



## **Undertaking before the Court Strong and Binding? Answer reaffirmed in the affirmative**

**By Dr. Pavlos Neofytou Kourtellos & Dr Marina Himoni**

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In a case currently under trial by the District Court of Nicosia, the plaintiffs in the action had initially filed an ex parte application by which they obtained ex parte a Norwich Pharmacal Order against a Bank, one of the Defendants in the main action. In accordance with the undertaking made before the Court by their counsels, the plaintiffs were bounded to limit the use of information and documents delivered to them by virtue of the disclosure order pending adjudication of their application.

In case their application was rejected, the plaintiffs were accordingly bounded to return the documents obtained, destroy any copies of them and themselves and any representative or employee, would be prohibited from using the information and the documents received **in any procedure in any jurisdiction**. Their application was eventually rejected and the interim orders were annulled. However, the Plaintiffs reverted and resubmitted afresh new actions both within and outside jurisdiction and requested remedies against various parties, including the same Bank by using the materials and information obtained through the above Norwich Pharmacal Order. The disclosed materials and information were also used in filing, amongst others, afresh a new action and in parallel obtaining a Norwich Pharmacal Order (disclosure order), an order which our clients co-Defendants in the action, have sought its annulment and/or setting aside. The order sought to be annulled by the Defendants was in essence issued against the co-Defendant bank and for the benefit of the Plaintiffs. By virtue of it, the bank was ordered to disclose documents, information and transactions related with the bank accounts of the other Defendants maintained with the bank.



The annulment of the above order was sought by the Defendants on the basis that the relevant documents, information and transactions were disclosed illegally and/or irregularly, in excess of the undertaking made by the Plaintiffs before the Court within the context of the initially obtained Norwich Pharmacal Order. The Defendants have in addition supported their application on the basis that their right to fair trial, bank confidentiality as well as their trust relationship with the Defendant Bank was breached. This was regarded as an abuse of process and an order by which the Plaintiffs obtained an unfair advantage.

By filing an afresh application for a Norwich Pharmacal Order against the Defendant, the Plaintiffs have not only used the information and materials disclosed in breach of their undertaking but they have more importantly failed to disclose the very existence of their undertaking. The Plaintiffs omitted to disclose a substantial fact in their application which if it was set before the Court, the latter would probably not have issued the Order.



Therefore, the Plaintiff's ground of opposition that the annulling order made no reference to the Plaintiff's obligation to return and/or not use the document is totally ungrounded according to the judge giving the ruling in the above application.

The concealment of a material fact has a catalytic effect – disturbs the basis of the order regardless of the existence of an intention to defraud the Court. The criterion is objective. The element of defraud is not a condition for the annulment of the issued order, it is enough to ascertain that the non-disclosure of certain facts, constituted objectively material fact for the exercise of the Court's discretion. And evidently in the present, **the existence of the undertaking was a material fact not disclosed to the Court...**

An undertaking is binding and there are consequences for breaching it which cannot be avoided. The plaintiffs in the current case have not only unlawfully retained the documents but they have also failed to act according to their undertaking. The undertaking was express and in writing and according to it, in case the issued order was annulled, any documents delivered pursuant to the said order “are prohibited from being used in any proceeding in any jurisdiction”. Not only the Plaintiffs failed to disclose to the Court the above undertaking but there is moreover no persuasive ground as to why the Plaintiffs could, after the annulment of the orders and despite their explicit undertaking, continue to enjoy the fruits of an order which was annulled by a Court judgment. The Honourable Court fully adopted our submissions upon delivering judgment:

*An undertaking is strong and binds whoever makes it, and the message is clear: No one shall be allowed to enjoy the fruits of an order*

*“As a matter of sole logic consequence, we consider that it is not acceptable for a party to receive and possess assets not belonging to him, without legal authorization, which has just come in his possession following the execution of a court order, having previously undertaken the obligation/commitment before the Honorable Court to return the documents and information. Nevertheless, in a way of contempt not only he does not implement what already has been recorded/commitment/undertaken but to the contrary, uses the documents and information which he inappropriately and/or illegally still possesses in order to initiate and/or promote other Court Procedures.”*

Based on the above, the Court annulled the disclosure order issued against the Defendant bank. ***An undertaking is strong and binds whoever makes it, and the message is clear: No one shall be allowed to enjoy the fruits of an order that has been annulled.***

For further information on this topic please contact Dr. Pavlos Neofytou Kourtellos at P. N. KOURTELLOS & ASSOCIATES LLC, by telephone: +357 25 745575 or by fax: +357 25 755525 or by e-mail: [pnk@kourtelaw.com](mailto:pnk@kourtelaw.com)

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