
NORWICH PHARMACAL AND DISCOVERY ORDERS IN THE CYPRUS CONTEXT

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1) Nature of Discovery orders / jurisdiction

Cyprus is a common law jurisdiction, and under certain conditions, English case law is treated as binding, but in most instances it is used as guidelines.

The jurisdiction of Cyprus Courts to issue discovery orders, is based on the ancient English equitable bill of discovery, which was the subject of renewed interest in a series of English cases, starting with Norwich Pharmacal.

Cyprus Courts have jurisdiction to issue discovery orders pursuant to:

- Section 32 of the Courts of Justice Law (14/1960), which empowers the Court to grant an injunction in all cases in which appears to the Court to be just and convenient to do so; and
- Section 29(1)(c) of the same law, which requires judges to apply the principles of equity, unless there is a provision in any other law to the contrary.
- The jurisdiction is equitable and discretionary.

2) Requirements for obtaining discovery orders?

The Applicant for discovery orders shall satisfy the Court:

- That a wrong has been carried out by an ultimate wrongdoer;
- There is a need for the issue of a discovery order to assist the applicant:
 - To plead and prove his claim;
 - To identify other wrongdoers; and
 - To trace stolen assets.

- The person against whom the discovery order will be issued, has been innocently or not, mixed with the wrongdoing, and is able, or likely to be able, to provide the requested information, or documentation, to assist the applicant.
(see MITSUI & CO –V– NEXEN PETROLEUM UK LTD).
- The issue of a discovery order is subject to the discretion of the Court, which will not grant such relief, if the requested information or documentation, may be obtained through another available mode, or if the Court is not satisfied that the Applicant has any real intention to commence proceedings against the wrongdoer.

3) What information or documentation might be obtained through the use of the discovery orders?

- Full details of beneficial owners of a Cyprus Company or of an overseas company which is managed and controlled from Cyprus, and relevant documentation (i.e. copies of passports, trust deeds etc.).
- Full details of signatories of bank accounts of the above Companies.
- Full details of bank accounts, bank statements, payments made, transfers received, instructions given, supporting documents justifying transfers etc.
- Corporate documents, including, but not limited, to resolutions of shareholders, resolutions of the Board of directors, powers of Attorney, agreements executed etc.

4) Against whom, such discovery orders may be issued?

- Service Providers based in Cyprus, managing Cyprus and overseas Companies.
- Cyprus Banks.

- Nominee directors, nominee shareholders, secretaries.
- Any third party, which has been innocently or not, mixed with the wrongdoing committed against the applicant by the principal wrongdoer, in order to assist the applicant to:
 - plead his case;
 - prove his case;
 - identify other wrongdoers; and
 - trace stolen assets.

5) Procedure

An application for discovery may be filed:

- In the context of an action to obtain interim relief in aid and in support of international commercial arbitral cases (Article 9 of Law 101/87 (UNCITRAL MODEL LAW)).
- In the context of an action, to obtain interim relief in aid and in support of an action, pending before the Courts of any Member State of EU, except Denmark (Article 31 of EU Regulation 44/2001).
- In the context of an action on the merits, filed before Cyprus Courts (i.e. against parties to the action as discovery defendants, as well as against not parties to the Cyprus action).
- In the context of an action, for discovery (no need for establishing jurisdiction of Cyprus Courts on the merits of the wrongdoing – such a procedure may be used

in aid of proceedings (legal or arbitral) pending even outside European Community).

6) Types of applications for discovery orders?

- By summons

The application is served to the third party, which has the right to be heard and oppose same.

- Ex parte

The application is tried in the absence of the third party, provided that the applicant satisfies the Court that there is an urgency for the issue of such orders ex parte (i.e. to trace stolen funds and freeze same → (BANKERS TRUST –V- SHAPIRA) – The Discovery Respondent has a right to oppose the validity of the discovery order – Inter parties hearing.

7) Strength of the case required to be shown for the issue of Discovery Orders.

The Applicant shall:

- identify clearly the wrongdoing, on which he relies, in general terms;
- show a good arguable case of existence of such wrongdoing; and
- show that he has a better argument than the defendant.

8) The Purposes for which disclosure may be required.

- The applicant does not have to show that he requires the disclosure for the purposes of legal proceedings (United Company Rusal –v- HSBC Bank (2011) EWHC).
- He might require it to seek redress for his grievance by other means, but not for the support or in aid of criminal proceedings (i.e. in the CHC Software Care Ltd – v- Hopkins & Wood (1993) FSR 241, the applicant required the disclosure to write to recipients of defamatory communications, concerning himself in order to set the records straight (i.e. in that sense was a remedy in tort)).
- Disclosure may be requested in support of pending actions in Cyprus, or action to be filed in Cyprus, or in support of pending actions or actions to be filed overseas.
- Disclosure may be sought in support of Court or arbitral proceedings.

9) Possible objections of Respondents

- **Legal privilege and confidentiality**

It has been decided by the Supreme Court of Cyprus, that no legal privilege and confidentiality exist, when Cypriot lawyers acts as a nominee director or nominee shareholder or a secretary of a Cypriot Company or of an overseas company (Evangelou & Another –v– Ambizas & Another).

- **Banking secrecy and confidentiality**

It has been decided by Cyprus Courts, that they have jurisdiction to issue discovery orders against banks based in Cyprus, if the public interest in the

administration of justice, requires such a disclosure, (i.e. the circumstances of the case show that the public interest in the confidentiality is outweighed by the interest of justice) (Rexel Luxembourg S.A. –v- (1) Sepi Sarl and (2) Alpha Bank Cyprus Ltd).

- **An independent action for discovery cannot be brought against a person who is in the position of a “*mere witness*” or bystander to the cause of action.**

The case law suggests that a bill of discovery may be issued against a person (i.e. individual or legal entity), who is in some way connected to, or involved in the misconduct, or wrongdoing innocently or not (Rexel Luxembourg S.A. –v- (1) Sepi Sarl and (2) Alpha Bank Cyprus Ltd).

10) Possible conditions to be imposed to the applicant.

The Court has jurisdiction to impose inter alia the following conditions:

- That the applicant to use the disclosed information and documentation only for the purpose for which the Court granted the disclosure order.

If the applicant wants to use documents and information disclosed pursuant to a discovery order, for any other purpose not authorized by the Cypriot Court, he has to apply to obtain specific permission of the Cyprus Courts (i.e. for example documents and information disclosed for the purposes of a Cyprus action, may be used for the purposes of an overseas action or proceedings, after obtaining special permission from Cyprus Court.

- That the applicant to pay to the discovery party, any reasonable costs and expenses, for complying with the discovery order (i.e. legal fees and expenses for

preparation of the affidavit of disclosure and making copies of disclosed documents).

- Deposit of Counter-Security to indemnify the Respondents, for any losses to be sustained, due to the issue of the discovery orders.

11) Possible issue of Gagging order against Discovery defendant

Cyprus Courts have jurisdiction to issue a gagging order (as an ancillary to a discovery order) against a discovery defendant, blocking him from alerting or informing his client/wrongdoer or any other person about the pendency of the discovery proceedings.

12) Why to use Cyprus to obtain discovery orders?

- The presence in Cyprus of a large number of Cypriot Companies, as well as of overseas Companies (i.e. BVI, Seychelles, Belize etc.), which are managed and controlled from Cyprus, through local service providers and the keeping of bank accounts with Cyprus local Banks, makes Cyprus, as one of the best jurisdictions to apply and obtain discovery orders.
- Application in Cyprus of English case law and the case law of other common law jurisdictions.

13) Possible stay of execution of the Discovery order in the event of an appeal.

The Supreme Court of Cyprus decided that it has jurisdiction, to stay any discovery order, pending an appeal, provided that:

- An arguable appeal has been filed against the decision granting the discovery orders;

- The non-granting of the stay of the enforcement of the discovery orders, will render the appeal of the discovery defendant, nugatory.

14) CONCLUSION

- Cyprus Courts are prepared to grant discovery orders, when are satisfied that it will be reasonable to issue such orders, and that doing so will serve the interests of justice.
- The availability of such orders depends, upon the facts of each particular case.
- The applicability of discovery orders is wide, ranging from simple disclosure of information and documents, to asset tracing and can affect a wide variety of persons including banks, trustees, service providers, accountants, individuals etc.
- Disclosure orders constitute a very important weapon for the tracking down and recovery of assets.