-defendant to the proceedings. The defendant admitted that it had compiled the dossier on behalf of its client but denied any wrongdoing. Ultimately, in the High Court, Mac Eochaidh J refused to grant a Norwich Pharmacal Order for a myriad of reasons. He was not satisfied that the plaintiff had proven that publication had taken place, nor was he satisfied that the plaintiff had made out a claim of wrongdoing in respect of the alleged defamation or in respect of the tort of conspiracy by unlawful means. The matter came before Mac Eochaidh J again almost one year later, on the 13th December 2016, at the normal discovery stage. He refused to grant

[9] ibid 503.
[10] ibid per Finlay CJ at 504.
[11] ibid per Finlay CJ at 504.
[12] [2015] IEHC 867.
[13] ibid [18]. The want of candour regarding the discovery of the USB stick had been raised by the defendant as a bar to the plaintiff obtaining Norwich Pharmacal relief, however, despite Mac Eochaidh J accepting that the court had not been told the full story regarding receipt of the USB stick, he decided that there had been a lack of evidence to find whether there had been a want of candour on behalf of the plaintiff.

any categories of discovery that would specifically identify the defendant's client because the issue was *res judicata*. However, he granted the plaintiff an order for discovery regarding the communications between the defendant and its client, but specifically limited the disclosure of documents on the basis that all such documents would be redacted to conceal the identity of the client.

Both the plaintiff and the defendant appealed the order of Mac Eochaidh J to the Court of Appeal.[14] Ryan P carried out a detailed analysis of the issues involved and ultimately dismissed both appeals. In respect of the application for a Norwich Pharmacal Order, he noted that it was incumbent on the plaintiff to prove a 'strong *prima facie*' case of wrongdoing before the superior courts could exercise their jurisdiction to grant such orders.[15] Ryan P also agreed with the findings of Mac Eochaidh J that the plaintiff had not satisfied the threshold to prove publication of the material contained in the dossier. Further, as regards providing proof of wrongdoing in the tort of conspiracy, Ryan P found that the plaintiff had not reached the 'base camp of fact that would enable him to invoke this procedure'.[16] He also held that the plaintiff was not entitled to the identity of the defendant's client by means of discovery. Ryan P concluded that the fundamental point was that:

> Red Flag's client was entitled to have the dossier prepared, even if this was done for the basest of motives. That in itself is not sufficient to establish a conspiracy on the part of that client or to demonstrate that Red Flag was itself a co-conspirator with the client. If the Dossier was actually published by Red Flag and it has defamed the plaintiff, then Mr. O'Brien has his remedy under the Defamation Act 2009.[17]

In *Doyle v. Commissioner of An Garda Siochána*,[18] the plaintiff's daughter and two granddaughters were tragically killed in the Dublin and Monaghan bombings in 1974. The plaintiff issued proceedings against An Garda Síochána seeking a Norwich Pharmacal Order to discover documentation relating to the investigation by An Garda Síochána into the bombings. The plaintiff had already lodged a legal complaint with the European Commission on Human Rights against the United Kingdom under Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on several different grounds. Predominantly the plaintiff complained that the Royal Ulster Constabulary ("RUC") had failed to investigate the bombings adequately; they had inadequately investigated the criminal activity in Northern Ireland leading up to the date of the bombings and had consequently failed to apprehend the culprits of these bombings. The plaintiff also complained that the RUC had failed to follow up on information, including information concerning possible suspects, supplied by An Garda Síochána and had failed to adequately liaise with An Garda Síochána. Laffoy J refused to grant the relief sought, partly because the plaintiff had failed to present any evidence of wrongdoing on the part of the United Kingdom. Further, the court noted that the plaintiff had already identified the United Kingdom as an alleged wrongdoer and had taken action against it by complaining it to the European Commission. Hence, the relief sought was essentially not to launch an action, but to aid in proving an existing claim that the plaintiff was already pursuing against the United Kingdom. The Court further commented that the jurisdiction of the court to order Norwich Pharmacal relief was limited

[14] [2017] IECA 258.
[15] ibid [41(x)].
[16] ibid [45].
[17] ibid [90].
[18] [1997] IEHC 147.

to compelling disclosure of the names and identity of the wrongdoers, although it noted that this requirement was not 'set in stone'.[19]

The plaintiffs in the *Megaleasing UK Ltd,*[20] *Doyle,*[21] *and O'Brien,*[22] matters were unsuccessful in their applications for Norwich Pharmacal Orders because they sought relief to uncover the reasons behind a suspected wrongdoing, rather than the identity of the wrongdoers in question. Equally, they failed to obtain relief because they had been unable to demonstrate any actual proof of wrongful activity. Rather, the underlying purpose of these applications appears to have been to validate suspicions and to uncover sufficient proof of, and the reasons behind, the suspected wrongdoing. However, where a plaintiff has been in a position to demonstrate wrongdoing, the superior courts have granted Norwich Pharmacal relief.

In *Ryanair v Unister GMBH*,[23] Gilligan J in the High Court granted a Norwich Pharmacal Order to the plaintiff against the first defendant, an online travel agent and operator of a price comparison website, which had displayed prices for the plaintiff's flights and sold the plaintiff's flights on its website. The information required in order to display price comparisons had not been obtained directly by the first defendant from the plaintiff's website, rather it was obtained through a third party from the plaintiff's website and this information was then sent by that third party and utilised by the first defendant to make price comparisons and to sell flights. The plaintiff issued proceedings in the High Court against the first defendant and other entities, claiming that its terms and conditions prohibited any party other than the plaintiff to sell its flights. The plaintiff further claimed that this constituted a breach of contract. The plaintiff also submitted that the first defendant had breached its copyright and trademark rights, thereby causing damage to the plaintiff's reputation, particularly having regard to the fact that the first defendant was imposing an additional surcharge on the consumer. The plaintiff pursued interlocutory relief, and amongst other reliefs, sought a Norwich Pharmacal Order compelling the first defendant to reveal the identity of the third party that it had engaged to obtain the information from the plaintiff's website. On receipt of this information, the plaintiff intended to join this third party as a co-defendant to the proceedings. The first defendant conceded that it had used information from the plaintiff's website which had been accessed and supplied to it by a third party. Gilligan J was not prepared to allow the first defendant to hide behind the actions of the third party. He was satisfied that the plaintiff had provided a '*prima facie* demonstration of wrongful activity in the use of the plaintiff's website'[24] and granted a Norwich Pharmacal relief directing the first defendant to disclose to the plaintiff the name and contact details of the third party.[25] The order was subsequently successfully appealed by the first defendant to the Supreme Court, but purely because of jurisdictional issues, rather than any reason connected to the misapplication of Norwich Pharmacal principles.[26]

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[19] ibid [21].
[20] *Megaleasing UK Ltd* (n 2).
[21] *Doyle* (n 18).
[22] *O'Brien* (n 14).
[23] [2011] IEHC 167.
[24] ibid [34].
[25] ibid [36]. Gilligan J specifically ordered the first defendant to disdose the name, personal and/or business registered address and/or place of business, email address, telephone number, fax number and such other points of contact of the third party.
[26] *Ryanair v Unister GMBH* [2013] IESC 14. Clarke J upheld the appeal, not because Gilligan J in the High Court had analysed the threshold tests required for the granting of a Norwich Pharmacal Order incorrectly, but because the plaintiff and the first defendant had been already engaged in litigation in Germany and in such

In *Parcel Connect Trading As Fastway Couriers v Twitter International Company*,[27] the plaintiff, the operators of the Parcel Connect Service and the owners of the Irish franchise of Fastway Couriers, applied to the High Court for a Norwich Pharmacal Order directing the defendant to disclose the identity of the operator of an impersonator Twitter account which had been set up in the name of Fastway Couriers. The impersonator Fastway Couriers account also displayed the plaintiff's trademarked logo. The plaintiff also sought injunctive relief requiring the defendant to remove the account from the Twitter platform together with a variety of other orders restraining the publication of the material complained of. The individual behind the impersonator account provided outrageous responses to the plaintiff's customers who had initially believed that they were directing enquiries regarding the status of their deliveries to the plaintiff's genuine Twitter account. Some of the responses provided by the operator of the parody account informed the customers that 'their parcels were left in caves' or 'were flung over the rainbow'. However, most of the responses were crass and vulgar. Allen J found that the responses were so preposterous that any misapprehension that it was the plaintiff's genuine account 'could not have survived the response provided to the genuine queries'.[28] Ultimately, the impersonator account, after undergoing a number of vulgar name changes, had been deactivated before the application was listed in front of Allen J. Hence, he did not have to make any orders for injunctive relief. However, the application for Norwich Pharmacal relief proceeded. Regarding this application, Allen J, found that: 'A strong *prima facie* case has been made out that the goodwill in the name and mark has been damaged by its use on the account and by its association with the comments posted using the username associated with the account.'[29] He also held that the comments by the operator of the impersonator account, which suggested that the plaintiff had provided an ineffective and incompetent delivery service, were defamatory of the plaintiff, who had built its businesses on the principle of efficient personal service. He ordered the defendant to disclose any details that it held relating to the identity of the person or persons who created the false account, including but not limited to, the name or names, e-mail address or addresses, telephone numbers and all IP addresses associated with all log-ins and log-out details.[30]

In *Blythe v The Commissioner of An Garda Síochána*,[31] the plaintiff sought a Norwich Pharmacal Order against the Garda Commissioner to uncover the identity of members of An Garda Síochána that had allegedly engaged in disseminating defamatory messages about the plaintiff

circumstances the Norwich Pharmacal Order should not have been granted while a jurisdictional challenge under the Brussels Regulation was pending.

[27] 2020 IEHC 279.

[28] ibid [19].

[29] ibid [18].

[30] In another unreported matter concerning an impersonator Twitter account, Mr Philip Rattle, a partner in a UK based private equity firm, successfully applied for a Norwich Pharmacal Order against Microsoft Ireland Operations Limited ("Microsoft") and Twitter International Company Ltd ("Twitter"). He claimed that the impersonator Twitter account, purporting to be operated by him made a number of highly distressing, racist and anti-sematic and defamatory tweets. Reynolds J ordered Microsoft to provide him with information, induding the name and address of the person or persons behind the email account. It appears that this was the second application to come before of the High Court Norwich Pharmacal relief. Furthermore, it appears that the first Norwich Pharmacal Order against Twitter failed to identify the individual behind the Twitter account. See Aodhan O Faolain, 'London based businessman obtains order to identify alleged troll' (*Irish Legal News,* 26 June 2019) <https://irishlegal.com/artide/london-based-businessman-obtains-order-to-identify-alleged-troll> Accessed 4 March 2021. See also The Law Reform Commission's Report ("LRC") on Harmful Communications and Digital Safety (LRC 116-2016) [58], which highlights that sometimes IP and other user information might not necessarily reveal the identity of the wrongdoer. The LRC has recommended that a one-step procedure be adopted for such orders whereby only one application would be required which would apply to both the relevant website and any subsequent telecoms company.

[31] [2019] IEHC 854.

on various social media platforms. It is important to note that the limitation period in which he could pursue defamation proceedings had been imminently due to expire. Humphreys J appeared to be cautious not to outline the background facts in any great detail in his written judgment. This approach appears to have been borne out of concern that to do so might attract adverse public attention from the national media and cause further suffering to the plaintiff.[32] The Gardaí in question were being investigated by the Commissioner of An Garda Síochána as part of an internal disciplinary investigation into the posting of these messages. Rather than pursuing the operators of the social media platforms on which the alleged defamatory comments were posted and disseminated, the plaintiff took a somewhat novel approach and sought a Norwich Pharmacal Order directly against the defendant, the Commissioner of An Garda Síochána. The plaintiff sought details of the names and addresses of the wrongdoers together with details of the portions of the defamatory material that each individual wrongdoer had created. The defendant resisted the application and, amongst other grounds of its defence, argued that the plaintiff had failed to establish clear and unambiguous evidence of wrongdoing. The defendant also submitted that information arising in the context of its internal disciplinary proceedings had been confidential. It further submitted that the defendant had not been mixed up in the facilitation of the wrongdoing and argued that the plaintiff could not have been identified from the material that was circulated. Regarding the threshold test to prove a wrongdoing, Humphreys J found that:

> Certainty, or a high degree of certainty, is not required. What is required, in the words of Kelly J., as he then was, in EMI Records Ireland Limited v. Eircom Limited [2005] IEHC 233 [2005] 4 I.R. 148, is "*prima facie* demonstration of wrongful activity". Ryan P. pointed out at para. 41(x) of O'Brien [2017] IECA 258 that the plaintiff should show, in the case that the requested party is mixed up in the wrongful conduct to a significant degree, while itself being innocent, that he or she has made out a strong case.[33]

Humphreys J found that the plaintiff had made out a 'strong case' that persons unknown had defamed him.[34] He ordered the Garda Commissioner to disclose to the plaintiff the names and addresses of persons where the defendant considered that there was *prima facie* evidence that they were involved in publications of allegations against the plaintiff of the general nature described in the plaintiff's affidavit and in each case specifying the portions of the particular defamatory material in relation to which any such person was concerned in publishing.[35]

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[32] By way of context, it is important to note that the plaintiff had previously sought an injunction restraining the progression of the Garda Sergeant Promotion Competition until an internal appeal he had lodged in regards to an inappropriate question asked of him about whistleblowers during the interview process, had been fully investigated and completed. This injunction blocked the promotion of over 400 applicants to the role of Sergeant. It was reported by RTÉ, the national broadcaster in Ireland, that the plaintiff sought a declaration that the conduct of the Garda Sergeant Promotion System was tainted with irregularity and flawed. The plaintiff also sought damages for breach of contract and breach of duty against the Garda Commissioner and Minister for Justice, the named defendants in that matter. See, 'Harris ordered to disclose names he believes involved in smear campaign' (*RTÉ News Website*, 9 September 2019), < https://www.rte.ie/news/courts/2019/0919/1076839-garda-defamation-action/> Accessed 23 March 2021.

[33] ibid [16].

[34] ibid [17].

[35] The defendant lodged an appeal of the decision on the 16th October 2019 on the grounds that the Garda Commissioner feared the order could open the door to further requests for confidential information relating to disciplinary matters and that this could impact on levels of co-operation, particularly if absolute confidentiality could not be guaranteed in its internal procedures. See: Shane Phelan, 'Commissioner appeals High Court order to name smear case gardaí' (*Irish Independent,* 25 October 2019)

Comment

The common thread in the foregoing matters where relief has been granted is that the plaintiff had been in a position to demonstrate a wrongdoing. It appears however, that relief is not contingent on a plaintiff establishing that a certain case of wrongdoing has occurred. The above *Parcel Connect*[36] and *O'Brien*[37] matters would tend to suggest that the superior courts are currently leaning towards requiring a plaintiff, who is seeking Norwich Pharmacal relief, to provide the court with strong *prima facie* evidence of wrongdoing.[38] It appears that applications presently grounded on mere suspicions of wrongdoing are insufficient to invoke the court's Norwich Pharmacal jurisdiction. On the contrary, the courts of England and Wales have, in some rare situations, adopted a very flexible approach regarding the requirement to prove wrongdoing as a pre-condition to granting relief. In fact, the courts in that jurisdiction have granted relief in circumstances where the plaintiff could not factually demonstrate a wrongdoing. This extension of the Norwich Pharmacal jurisdiction is arguably demonstrated in the matter of *P v T*.[39] In this matter, the claimant, an employee of the defendant, had been dismissed on grounds of gross misconduct, on foot of allegations made about him and which had been provided to the defendant by a third party. The defendant would not reveal the nature of the allegations or the identity of the third party who had provided the allegations. The claimant pursued a claim for unfair dismissals against the defendant before an industrial tribunal. He succeeded in his claim and the defendant was ordered to re-engage him and to pay compensation for unfairly dismissing him. The defendant refused to re-engage him but continued to pay his wages. The claimant subsequently commenced fresh proceedings against the defendant seeking a declaration that the dismissal was void. In these fresh proceedings, the claimant pursued interlocutory relief seeking the precise details of the allegations which had been made against him, together with the identity of the individual who made the allegations. However, because the plaintiff was not in a position to specify the precise nature of the wrongdoing or demonstrate that a specific wrongdoing had occurred, the court could not conclude that he had established a clear case of wrongdoing in any of the torts of malicious falsehood, conspiracy or defamation. However, taking into account the very unusual circumstances and the unjust position that the claimant found himself in, Sir Richard Scott V.C. noted that the interests of justice demanded that the claimant should be in a position to clear his name if the allegations made against him were false. He ordered the defendant to disclose the identity of individual who had made the allegations against the claimant, together with precise details of the allegations made about him by this individual. The facts of this matter are unusual, and the plight faced by the claimant had been inherently unfair. In reality the application was technically not for a Norwich Pharmacal Order but an application for preliminary disclosure.

<https://www.independent.ie/irish-news/courts/commissioner-appeals-high-court-order-to-name-smear-case-gardai-38629553.html> accessed on 14th October 2020. At the time of writing, the Court of Appeal has not delivered its judgment on the appeal.

[36] *Parcel Connect* (n 27).

[37] *O'Brien* (n 14).

[38] However, there are slightly contradictory statements emanating from the courts regarding the whether a strong *prima facie* case or a *prima facie* case of wrongdoing is required. In *Munema* (n 4), the Court of Appeal at [31] noted that 'It is not an order made as of right, even where there is prima facie evidence of wrongdoing shown to exist on the part of the person whose identity is sought to be disdosed'. Similarly, in *Blythe* (n 31), Humphreys J at [16] also referred to a *prima facie* demonstration of wrongdoing. In both of these matters, it was held there was strong proof of wrongdoing, thus no detailed consideration of the minimum threshold test had to be undertaken.

[39] [1997] 1 WLR 1309.

The flexibility adopted by the court in assisting the plaintiff to achieve justice needs to be interpreted in light of this. Further, the claimant had no other means whatsoever of establishing the identity of the third party or the allegations that this third party had levelled against him.

In *Carlton Film Distributors Plc v VCI,*[40] the claimant suspected that the first defendant had been producing more videos than had been agreed between the parties and in contravention of the terms and conditions of their licensing agreement. However, the claimant had no proof to back up its strong suspicions. The claimant undertook an audit of the first defendant; however, the first defendant maintained that it did not have the manufacturing records requested. The claimant pursued an application for pre-action disclosure and sought a Norwich Pharmacal Order against VDC, the second defendant and the pressing plant involved in manufacturing the videos for the first defendant. Jacob J noted that Norwich Pharmacal relief 'is not limited simply to the case of finding out the name of a wrongdoer. It also extends to cases where there is a good indication of wrongdoing, but not every piece of what the claimant needs to plead a case is fully in position.'[41] Jacob J held that the court had jurisdiction to make the order sought by the claimant and exercised his discretion in the claimant's favour by ordering VDC to disclose the required manufacturing lists. The granting of the relief essentially provided the claimant with the missing piece of the jigsaw to instigate proceedings.[42] Furthermore, the court granted the relief in this matter, even in a situation where the identity of the suspected wrongdoer had been known. This matter also highlights that the courts of England and Wales have, in some situations, expanded the scope of Norwich Pharmacal jurisdiction into matters where there is an indication or a suspicion of wrongdoing. However, a word of caution should be exercised regarding this apparently more relaxed approach to Lord Reid's requirement of demonstrating the occurrence of a wrongdoing. This decision also must be assessed in light of the different jurisdictional intricacies regarding civil procedure rules which apply to pre-action disclosure.[43] They should also be judged in the context of the significant evolution which has occurred in that jurisdiction since the authority to grant Norwich Pharmacal relief was first confirmed in Lord Reid's speech. It is unlikely, particularly on foot of the superior courts' pronouncement of strict conditions in this jurisdiction regarding the requirement to prove wrongdoing, as outlined in *Blythe,*[44] *O'Brien,*[45] and *Parcel Connect,*[46] that the Norwich Pharmacal jurisdiction will extend this far, at least at the present stage of its evolution.[47]

Mixed up in the Wrongdoing

[40] [2003] EWHC 616.

[41] ibid [11].

[42] In *Mitsui v. Nexen Petroleum* [2005] 3 All ER 511, Lightman J also recognised at [19] that in appropriate cases, disdosure of 'the missing piece of the jigsaw' could be ordered. However, relief was refused by Lightman J in this particular matter.

[43] The court's power in England and Wales to grant pre-action disdosure is contained in CPR 31. In particular, see CPR 31.18 which preserves the court's jurisdiction to grant Norwich Pharmacal relief.

[44] *Blythe* (n 30).

[45] *O'Brien* (n 14).

[46] *Parcel Connect* (n 27).

[47] William Abrahamson, James Dwyer and Andrew Fitzpatrick, *Discovery and Disclosure* (3rd edn, Round Hall 2019) [16.52] also warn that 'any move away from the requirement of dear evidence of wrongdoing might result in an undesirable level of uncertainty and significantly heighten the risk of misuse, if not abuse, of the jurisdiction'.

In *Norwich Pharmacal*,[48] Lord Reid commented that 'It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability'.[49] Hence, it is clear from the forgoing that a defendant does not need to have incurred any actual liability for the wrongdoing before a court will grant a Norwich Pharmacal Order against it. Rather, the test provides for the granting of such orders where it can be shown that the defendant has become 'mixed up in the tortious acts of others.'[50]

Innocently mixed up in the wrongdoing

In the present times, where the of ease of access to the internet and the wide-scale use of social media exists; Norwich Pharmacal Orders are frequently sought and granted against internet service providers ("ISPs") or social media operators, which innocently have become mixed up in the facilitation of the wrongdoing, by means of their subscribing customers using their online facilities to post and share defamatory comments on social media platforms.[51] The potential to cause instantaneous harm is significant, because harmful comments can be disseminated easily and widely - literally at the click of a button. Similarly, the internet creates an easy and instantaneous means of disseminating copyrighted material.

In *Sony Music Entertainment (Irl) v UPC Communications Irl Ltd (No 2)*,[52] the defendant, an ISP, innocently became mixed up in the wrongdoing of its subscribers, who had been illegally downloading music in contravention of the plaintiff's copyright. The unlawful downloading of music, using the defendant's facilities, caused significant financial harm to the plaintiffs.[53] The plaintiffs sought the assistance of the court to implement a graduated response system ("GRS") between it and the defendant ISP. The purpose of the GRS was to devise an agreed protocol of action between the parties, with the aim of deterring the defendant's subscribers from illegally downloading the plaintiffs' copyrighted material. Further, the aim of the GRS had been to put in effect a system of when and how Norwich Pharmacal applications could be pursued between the plaintiffs and the defendant ISP. The court found that it would have obviously been unworkable if an application had to be pursued for Norwich Pharmacal Orders in respect of each and every such breach of the plaintiffs' copyright. Instead, Creegan J ordered that when the plaintiff informs the defendant of a copyright breach, the defendant must then inform its infringing subscriber and warn them to cease and desist. If the subscriber fails to heed two cease and desist warnings from the defendant and infringes a third time, then the defendant would be required to disclose to the plaintiff the IP address, and to date and time stamp any such infringements. The plaintiff would then be in a position

[48] *Norwich Pharmacal* (n 4).
[49] ibid 142.
[50] ibid 175.
[51] Generally, ISP's and social media providers when defending daims in the tort of defamation rely on the protections afforded under the E-Commerce Regulations 2003 (S.I. 68/2003), wherein Regulations 15-18 provide it with a defence with regard to defamatory content created by users, subject to meeting certain criteria. Furthermore, ISP's and social media providers can avail of the statutory defence of innocent publication, under s 27(2)(c) of the Defamation Act 2009. Arguably, an ISP's or social media operator could potentially incur liability if it fails to take steps to investigate complaints from those affected and expeditiously take action to remove or disable unlawful information of which it knows or becomes aware of.
[52] [2015] IEHC 317.
[53] ibid [4]. Creegan J noted that the 'problem is enormous. For example, during a 30 day period in November 2012, an agent of the plaintiffs' identified that persons using the defendant's internet services had unlawfully uploaded approximately 7,500 copies of a sample of nearly 250 songs in a one month period'.

to apply for a Norwich Pharmacal Order to uncover the identity of the infringing subscriber, at its own expense. The Norwich Pharmacal application would not be opposed or consented to by the defendant.[54] Further, in the aforementioned *Parcel Connect*,[55] the defendant social media operator had been sufficiently mixed up in the plaintiff's wrongdoing by virtue of its social media platform being improperly used by a pseudonymous user. This user ultimately ended up defaming the plaintiff and infringing its trademark in a series of outrageous tweets posted on the impersonator Twitter account.

In the recent matter of *Lisas Lust List Ltd v Facebook Ireland Limited*,[56] the defendant, who is a social media operator, became innocently mixed up in wrongdoing by virtue of comments posted on its platform. In this matter, the operator of the plaintiff company, Lisa McGowan, obtained a Norwich Pharmacal Order against the defendant compelling it to provide her with information to identify anonymous persons who were trolling, defaming and stalking her Facebook and Instagram accounts. Hyland J, satisfied that the requisite proofs had been put before the court, granted an order compelling the defendant to provide her with details about the abusive account holders to include their identities, names, postal addresses, telephone numbers, e-mail addresses, IP address.

Outside the realm of online wrongdoing,[57] the defendant in *Norwich Pharmacal,*[58] as a result of its statutory obligations, had become innocently mixed up in the wrongdoing of a third party by allowing the importation of the chemical compound furazolidone, in contravention of the claimant's patent. Moreover, in *Blythe*,[59] the court deemed that the defendant had been sufficiently mixed up in the wrongdoing by virtue of its role and function as the head of An Garda Síochána.

More than innocently mixed up in the wrongdoing

Norwich Pharmacal relief is also available against those who are more than innocently involved in the wrongdoing. The key component is that the defendant must have been mixed up in the wrongdoing - whether they are mixed up deliberately or innocently is largely irrelevant. Mac Eochaidh J in *O'Brien* specifically acknowledged that the relief would also be

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[54] Full particulars of the order are contained in paragraph 28, Appendix 1 of *Sony Music Entertainment (Irl) Ltd v UPC Communications Irl Ltd* (No 2) [2015] IEHC 386. See also the earlier decisions of the High Court in *EMI v Eircom Limited* [2005] 4 I.R. 148; *EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd* [2010] IEHC 377, where the courts have considered Norwich Pharamcal Orders in the context of claims grounded on copyright infringement.

[55] *Parcel Connect* (n 27).

[56] See 'Influencer' secures order to identify online trolls' (*RTÉ,* 31 August 2020) <https://www.rte.ie/news/courts/2020/0831/1162345-lisa-mcgowan/> Accessed 4 March 2021. Proceedings in this matter were issued on the 20th August 2020 and relief was granted 11 days later, on the 31st August 2020. This illustrates how expeditious it can be to procure relief.

[57] Regarding further written judgments involving online wrongdoing, see also *Tansey v Gill* [2012] IEHC 42. Peart J granted Norwich Pharmacal relief to the plaintiff on foot of defamatory comments made by anonymous posters about the plaintiff's services on <www.rate-your-solicitor.com>. Peart J at [21] described the website as 'a happy hunting ground for unscrupulous defamers'. He ordered the three defendants, who owned, operated and registered the website, to deliver up to the plaintiff the names and address of all persons involved and concerned in the publication of defamatory material of and concerning the plaintiff, including the author of such material and all persons involved in maintaining the website upon which the material is hosted. He also granted an injunction which ultimately had the effect of permanently shutting down the website.

[58] *Norwich Pharmacal* (n 4).

[59] *Blythe* (n 31).

available against actual concurrent wrongdoers, and at an interlocutory stage during the litigation process, providing the necessary proofs had been me.t[60] He stated that:

> It is also clear from an examination of Irish jurisprudence that whereas historically such orders were made against an innocently involved defendant, it is clear that disclosure orders can be made against actual wrongdoers and whether one calls those Norwich Pharmacal orders or disclosure orders or discovery orders, such orders, are available to the High Court and have been made in the past.[61]

Similarly, Clarke J, in Ryanair had been:

> prepared to accept, for the purposes of the argument and without so deciding, that the Irish courts may have a general jurisdiction, at an interlocutory stage and in circumstances such as that which would pertain to a third party provider in a case such as this, to make a disclosure order concerning the identity of such third party provider.[62]

Sufficiently mixed up in the wrongdoing or a mere bystander?

In *Norwich Pharmacal,*[63] Lord Reid sought to differentiate between those who became mixed up in wrongdoing and those bystanders who merely witnessed it. He noted the following:

> But that does not mean, as the appellants contend, that discovery will be ordered against anyone who can give information as to the identity of a wrongdoer. There is absolutely no authority for that. A person injured in a road accident might know that a bystander had taken the number of the car which ran him down and have no other means of tracing the driver. Or a person might know that a particular person is in possession of a libellous letter which he has good reason to believe defames him but the author of which he cannot discover. I am satisfied that it would not be proper in either case to order discovery in order that the person who has suffered damage might be able to find and sue the wrongdoer. Neither authority, principle nor public policy would justify that.[64]

Similarly, Lord Morris of Borth-y-Gest, in the same case, also commented that:

> It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter would wish to have for the purpose of bringing some proceedings. At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information.[65]

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[60] *O'Brien* (n 30).
[61] ibid [13].
[62] See *Ryanair* (n 26) [9.4].
[63] *Megaleasing UK Ltd* (n 2).
[64] ibid 174.
[65] ibid 178.

Both Lord Reid's and Lord Morris' analysis make it clear that a defendant must become involved past the point of being a mere witness or bystander before a court should consider granting Norwich Pharmacal relief. In *Blythe*,[66] the defendant's counsel submitted that the defendant therein, the Garda Commissioner, had not been in any way responsible for the defamatory messages and therefore did not facilitate the wrongdoing. However, Humphreys J remained unconvinced by this argument. He held that the defendant:

> was involved beyond the mere bystander role. He was the principal of the potential defendants, even if not perhaps strictly speaking in law their employer. He was also the investigator of the publication for disciplinary purposes and has responsibility for discipline in relation to members of An Garda Síochána who commit acts that amount to a breach of discipline, which certainly has a significant evidential overlap with the behaviour complained of here.

He also found that his power to grant relief was not constrained by an arbitrary limitation requiring there to be some direct facilitation by the defendant in the wrongdoing.[67] *Various Claimants v News Group Newspapers Limited* demonstrates how the courts in the jurisdiction of England and Wales have, in certain situations, held the Police to be more than mere bystanders.[68] The judgment is also useful to examine because it provides a helpful analysis of the test utilised by the court to separate a mere bystander from a participant. The case involved an application for an order for disclosure by the Metropolitan Police Service ("MPS") of certain information relating to phone hacking activities said to have been conducted by journalists engaged by the first defendant's newspaper. The MPS in previous matters had informed the victims regarding the occurrence of phone hacking. Without the MPS advising the victims that their phones were hacked, it would not otherwise have been possible for the victims to find out that this had occurred.[69] The key question that the court had to decide was whether the claimants could obtain Norwich Pharmacal relief against the MPS in circumstances where the MPS had not participated in, or facilitated, the wrongdoing. Mann J considered the relevant question to be:

> not whether the MPS have participated in, or facilitated, or been involved in the actual wrongdoing in this case. It is whether the MPS is a mere witness (or metaphorical bystander) or whether its engagement with the wrong is such as to make it more than a mere witness and therefore susceptible to the court's jurisdiction to order Norwich Pharmacal disclosure.[70]

He concluded that the MPS was 'not like someone who happens to witness an offending act and who thereby acquires relevant information. It is someone whose duty is to acquire information about the offending act, albeit not for the benefit of the victims'.[71] He also

[66] *Blythe* (n 31).
[67] ibid [25]. Perhaps Humphreys J could equally have quoted Lord Morris of Borth-y-Gest 'actively concerned' criteria to find that the defendant was not a mere bystander.
[68] [2013] EWHC 2119.
[69] ibid. See [9] – [10] for context of when the MPS have previously made disdosures to individuals that their phones were hacked.
[70] ibid [54].
[71] ibid [55].

surmised that the MPS had provided information which it would not have otherwise volunteered had it been a mere witness. In such circumstances, he granted the order sought.

The decision of Humphreys J in *Blythe,*[72] and Mann J in *Various Claimants,*[73] suggests that the courts in both jurisdictions are relatively flexible as regards the interpretation of what they deem meets the requirement of being sufficiently mixed up in a wrongdoing. It appears that the threshold has not been set very high and could realistically be met by proving that a defendant had become sufficiently mixed up in a wrongdoing by having some or any form of involvement in, or engagement with the reputed wrongdoing.

Balancing competing rights – the proportionality test

Lord Reid in *Norwich Pharmacal*, [74] having outlined the principles behind the court's jurisdiction to make such an order in any particular case, stated that he would therefore order the defendant to disclose the information sought 'unless there is some consideration of public policy which prevents that'.[75] In that particular matter, it was held that there were no such public policy considerations that prevented Lord Reid from ordering the defendant to disclose the identity of the wrongdoer to the plaintiff. Thus, before a court is prepared to grant Norwich Pharmacal relief, it is incumbent upon it to consider the broader issues involved in a matter before either granting or denying relief. This can be a precarious and challenging exercise. Frequently, the plaintiff's right to redress a wrongdoing will collide with an alleged wrongdoer's right to privacy. The consequences of denying a plaintiff Norwich Pharmacal relief will essentially mean that a plaintiff who has suffered a wrong could be precluded from taking the necessary action to vindicate their legal rights. On the other hand, once the identity of the wrongdoer is disclosed, this can never be undone.

The courts of England and Wales, when tasked to decide between competing rights, have carefully considered and weighed a broad range of relevant factors apparent in any given matter, with a view towards assessing whether the granting of Norwich Pharmacal relief is a proportionate response in the circumstances. The decision of the Supreme Court of England and Wales in *Rugby Football Union v Consolidated Information Services Limited (formerly Viagogo Ltd)* is of seminal importance in that jurisdiction.[76] In this matter, RFU, the applicant (the governing body of the game of rugby union in England), issued proceedings seeking disclosure of the identity of those who had advertised for sale, or sold tickets for Six Nations matches on the respondent's website, for values that exceeded the face value of the tickets, sometimes by many multiples. The applicant's inherent function of promoting the game of rugby union is achieved by setting ticket prices at reasonable levels so as to facilitate persons attending Twickenham Stadium to view England's International matches. The applicant therefore did not want its tickets falling into the hands of ticket touts, who would profit from the sale of their tickets by reselling them for prices in excess of the face value price. Before initiating proceedings, the applicant had written to the defendant seeking information about those selling and purchasing the tickets. However, the respondent refused to divulge this information.

[72] *Blythe* (n 31).
[73] *Various Claimants* (n 68).
[74] *Norwich Pharmacal* (n 4).
[75] ibid 175.
[76] [2012] UKSC 55.

The English High Court granted Norwich Pharmacal relief, finding that the applicant had demonstrated an arguable case of wrongdoing against those buying and selling the tickets in both breach of contract and conversion.[77] It also held that those who entered the stadium by use of a ticket obtained in contravention of the conditions outlined on the tickets were arguably guilty of trespass. The respondent appealed the matter to the Court of Appeal on the basis that the granting of Norwich Pharmacal relief disproportionately breached the alleged wrongdoers' personal data rights, namely under Article 7 and Article 8 of the Charter of Fundamental Rights of the European Union.[78] In the Court of Appeal, Longmore J noted that disclosure had been permitted by the terms and conditions of the defendant's website in circumstances where it would be required to comply with a court order. He held that the requirement that the defendant disclose a limited amount of personal data in this matter had been a proportionate response and he dismissed the respondent's appeal. The matter was then appealed to the Supreme Court, where the respondent's submission was effectively confined to the argument that the granting of a Norwich Pharmacal Order would breach the privacy rights of the wrongdoer under Article 8 of the Charter of Fundamental Rights of the European Union. The Supreme Court was therefore tasked with striking a balance between alleged wrongs on one hand and the asserted privacy rights of alleged wrongdoers on the other. Lord Kerr noted that 'the essential purpose of the remedy is to do justice'.[79] This involves the exercise of discretion by a careful and fair weighing of all relevant factors. The following relevant factors were identified by Lord Kerr:

(i) the strength of the possible cause of action contemplated by the applicant for the order;

(ii) the strong public interest in allowing an applicant to vindicate his legal rights;

(iii) whether the making of the order will deter similar wrongdoing in the future;

(iv) whether the information could be obtained from another source;

(v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing;

(vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result;

(vii) the degree of confidentiality of the information sought;

(viii) the privacy rights under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed;

(ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed;

[77] *The Rugby Football Union v Viagogo Ltd* [2011] EWHC 764. The courts in England and Wales have adopted a threshold test requiring a daimant to demonstrate a case of 'arguable wrongdoing' before they will consider granting relief.
[78] *Rugby Football Union v Viagogo Ltd* [2011] EWCA Civ 1585.
[79] ibid [17].

(x) the public interest in maintaining the confidentiality of journalistic sources, as recognised in section 10 of the Contempt of Court Act 1981 and article 10 of the European Convention on Human Rights.[80]

Lord Kerr, guided by the above criteria, evaluated the impact that the disclosure of the information would have had on the errant ticket sellers concerned in this matter and weighed this against the value to the applicant of obtaining the wrongdoers identities. He noted that the wrongdoers would not be unfairly or oppressively treated by disclosure of their identities. He also believed that the motive of the applicant to promote the game of rugby was an entirely worthy cause. He concluded that the granting of the order was a necessary and proportionate response to the circumstances of this matter.

The Irish courts, particularly in the most recent judgments, also approach matters with the aim of granting orders where they represent a necessary and proportionate response to the wrongdoing inflicted. In the aforementioned *Blythe*,[81] Humphreys J had been tasked with balancing the defendant's right to keep confidential the identity of individuals subjected to its internal disciplinary procedures, against the plaintiff's right to initiate proceedings urgently against the unknown individuals who allegedly had defamed him. Taking all the broader factors and competing interests into account, he noted that there 'should be a confluence of interests between the court's role of doing justice, the plaintiff's rights under the Constitution and the ECHR to an effective remedy, and the defendant's interest in the accountability of his members to the courts even on the civil side.'[82] Ultimately, after assessing the various factors, he concluded that it would be proportionate to grant Norwich Pharamacal relief to the plaintiff. He found that disclosure of the identity of the members of An Garda Síochána, who had made the comments complained of, would not prejudice the Gardaí involved in internal disciplinary proceedings, nor would it compromise the internal operations of An Garda Síochána's disciplinary procedures.[83]

Muwema v Facebook Ireland Ltd perhaps best illustrates the precarious duty faced by the court when tasked to balance competing rights.[84] This judgment also illustrates that a decision to grant Norwich Pharmacal relief can potentially have profound and unintended consequences. In this matter, the plaintiff, a Ugandan Lawyer sought Norwich Pharmacal relief to uncover the identity of the individual behind the Facebook account in the pseudonymous name of Tom Voltaire Okwalinga ("TVO"). The plaintiff also sought orders under s 33 of the Defamation Act 2009 requiring the defendant to remove alleged defamatory articles and to prohibit the further publication of these articles. Before seeking these reliefs from the court, the plaintiff had previously written to the defendants and asked it to remove the material on a number of occasions. The defendant refused on the grounds that the it was not in a position to verify the truth or falsity of the content of the material in dispute and it suggested that the plaintiff should make his request directly to the Facebook account holder.

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[80] ibid [17].

[81] [2019] IEHC 854. See also *Blythe* (n 31). Humphreys J, at [7] of his judgment, specifically noted the influence that the judgments of the Courts of England and Wales previous had in seminal Irish decision. He also commented on the evolution and extension of the Norwich Pharmacal jurisdiction by the Supreme Court of England in *Rugby Football Union* (n 76).

[82] ibid [27].

[83] ibid. Humphreys J also noted that s 62(4) of An Garda Síochána Act 2005 provides a mechanism whereby disdosures of such information is lawful if it is either made to the court or if it is authorised by the Garda Commissioner. As aforementioned, it has been reported that this decision has been appealed by the defendant, predominantly on the basis that the defendant believes that it could compromise the integrity of its internal disciplinary procedures. See (n 34).

[84] [2016] IEHC 519.

Further, the defendant contended that it required a court order identifying the specific defamatory content before it would be in a position to remove that content. The plaintiff took particular umbrage with three articles posted on TVO's Facebook account between 17th March 2016 and 24th March 2016, which claimed that the plaintiff: accepted US$260,000 in bribes, had staged a break in at the premises of his own law firm in order to jeopardise a presidential election and had been protected by armed forces. The plaintiff claimed that these articles had been widely commented on and had resulted in the endangerment of his safety, reputation and credit.[85] Binchy J found that any suggestions that the plaintiff, a practising lawyer, took a bribe or staged a break-in to orchestrate a subterfuge, in the absence of proof to support those positions, were manifestly defamatory. Binchy J granted a Norwich Pharmacal Order in the terms of which the parties had agreed prior to the application. He refused to grant an injunction ordering the taking down of the alleged defamatory material, finding that the allegations had been independently published elsewhere and therefore a takedown order would serve no useful or effective purpose.

Subsequently, new evidence about the plight of TVO came to light before the defendant complied with the order to hand over the agreed documents identifying TVO. The defendant immediately sought leave from the Court to introduce this new evidence with a view towards trying to persuade the court to reconsider its decision to grant a Norwich Pharmacal Order. Six months later the matter came back in front of Binchy J.[86] The defendant argued that subsequent to the granting of the Norwich Pharmacal Order, it had uncovered evidence that suggested that TVO was a political activist and had been marked for arrest by the Ugandan Government. The defendant submitted that it had also come to light that the plaintiff had identified two Facebook pages for TVO, one of which appeared to be a fake or an imitation profile. The crux of the defendant's submissions highlighted issues regarding Uganda's poor human rights record. In brief, the submissions suggested that if the authors of the TVO profile and the imitation TVO profile were identified, then there would be a significant possibility that this could endanger the life, or lives, of whomever had been posting under the TVO profiles. The defendant also submitted an affidavit from Nicholas Opiyo, a lawyer for Robert Shaka, a political activist who had previously been incorrectly identified as TVO and had been imprisoned at the behest of the Ugandan government. Mr Opiyo outlined how Mr Robert had been imprisoned and detained incommunicado. He was eventually released after Mr Opiyo had challenged the nature of the detention. Mr Opiyo maintained that Mr Robert was subsequently harassed and threats had been made against his life. Mr Opiyo had been subsequently arrested for other charges and had been living in fear of his life. Mr Opiyo further deposed that if the identity of the real TVO was made known, there would be a significant danger that this person would suffer a worse fate than Mr Robert. Binchy J, relying on the dicta of Clarke J in his judgment in *McInerney Homes Limited*,[87] found that the defendant had met the threshold criteria to admit the new evidence. The postings by TVO had previously been found to be defamatory and Binchy J therefore did not have to reconsider

[85] ibid. See paragraphs [11]-[17], where the defendant highlighted in its submissions that routine internet searches revealed that the plaintiff was the subject of a significant amount of adverse publications which suggested credibility issues with his professional conduct and further highlighted the that he had been the subject of considerable controversy in Uganda. The defendant further submitted that they were protected and had a full defence in respect of the publications of TVO on its platform under Regulation 18(3) of the E-Commerce Regulations 2003 (S.I. 68/2003) and under s 27 (2)(c) of the Defamation Act 2009. S 27 (2)(c) provides a full defence in situations where the defendant can establish that it is an innocent publisher as defined under this provision. However, these submissions appear to have been delivered by the defendant with the aim of preventing the plaintiff from pursuing a defamation case against it and to resist the application for a takedown type injunction, rather than being borne out of any initial moral concern to protect TVO's identity.

[86] *Munema* v *Facebook Ireland Limited* [2011] IEHC 25.

[87] [2011] IEHC 25 [3.1].

his original findings, rather he needed to determine if it would have been proportionate to grant relief in light of the new evidence presented. Binchy J carried out a detailed evaluation of the criteria used by the courts in England and Wales in *Rugby Football Union,*[88] and analysed whether any applicable conditions could be applied from that matter to the facts of the case in front of him. He noted that the nub of the issue centred around: 'a weighing of the right of the plaintiff to vindicate his good name on the one hand and the right to life and bodily integrity of TVO on the other'.[89] After conducting an evaluation of the conflicting rights and broader consequence that could follow if TVO had been unmasked, Binchy J concluded that 'it must be correct to say that a person's right to his good name must take second place to the right to life and bodily integrity of another where the threat to bodily integrity is sufficiently serious, as I believe it to be here'.[90] He refused the defendant's application opposing the granting of a Norwich Pharmacal Order, but on a conditional basis. He ordered the defendant to contact TVO forthwith to advise him that unless the offending postings were removed within fourteen days from the date of delivery of the perfected order, then the plaintiff would be entitled to renew his application for Norwich Pharmacal relief which would be duly granted.[91]

The plaintiff appealed the order of Binchy J regarding the conditional terms of the Norwich Pharmacal Order to the Court of Appeal.[92] The plaintiff argued that the High Court had afforded too much weight to the affidavit of Mr Opiyo and what the plaintiff asserted was one-sided hearsay evidence adduced from various different entities to prove that the Ugandan government had issues in its observance of human rights. The plaintiff also submitted that there had been nothing particularly offensive or unlawful about TVO being marked for arrest by the Ugandan authorities because it is was an offence to post offensive material on the internet in Uganda.[93] However, Peart J dismissed the plaintiff's appeal because he was satisfied that there had been no issue with the evidence adduced by the defendant or the weight attached to that evidence by Binchy J. He concluded that the correct test had been applied by the High Court to the issues at hand and ultimately that the plaintiff's right to bring proceedings for damages for defamation against TVO had been outweighed by the risks outlined to TVO's life.[94] Peart J confirmed that the 'rights of one party must be balanced against the rights of the other party when considering where the correct balance of justice lies'.[95] He also held that the courts power to grant Norwich Pharmacal jurisdiction:

> is a discretionary jurisdiction to be exercised in the light of the facts and circumstances of any particular case. It is not an order made as of right, even where there is prima facie evidence of wrongdoing shown to exist on the part of the person whose identity is sought to be disclosed. There may in any

[88] *Rugby Football Union* (n 76) [29] & [40].
[89] [2017] IEHC 69 [39].
[90] ibid [40].
[91] ibid [41].
[92] *Muwema* (n 4).
[93] ibid [26] - [27].
[94] ibid [39]. However, Peart J was keen to highlight that he did not support the endorsement of any concept of a hierarchy of constitution rights. He commented that 'Mere assertion of a real risk to life and/or bodily integrity should not without more trump the other party's right, as in this case, of access to justice in order to bring a claim for damages.' The decision also highlights that a wrongdoer should not merely assume that proving a risk to their lives will be sufficient to deny a plaintiff Norwich Pharmacal relief.
[95] ibid [31].

> particular case be countervailing facts and circumstances which would warrant a refusal of an order.[96]

Available via other means

McCarthy J in his judgment in *Megaleasing* noted that the jurisdiction to grant Norwich Pharmacal relief should be 'sparingly used'.[97] Therefore, if information is more readily or practically available from other sources or by making other enquiries, it is axiomatic that an application for a Norwich Pharmacal Order should not be pursued.[98] However, it is clear from the recent decision in *Blythe* that there is no requirement for an application having to be as a means of last resort, nor is there a requirement that application is the only available means of identifying the wrongdoer.[99] In *Blythe*,[100] the defendant submitted that the plaintiff could have obtained the information on who defamed him by examining other sources and in particular by examining who had viewed his LinkedIn profile. It is unclear from the judgment as to how this would have identified the wrongdoers, however, Humphies J noted that:

> A party is not under an obligation to take all conceivable steps above and beyond the option of seeking disclosure from a respondent to an application, or indeed to set out all steps taken in endless detail. It is clear on the particular facts that the information in the possession of the defendant has the potential to materially assist the plaintiff's right of access to the court.[101]

This decision should be read in the context of its specific facts. It is important to note that Humphreys J found that 'no clear, simple and effective step has been identified on behalf of the defendant that could have been taken by the plaintiff to obviate the need for the motion'.[102] If the defendant had sufficiently demonstrated that the plaintiff could have obtained the information via other readily available or practical means, then the court most likely would have arrived at a different conclusion.

What can be obtained?

Lord Reid, in *Norwich Pharmacal*, stated that a person who has become mixed up in the wrongdoing of another has a 'duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers'.[103] Therefore, he envisaged that the Norwich Pharmacal relief was limited to disclosing information that would identify

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[96] ibid [30].
[97] See *Megaleasing UK Ltd* (n 2).
[98] Where the information sought can be obtained via other practicable means, the courts in England and Wales are disindined to grant Norwich Pharmacal Relief. See the comments of Lightman J, at [24] in *Mitsui* (n 42), where he stated that 'The jurisdiction is only to be exercised if the innocent third parties are the only practicable source of information'. However, see also, *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)*[2009] 1 WLR 2579, [94], in which Thomas LJ confirmed that the granting of Norwich Pharmacal relief is not contingent on a requirement that the remedy is one of last resort.
[99] See *Blythe* (n 31).
[100] ibid.
[101] ibid [22].
[102] ibid [23].
[103] *Norwich Pharmacal* (n 4) 175.

a wrongdoer to a plaintiff. Finlay C.J. in *Megaleasing UK Ltd* also noted that the existing English authorities at the time confined the jurisdiction to grant Norwich Pharmacal relief to matters where 'what is really sought are the names and identity of the wrongdoers, rather than factual information concerning the commission of the wrong'.[104] The plaintiffs in *Megaleasing UK Ltd* and *Doyle* were unsuccessful in their applications for Norwich Pharmacal relief, partly because they had sought such Orders to aid proving, or pleading, particulars of the suspected wrongdoing against individuals and entities that they had already identified as potential wrongdoers.[105] Laffoy J in *Doyle* specifically commented that:

> it is doubtful, on the authority of the decision of the Supreme Court in the Megaleasing case, whether this Court's inherent jurisdiction would extend to making the order sought by the Plaintiff which is aimed at obtaining disclosure of factual information concerning the commission of the alleged wrong.[106]

Traditionally, the courts have generally restricted disclosure to the 'names and identity of the wrongdoers, rather than factual information concerning the commission of the wrong'.[107] However, more recently, Humphreys J in *Blythe* signaled that in appropriate cases, the court's jurisdiction would not be specifically limited to:

> requiring disclosure of just the identity of the wrongdoer. Having regard to the general considerations of the imperative of doing justice and the right of access to the court and to an effective remedy, it would be arbitrary to impose such a limitation as a matter of absolute principle.[108]

In addition to ordering disclosure of the names of the Gardaí involved in the publication of the alleged defamatory material, he ordered that the defendant identity the specific portions of the defamatory material in relation to which any such person was concerned in the publishing thereof. Hence, Humphreys J appeared to expand the ambit of the order further than it had been previously been exercised in this jurisdiction. However, he noted that:

> A distinction needs to be drawn between information needed to launch the action and information needed to prosecute or advance the action. All the plaintiff needs at the pre-action stage is the information necessary to launch the action. If there is a case for access to further documents which are in the possession of the Garda Commissioner but not in the possession of defendants against whom the plaintiff intends to proceed substantively, that can be dealt with by way of third-party discovery at a later stage. Admittedly, there is a certain duplication involved in that process, but that appears to be the current state of the law.[109]

Undertakings to use the information disclosed for specific purpose

[104] *Megaleasing UK Ltd* (n 2) 504.
[105] *Megaleasing UK Ltd* (n 2) and Doyle (n 18).
[106] ibid [22].
[107] *Megaleasing UK Ltd* (n 2) 504.
[108] *Blythe* (n 31) [11].
[109] ibid [11].

A plaintiff who is successful in the application for Norwich Pharmacal relief might be required to provide a specific undertaking as to the use of the information disclosed. Allen J in *Parcel Connect* made the Norwich Pharmacal Order conditional on a written undertaking from the solicitor acting for the plaintiff confirming that the information disclosed by the defendant would not be used for any purpose other than seeking redress in respect of the wrongs complained of.[110] Arguably, undertakings as to the specific use the information would provide a vital safeguard to the court to ensure that the information is used for the stated purposes for which the application was originally pursued. A requirement to provide undertakings as to the specific use of the information ordered may become more common should the courts in the future expand the ambit of the Norwich Pharmacal remedy into new scenarios.

Potential for Significant Evolution

While the evolution of the Norwich Pharmacal remedy is at a far less advanced stage in this jurisdiction, consideration of Humphreys J's confirmation that the remedy should not be subject to arbitrary tests and limitations suggests that the courts here may broaden the scope of the Norwich Pharmacal jurisdiction.[111] Notwithstanding its ability to broaden the Norwich Pharamacal jurisdiction, the superior courts are currently unlikely to extend the jurisdiction into situations where proof of specific wrongdoings cannot be demonstrated, such as occurred in England and Wales in *P v T,*[112] and *Carlton Film Distributors Ltd*.[113] Thus far, the superior courts in Ireland have only granted relief in situations where wrongdoing of a tortious nature has occurred and where the information was requested for the purposes of issuing legal proceedings. However, it appears, at least from the written judgments, that the courts might not have been specifically requested to grant relief in circumstances where the wrongdoing is unconnected to a tortious act, or unconnected to the specific purpose of issuing legal proceedings.

The courts in England and Wales have long ago endorsed the extension of Norwich Pharmacal relief in matters involving wrongdoing unconnected to a tort. They have also confirmed that there is no requirement that the Norwich Pharmacal jurisdiction be exercised only for the purpose of enabling legal proceedings to be issued against the wrongdoer, provided, however, that some other legitimate purpose in seeking the disclosure is identified. This could be demonstrated by evidencing the need to seek some other form of legitimate redress against a wrongdoer. For example, this redress could be in the form of requiring the information to obtain an injunction,[114] or requiring a wrongdoer's identity to commence

[110] *Parcel Connect* (n 27) [22] - [23]. See also the *ex tempore* judgment of Kelly J in *EMI Records (Ireland) Limited* v *Universal Music Ireland Limited* [2005] IEHC 233. He also made the order for Norwich Pharmacal relief conditional on undertaking that the information disdosed by the defendant will not be used for any purpose other than seeking redress in respect of the wrongs complained of.

[111] See (n 67) and (n 111).

[112] *P v T* (n 39).

[113] *Carlton Film Distributors* (n 40).

[114] *British Steel* v *Granada Television Ltd* [1981] AC 1096. In this matter, confidential documents belonging to the plaintiff were disdosed by an employee to the defendant. The defendant used the documents to make a television programme devoted to the steel strike that was ongoing at that time. This leak constituted a breach of confidence and the plaintiff sought Norwich Pharmacal relief to uncover the name of the informant to enable it to seek an injunction. The court reiterated that there was no restriction on the plaintiff to seek the information purely for the purpose of pursuing legal proceedings, rather the courts would assist those who required the information to seek some legitimate form of redress.

disciplinary action on foot of confidential disclosures made by this wrongdoer to third parties, in breach of the terms and conditions of their contract of employment. The application of these extensions is demonstrated in the matter of *Ashworth Hospital Authority v MGN Limited*.[115] In this matter, the Moors murderer Ian Brady, who was an inpatient of the claimant's psychiatric hospital, engaged in a hunger strike in protest at having been transferred to another ward within the facility. The hunger strike was prolonged and culminated in the claimant having to force feed Ian Brady by nasogastric tube, which attracted significant media attention. The defendant published an article about the hunger strike, within which, details and extracts of Ian Brady's medical files were published. The newspaper, for a payment of £1,500, had received these confidential records from an intermediary, who in turn had obtained the records from a source within the hospital. The source obviously had to have access to medical records and therefore was most likely a member of staff of the claimant. This disclosure breached the confidentiality clause that which had been incorporated into every employee's contract of employment with the claimant.

This disclosure had the potential to undermine the confidence and vital functioning of the relationship of confidentiality which exists between a doctor and their patient. This in turn could have the effect of dissuading patients from providing information about themselves and from engaging openly with the claimant's treatment and rehabilitation services. The claimant conducted an internal investigation but had been unable to discover the identity of the leak. The claimant therefore sought Norwich Pharmacal relief against the defendant to reveal details of the names of the persons who were involved in procuring the records for their journalist. The claimant's motivation to seek relief was not to launch legal proceedings against the errant employee; rather, it had been driven by the necessity to restore confidence in its hospital, by proving that it had found the source of the leak. Thereafter, it intended to use the information to commence disciplinary investigations and terminate the errant employee's contract of employment.

Rougier J in the High Court ordered the defendant to serve a witness statement confirming how the defendant came into possession of the information.[116] The defendant was also ordered to identify the name of any persons involved in his acquisition of the records. The defendant appealed the order to the Court of Appeal.[117] The journalist in question did not know the name of the employee who had handed the records to his source. However, it was accepted that details of the source would in all probability lead back to the employee who provided him with the records. The defendant relied on numerous grounds in its submissions in the Court of Appeal.[118] Amongst those submissions, the defendant argued that the breach of confidence did not amount to tortious conduct. Thus, it argued that the court could not award Norwich Pharmacal relief because the principle deriving therefrom only applied to tortious conduct.[119] This argument was soundly rejected by Lord Philips who stated that he could not see any:

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[115] [2002] UKHL 29.

[116] *Ashworth Hospital Authority v MGN Limited* EWHC, Unreported, 19th April 2000.

[117] *Ashworth Security Hospital v MGN Ltd* [2000] EWCA Civ 334.

[118] The defendant submitted that Ian Brady had already disdosed most of the details contained in the records to the media in furtherance of his campaign. Therefore, the contents of the actual records were already in the public domain. The defendant further argued that it was vital and in the interests of preserving freedom of expression that journalistic sources were protected from being identified. In this regard, the defendant relied on Artide 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1953 and s 10 of the Contempt of Court Act 1981.

[119] ibid [44]. This submission was not put forward in the defendant's appeal to the House of Lords.

> basis in principle for confining Norwich Pharmacal to cases involving tort. On the contrary the principle in Norwich Pharmacal should be one of general application. Under it jurisdiction to order disclosure of the identity of wrongdoers should exist in equity wherever the person against whom disclosure is sought has got `mixed up' in wrongful conduct that infringes a claimant's legal rights.[120]

The Court of Appeal dismissed the appeal. It found that the 'disclosure of confidential medical records to the press is misconduct which is not merely of concern to the individual establishment in which it occurs. It is an attack on an area of confidentiality which should be safeguarded in any democratic society'.[121] The defendant appealed the matter to the House of Lords.[122] It predominantly relied on the same arguments presented to the Court of Appeal. It also submitted that the Norwich Pharmacal jurisdiction to order discovery is an aid to litigation and that it did not extend to cases where a claimant had neither brought nor intended to bring proceedings.[123] The House of Lords dismissed the appeal. It found that relief was not contingent on proving wrongdoing of a tortious nature; rather, the House of Lords emphatically endorsed the application of Norwich Pharmacal relief to matters in which a wrongdoing of some kind could be demonstrated. It found that the claimant had been the victim of wrongdoing in the form of a breach of contract and breach of confidence by the actions of its errant employee. This wrongdoing, while not tortious in nature was sufficient to invoke the court's jurisdiction. Lord Slynn of Hadley held in his speech that:

> The first is that the jurisdiction recognised in Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 to order disclosure of, inter alia, the identity of a source of information or documents does not depend on whether the person against whom the order is sought has committed a tort, a breach of contract or other civil or criminal wrong.[124]

Lord Woolf also held that there was no specific requirement that the information must be required to ground legal proceedings. Relying on the judgment of the Court of Appeal in the earlier case of *British Steel Corporation,*[125] he noted that:

> Mr Irvine suggested this was limited to cases where the injured person desired to sue the wrongdoer. I see no reason why it should be so limited. The same procedure should be available when he desires to obtain redress against the wrongdoer - or to protect himself against further wrongdoing.[126]

Thus, relief can be granted in England and Wales if a claimant can establish that the information is required to seek some form of legitimate redress for the wrongdoing concerned or to protect against the occurrence of further wrongdoing. However, relief should not be granted unless a claimant has identified clearly the wrongdoing on which he relies in general terms and identifies the purposes for which the disclosure will be used (if such disclosure is ordered). Lord Woolf specifically ordered that the disclosed material was

[120] ibid [66].
[121] ibid [99].
[122] *Ashworth Security Hospital* (n 117).
[123] ibid [23].
[124] *Nornich Pharmacal* (n 4) [1].
[125] *British Steel Corporation* (n 114).
[126] *Ashworth Hospital* (n 116) [45].

to be restricted expressly or implicitly to the disclosed purposes unless and until the court permitted it to be used for another purpose.[127]

Reform

The complexities that arose post-ordering Norwich Pharmacal relief in *Muwema* highlight the need for the wrongdoer to have their say in the application process, or at the very least to be provided with notice of the application and invited to have their say at the application hearing. It was after the order had been granted by Binchy J that the defendant discovered that this could have had profound consequences for TVO's life.[128] It appears from the judgment that TVO played no part in preventing his unmasking, rather, and very fortunately for TVO, it appears from the Facebook's grounding affidavit that it had been informed, almost by chance, about TVO's plight by colleagues immediately before complying with the order.[129] However, for the purposes of protecting both the wrongdoers and the court, the wrongdoer should be involved in the process, or at the very least every attempt should be made to put the wrongdoer on notice of the application.

The Law Reform Commission ('LRC') in their 2016 Report on *Harmful Communications and Digital Safety* suggested that the wrongdoer should be allowed the opportunity, on an anonymous basis, to make representations before the court prior to the court granting Norwich Pharmacal relief.[130] Further, the LRC noted that some applications had been granted on an ex-parte basis by the High Court, in potential contravention of the right to fair procedures and the right to free speech. Similarly, Digital Rights Ireland ("DRI") argued that the anonymous user should be given an opportunity to make representations to the court before they were to be stripped of their anonymity. This could be achieved by requiring the ISP, or social media platform, to notify the user, and then allowing the user to make written submissions via the ISP or social media operator. In addition, the user should be provided with an opportunity to be heard at the application, via a mechanism that would preserve their anonymity. DRI further submitted that some procedures which facilitate the involvement of the wrongdoer must be adopted if unwarranted infringements on the right to anonymity are to be avoided.[131]

Furthermore, it is noted that the costs of obtaining relief can be prohibitive. The jurisdiction to grant Norwich Pharmacal Orders is vested solely with the superior courts.[132] Neither the Circuit Court nor the District Court currently enjoy any jurisdiction to grant this remedy.

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[127] ibid, [60].

[128] *Muwema* (n 87). It must be remembered that TVO freely chose to make comments on a public forum, which he most likely knew would attract significant attention. See [38] of Binchy J's judgement where he remarks that TVO had been the author of his own misfortune for making public comments about the plaintiff on Facebook however he found that this should 'scarcely be a reason for the Court to make an order that would expose TVO to human rights abuses'.

[129] ibid [3].

[130] (LRC116 – 2016) (n 30) [59].

[131] Fergal Crehan, 'Presentation to the Law Reform Commission Public Seminar on Cyber Crime affecting personal safety, privacy, and reputation, induding cyberbullying' <*https://publications.lawreform.ie/Portal/DownloadImageFile.ashx?objectId=4564*> accessed 14 October 2020. A version of the paper, written with Dr. TJ McIntyre of the Sutherland School of Law, University College Dublin, was also submitted by Digital Rights Ireland to the Law Reform Commission in response to its Issues Paper on Cyber-crime affecting personal safety, privacy and reputation induding cyber-bullying (LRC IP 6-2014).

[132] The power to grant Norwich Pharmacal Orders is not specifically mentioned in the Rules of the Superior Courts. See (n 4).

Pursuing litigation at first instance in the High Court is an expensive endeavor. Arguably the expense involved to a plaintiff potentially undermines the very aim of the relief namely to facilitate justice, because the prohibitive costs could put the relief beyond the reach of those who cannot afford to discharge them.[133] Potentially, relief might be more financially attainable if the jurisdiction to grant Norwich Pharmacal Orders was to be extended to the lower courts.[134] In particular, the Circuit Court currently enjoys jurisdiction to grant a wide array of injunctive remedies, and there is no evidence that this has caused any administrative or 'floodgate' issues. However, currently there are no proposals mooted to implement any such changes. The expensive nature of the relief is further compounded because frequently the cost of seeking Norwich Pharmacal relief is generally not recoverable from the defendant against whom the order is sought. This is because the defendant in most situations has become innocently mixed up in the wrongdoing. In such situations, Lord Reid in *Norwich Pharmacal* envisaged that: 'It may be that if this causes him expense the person seeking the information ought to reimburse him'.[135] Accordingly, in appropriate matters, Lord Reid envisaged that the claimant would not only have to bear their own costs of the application, but that they would also pay for the defendant's costs associated with disclosing the material ordered.

The attitude of the Irish courts towards making orders for costs differs depending on the facts of the case in front of it. Where defendants innocently get mixed up in wrongdoing, the courts can be minded to make no order as to costs of both the application and the costs associated with the costs of disclosure. In *Parcel Connect,*[136] Allen J made no orders as to costs. In this matter, the defendant would not reveal the identity of the user of the offending account without a court order. Despite this stance, the defendant maintained a neutral position and it did not specifically challenge the application for Norwich Pharmacal relief. However, it is open to the plaintiff to seek to recover any costs incurred in obtaining the Norwich Pharmacal relief directly from the wrongdoer at a later juncture. Arguably, these costs naturally flow from the original wrongdoing upon which the proceedings will be grounded and it is open to the court to consider awarding them if the plaintiff subsequently succeeds in their proceedings against the then identified wrongdoer.[137]

In *Blythe*,[138] the defendant refused to reveal the information sought by the plaintiff and robustly challenged the plaintiff's application for Norwich Pharmacal relief. The defendant's robust defence to the application appears to have influenced Humphreys J's decision to award the costs of the application to the plaintiff. He also noted that 'as regards the costs of making the disclosure, the case for costs in making disclosure are stronger where the

[133] In *EMI Records (Ireland) Ltd* (n 54), Charleton J, in the context of dealing with applications for injunctions and Norwich Pharmacal Orders to remedy copyright infringements between the plaintiff and customers of the defendant ISP, noted the disproportionate costs that can be involved in such applications. He made obiter comments at [62] of his judgment that it could become more costs effective if appropriate legislative intervention occurred, placing such an obligation by law on the ISPs to pursue inexpensive applications for Norwich Pharmacal relief to the District Court.

[134] William Abrahamson and others (n 47) para 16.42 advocate for the respective rules committees to amend CCR Ord.32 and DCR Ord.46A to include a power to grant Norwich Pharmacal Orders in appropriate circumstances. They also argue that it would also be useful to include the High Court procedure in RSC Order 31, as codification of the rules would assist in identifying the parameters of the jurisdiction.

[135] *Norwich Pharmacal* (n 1) [75].

[136] *Parcel Connect* (n 27) [25].

[137] See the comments of Finlay Geoghegan J at [79] in *Sony Music Entertainment (Ireland) Ltd v UPC Communications (Ireland) Ltd.*, where she noted that that 'in Norwich Pharmacal applications there is the possibility of costs incurred by the applicant being recovered from the wrongdoer'.

[138] *Blythe* (n 31).

requested party doesn't object to the order, because there must be some incentive to parties to come to terms at an early stage'.[139] A court will also consider other factors when addressing the issue of costs.[140] For example, a court might be minded to award costs of an interlocutory application to a plaintiff in a situation where the defendant appears to be a concurrent wrongdoer and knowingly mixed up in the wrongdoing of the unknown third party. Conversely, a court might also award costs to a defendant against a plaintiff who falls short of satisfying the proofs, as outlined in detail above, or a plaintiff who has sought such an order when the information was freely or practically available from other sources.

Conclusion

The recent written judgments in *Muwema,*[141] *O'Brien,*[142] *Parcel Connect,*[143] and *Blythe*[144] have provided welcome guidance on the superior courts' interpretation of the evidential proofs required to ground a successful application for Norwich Pharmacal relief. The judgments in *O'Brien* and *Parcel Connect* suggest that relief is contingent on a plaintiff demonstrating strong *prima facie* evidence of wrongdoing. The relief is currently not available in situations where the application has been grounded merely on a suspicion of wrongdoing. However, *Muwema* illustrates that even in situations where evidence of wrongdoing has been demonstrated, relief will only be granted if it is a just and proportionate response, having regard to all the facts and circumstances involved in any particular matter. Arguably, provided that the occurrence of a wrongdoing is demonstrated, it might better serve the interests of justice if the court's focus shifted to examining whether the granting of relief would be a proportionate response to the wrongdoing rather than procrastinating over the actual strength of the wrongdoing demonstrated. The courts, as demonstrated by the approach of Humphreys J in *Blythe,*[145] appear to have exercised a significant flexibility with regard to the nature of the proofs required to satisfy the threshold requirements that a defendant had become mixed up in the wrongdoing. This judgment also highlights that the courts are not solely confined to ordering disclosure of the identity of a wrongdoer only, but in certain situations can order defendants to provide further information, if it is deemed necessary to launch an action.

While relief can be obtained expeditiously in the High Court, justice should be within the reach of all citizens regardless of the depth of their pockets and as such, consideration should be given to extending the jurisdiction to grant Norwich Pharmacal relief to the Circuit Court. Unfortunately, at the time of writing, no such changes are currently mooted.

The role which the wrongdoer plays in the actual process is something that needs to be considered in more detail. While it might prove difficult to devise any workable solution, it would place the court in a safer position if it required the online wrongdoer to be put on direct notice of any application and afforded an opportunity to respond, either directly or

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[139] ibid [35].

[140] See the decision of the English Court of Appeal in *Totalise Plc v Motley Fool [2001] EWCA Civ 189*. In particular, see [31], where the court sets out a number of situations where it would be appropriate to order the daimant to pay for the costs of disdosure. Conversely, it noted that a defendant 'who supports or is implicated in a crime or tort or seeks to obstruct justice being done should believe that the court will do other than require that party to bear its costs and, if appropriate, pay the other party's costs'

[141] *Muwema* (n 4).

[142] *O'Brien* (n 14).

[143] *Parcel Connect* (n 27).

[144] *Blythe* (n 31).

[145] *Blythe* (n 31).

through the defendant, before relief is granted. This could be difficult to achieve in practise and perhaps, demonstrable evidence of attempts to put the wrongdoer on such notice could sufficient. Any such provisions should be balanced in such a manner that ensures it does not undermine the inherent purpose of the order to 'do justice' and cause the plaintiff any further harm or delay in seeking efficient relief. [146]

Traditionally, judges have had regard to and been guided by the decisions in England and Wales,[147] where significant evolution has taken place since the authority to grant Norwich Pharmacal relief was first confirmed in Lord Reid's eponymous judgment. It is therefore likely that any future extension of the Norwich Pharmacal remedy in this jurisdiction will be guided by the evolution that has occurred in England in Wales, where the courts have adopted a flexible and progressive attitude to the expansion of their Norwich Pharmacal jurisdiction. Lord Woolf in *Ashworth Hospital*[148] noted that:

> New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.[149]

It is likely that there is significant evolution in store for the Norwich Pharmacal Order in this jurisdiction, as the courts here encounter new situations. It is suspected that this evolution will follow the expansion endorsed in England and Wales in *Ashworth*,[150] and that the courts, when the correct circumstances present themselves, will grant relief in matters unconnected to tortious wrongdoing. In tandem with any such evolutionary extension of the Norwich Pharamacal jurisdiction in the Irish courts, is the possibility that relief could be granted in matters where the primary relief sought is to seek some other form of legitimate redress unconnected to the issuing of legal proceedings. However, such extensions should be applied only in appropriate cases, where the relief is a practical necessity and considered to be a proportionate response in all of the circumstances. Any such extensions should also be made contingent on proper undertakings being provided to the court that the information disclosed should be used specifically for the purposed outlined in the application.

The Norwich Pharmacal Order truly is an 'exceptional',[151] and flexible remedy which has opened up 'a new chapter in our law'.[152] While devised almost half a century ago, in a time of lower technological capability, it has successfully evolved with the times to provide potentially the strongest litigation weapon to right the wrongs of unknown wrongdoers in the current digital age. Its strength lies in its flexibility and as the nature, manner and means of wrongdoing evolves in the future, it is anticipated that the Norwich Pharmacal Order will continue to keep pace and effectively respond.

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146 See (n 79).
147 In *Blythe* (n 31), Humphreys J noted at [7] that 'Costello J, as he then was, in his judgment in Megaleasing (with which the Supreme Court differed) relied on English caselaw as it stood at the time, but that law has been undergoing continuous evolution and has been extended further, particularly by the judgment of the UK Supreme Court in Rugby Football Union v. Consolidate Information Services Limited [2012] 1 WLR 3333. That evolution was noted by MacEochaidh J in O'Brien'.
148 *Ashworth Hospital* (n 119).
149 ibid [57].
150 ibid.
151 ibid, per Lord Woolf at [57].
152 *British Steel Corporation* (n 114).