Judicial Secrecy and Suspension of Adversarial Proceedings:

Super Injunctions, Sealing and Gagging as Effective Tools in Asset Tracing and Recovery

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Fraud is a scourge the world over. More than ever, fraudsters use highly complex and sophisticated schemes to deceive victims and deprive them of enormous value annually. Therefore, when designing a plan to assist victims seeking to locate and recover assets that have been misappropriated, one has to choose and strategically employ tools that are effective. Such tools are taken from the full range of the court's powers to uphold justice and to be effective, such as freezing orders, Mareva injunctions, search and seizure orders, Anton Piller orders, interrogatories, requests for judicial assistance, letters rogatory, and the use of treaties and agreements such as mutual legal assistance treaties.

Judicial secrecy is a tool the Court employs when receiving an application for Norwich Pharmacal/Bankers Trust relief ("Norwich relief"), and for the duration of such relief. It is fundamental to avoid tipping off the fraudster. How does the Court reconcile secrecy with the general principle of open justice?

Also, more is involved than the suspension of adversarial proceedings. Indeed, the initial application may be ex parte, and is a suspension in that sense. But, typically, the application may consist of three phases. While the initial phase is non adversarial, subsequent phases are not. Firstly, without notice to the respondent, the applicant applies to seal or close the record ("sealing") and to prevent the respondent from disclosing the existence of the proceedings with any persons other than his legal advisors, who are also bound by the non-disclosure order ("gagging"). Secondly, with notice to the respondent, the applicant applies for a document disclosure order in respect of the respondent and named companies and individuals (Norwich relief). Thirdly, again with notice to the respondent, the applicant may apply for a Mareva injunction to prevent the respondent from transferring or diverting any funds held on behalf of the fraudster. This article focuses on the first phase, namely the nature and effectiveness of sealing and gagging relief. It does soprimarily from a common law perspective, but also from a civil law perspective.

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Sealing and Gagging Relief

Sealing and gagging relief has three primary characteristics:

(1) Sealing. The Court's file in a particular matter is sealed i.e. persons not involved in the action before the Court are not allowed to view the file and its contents;

(2) Gagging. All persons aware of the proceedings are prevented from disclosing the existence or subject matter of the proceedings or the contents of the Court's file to anyone except insofar as may be necessary to seek the advice of counsel who will be similarly restrained; and

(3)Closed hearings. As a part of the sealing of the proceedings, the hearings are held in camera and not in open court, they are not published.

The importance and significance of sealing and gagging relief to litigants involved with asset recovery cannot be overstated. It is particularly useful in areas where secrecy, privacy and confidentiality are essential including international fraud, white collar crime, breaches of trust and fiduciary duties, tracing and recovery.

In practice an application for sealing and gagging relief is usually made as a precursor to or in conjunction with seeking other relief such as a Banker's Trust and Norwich Pharmacal disclosure orders, or perhaps a Mareva Injunction. When examined within this context the rationale for seeking sealing and gagging relief becomes clear. Firstly, the objective should be to have the Court's file sealed and prevent persons from disclosing the facts or nature of the proceedings. This is particularly the case when dealing with sophisticated fraudsters capable of moving assets almost instantaneously upon hearing of the proceedings. Once the sealing and gagging relief is in place, then applicants may be proceed to obtain the appropriate Banker's Trust/ Norwich Pharmacal relief to gather the requisite information on the wrongdoing at hand and the persons involved. Finally, depending on the results of disclosure, applicants may proceed to obtain Mareva relief to freeze the assets of fraud and the requisite bank accounts at hand so as to prevent the transfer of assets out of the jurisdiction in question.

Making the Application

Based on the foregoing, sealing and gagging relief can be a very significant part of your litigation efforts. However, making the application can become very complex particularly when made in the context of seeking other forms of relief conducive to asset recovery. Therefore, a Counsel that is expert in the field and familiar with making such applications before the Court should be consulted to guide one through the process. As a matter of Bahamian practice the application for sealing and gagging relief is typically made in following manner:

It is brought by Ex-Parte Summons;

Supported by Affidavit with full and frank disclosure; and

Backed by Skeleton Arguments.

Super-Injunctions

Super-injunctions are understood as interim non-disclosure orders containing a prohibition on reporting the fact of proceedings pursuant to the Practice Guidance issued by Lord Neuberger (M.R.) on 1st August 2011 entitled "Interim Non-Disclosure Orders". The principles in the Practice Guidance are set out in brief below.

It was indicated that interim non-disclosure orders in civil proceedings to restrain the publication of information could be founded on:

1. Rights guaranteed by the European Convention on Human Rights 1950;
2. Grounds of privacy;
3. Grounds of confidentiality;
4. Threatened contempts of Court;
5. Threatened libel or malicious falsehood;
6. Harassment; or
7. Norwich Pharmacal applications.

It was noted that all such orders would reduce the exercise of Article 10 of the European Convention on Human Rights, the right of freedom of expression, through prohibiting the disclosure of information.

However, the Practice Guidance made clear that open justice was a fundamental principle and that the general rule was that hearings judgments and orders were public and this applied to applications for interim non-disclosure orders/super-injunctions as well.

It was stressed that derogations from the general principle could only be justified in exceptional circumstances, when they were strictly necessary as measures to secure the proper administration of justice. No general exception to open justice existed when privacy or confidentiality issues arose. It would only be in the rarest cases that a super-injunction, would be justified where strictly necessary such as anti-tipping-off matters and where secrecy in the short term was required to ensure that the applicant could notify the respondent that the order was made. Only in truly exceptional circumstances could such orders for longer periods be granted and interim non-disclosure orders could not be granted based on the consent of the parties.

Anonymity will only be granted where it is strictly necessary, and then only to that extent. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence.

When considering any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of Article 8 of the

Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their Article 8 Convention right is entitled.

On the heels of the Practice Guidance came the decision of **Hutcheson v Popdog Ltd [2011] EWCA Civ 1580.** In this case, Eady J at first instance granted an interim injunction against publication of information regarding an ongoing dispute between Mr. Hutcheson and Pop dog Ltd. However, the injunction he granted did not bind third parties such as News Group Newspapers Ltd ("**NGN**") from publishing information about the case, because NGN's Article 10 freedom of expression rights trumped Mr. Hutcheson's Article 8 right to private and family life.

The matter was appealed by Mr. Hutcheson to Court of Appeal. Lord Neuberger MR ultimately refused to grant the appeal on the basis that the issues raised were merely academic considering the Court of Appeal agreed that in the instant case the Article 10 right did trump the Article 8 right. However, the Master of the Rolls highlighted the significance of the Practice Guidance at paragraph 18 of his judgment emphasizing that notwithstanding that an interim injunction was in place, affected persons not party to the proceedings should be informed of the developments in the case. He stated:

> "I have in mind especially para 36 of the Practice Guidance, which requires a party, who has an interim injunction restraining publication of information, to keep any affected non-party informed of developments in the case, and paras 37-41, which require active case management of such a case."

Post the Practice Guidance and the decision in **Hutcheson v Pop dog Ltd** we can see the reluctance of the Courts to willingly derogate from the general principle of open justice.

AVB V TDD 2013 EWHC 1705 (QB) was an action involving an elderly solicitor and a younger woman with whom he had a relationship. In this case, Mr. Justice Tugendhat granted a non-disclosure injunction to restrain the publication of information concerning their relationship and communications about family members alleged to be private and confidential, and information that might identify the parties to the proceedings.

The Judge anonymised the parties to the proceedings as he decided that doing so was in the interest of justice, under Civil Procedure Rule 39.2 which provides for a hearing or parts of hearing to be held in private if considered necessary in the interest of justice.

Under the same rule he also ordered that:

1. No copies of confidential statements and the applications should be provided to non-parties without further order of the court; and
2. The hearing papers should be protected.

However, the Judge clearly noted that since the Practice Guidance and the decision in **Hutcheson v Popdog Ltd** the Courts have declined to make interim non-disclosure

orders unless they provide for case management which will bring the matter to trial or other final determination by agreement.

In **Global Torch Limited v Apex Global Management Limited & others 2013 EWCA Civ 819**, a company was incorporated on 23rd October 2009 under the English Companies Act 2006 as a private company limited by shares. The principal shareholders in the Company at the time of its incorporation, and since were Global Torch and Apex Global Management. The relationship between the principal shareholders went south and a number of allegations of misconduct and criminality were made against each party. Application was made to have the proceedings heard in private. On appeal, the Practice Guidance was highlighted and Lord Justice Maurice Kay reasoned at paragraph 14 that the following principles in light of the Practice Guidance were applicable:

> "When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights as well as the general public interest in open justice and in public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of Article 8 of the Convention (right to respect for private and family life), where that is engaged), is not undermined by the way in which the court has processed an interim-application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their Article 8 convention right is entitled."

He held at paragraph 34:

> "I can see no warrant for a general lowering of the bar. Outside the area of statutory or other established exceptions, the open justice principle has universal application except where it is strictly necessary to depart from it in the interests of justice. If application for the departure is made it will fall to be decided by reference to the principles which I have been considering whether the proceedings are at an interim or final stage."

Given the Court's move to prioritize the general principle of open justice, and derogations therefrom being strictly necessary and available only in exceptional cases, the Courts appear to be greatly limiting the availability of Gag and Seal orders for potential litigants.

Common Law Principles In General

The Court has power to grant orders sealing its file and restraining all persons disclosing or communicating the details and subject matter of proceedings brought before it pursuant to its inherent powers to make any order necessary to enable it to act effectively.

This applies even in matters regulated by Acts of Parliament or rules of Court, so long as the order does not contravene Acts or rules.

In R v Connelly [1964] AC 1254 Lord Morris of Borth-y-Gest at page 1301 explained:

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

Additionally, the issue of the Court's jurisdiction to anonymise and restrict publication of its proceedings was considered by the House of Lords in **Scott (otherwise Morgan) and Another v Scott [1913] AC 417**. Here, on page 437 Viscount Haldane, Lord Chancellor stated:

> "While the broad principle is that the Court of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions such as those to which I have referred. But the exceptions, are themselves the outcome of yet a more fundamental principle that the chief object of the Courts of Justice must be to secure that justice is done.
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> He continued:
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> The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only a means to an end must accordingly yield."

From the above passages we can discern the Lord Chancellor enunciating that the general rule as to open justice should yield to the necessity of litigating in private where securing justice required doing so.

The decision in **Scott (otherwise Morgan) and Another v Scott** should be seen as setting down a general underlying principle according to**Re Shuldham [2012] EWHC 1420 (Ch)** per Floyd J at paragraphs 7-9 where Floyd J explained:

> "In approaching any request by a party to litigation for the proceedings to be held in private or anonymised, it is helpful to have in mind what Viscount Haldane said in **Scott v Scott [1913] AC 417** as being the general underlying principle**"**

In **Republic of Haiti and Others v. Duvalier and others [1989] 1 All E.R. 456**, recognition was given by the Court of Appeal at page 460 with respect to the English practice regarding Mareva Orders with ancillary orders attached. It can be seen from the case that it would be quite typical for such orders to be made, in the absence of defendants and that such orders should not be communicated to the defendants until after their solicitors had complied with the part of the order relating to disclosure of information.

In the Bahamian case **of Bank of Nova Scotia Trust Co. v Barletta [1998] BHS J. No. 150, 1995 No. 858**under an Agreement the first and second Defendants in this matter

agreed to execute whatever documents were necessary to give a Usufruct (right to use for life) to the daughter-in-law of the first Defendant over two of three properties in the Dominican Republic and to transfer ownership of the properties in the following manner: one to the second Plaintiff, one to the third Plaintiff, and the other to the second and third Plaintiffs in equal shares. All this was said to be in consideration of the first Plaintiff, the Bank of Nova Scotia Trust Company (Bahamas) Limited establishing two Appointments in the names of the first and second Defendants in the amount of $8,750,000.00 each.

In this action the Plaintiffs contended that the first and second Defendants were in breach of the above mentioned Agreement and sought various forms of relief from the court. The Court held that based on comity the proper forum for the proceedings was the Dominican Republic and as such Davis J at paragraph 103 held that "comity requires that this court should stay its hand in this matter and allow the proceedings in the Dominican Republic courts to take their course. It would be injudicious to do otherwise."

During the course of the litigation an Interim Order had been obtained prohibiting publication relating to the proceedings. In light of the ruling by Davis J the issue arose as to whether the court's file should continue to be sealed as this may affect the availability of evidence for use in the proceedings in the Dominican Republic. Based on the circumstances before it, the Court held at paragraph 120that the Interim Order prohibiting publication should be revoked. However, the court went on to add, recognized and was satisfied that there lies in the Court, power in appropriate cases to restrict publication of a report of court proceedings but this power should be used in sparingly and in exceptional circumstances.

A constellation of dozens of gag and seal orders were obtained in unraveling the Tradex Ponzi scam. For example, in the case of **Marcus A. Wide v First Caribbean International Bank 2005/Com/bnk 21 (unreported)**bank records associated with Arthur Ferdig were obtained. Marcus A. Wide, Liquidator of Tradex Ltd (In liquidation) had instituted proceedings relative to that liquidation in an attempt to recover assets of the company which had been concealed away in various countries across the globe. Our firm represented the Liquidator. The investigation of the affairs of Tradex Ltd was massive, required an advanced global search and the coordination of the proceedings in The Bahamas with other jurisdictions.

The investigations would have been jeopardized had their facts, results and the proceedings been disclosed. As such our firm obtained a constellation of gag and seal and disclosure orders at various stages of the proceedings to ensure that the investigations of the liquidator were effective. Such orders included:

1. An Order filed 5th April 2005 that the Court's file and record be sealed and all parties were prevented from disclosing either the fact of the application or content of the pleadings save and except, as was necessary for parties to seek advice from legal counsel;

2. An Order 1 September 2005 that the Court's file remained sealed and all persons having notice of the proceedings be restrained from disclosing information relative to the same save as necessary to seek advice from legal counsel;

3. An Order filed 10th May 2006 extending the previous orders;

4. And other orders restraining specific persons from disclosing information relative to the proceedings save as necessary to seek advice from legal counsel.

In this same matter the court exercised its discretion to issue a Norwich Pharmacal/Bankers Trust Order against third parties and then restrain those third parties from disclosing or communicating the fact of those proceedings on an ex-parte application.

English case law, though not strictly binding on Bahamian Courts is nonetheless of persuasive authority. As such the above cases concerning interim non-disclosure orders/super injunctions will most likely inform the Bahamian Court's decision making process in this area as well.

Civil Law Approach

In general civil law jurisdictions do not make explicit provision for the types of relief contemplated under Bankers Trust, Norwich Pharmacal, or Mareva Orders. As such sealing and gagging relief relative to the pursuit of such orders is typically not an option readily available to litigants.

However, a shift may be taking place within the context of EU law within the sphere of the enforcement of intellectual property rights pursuant to Article 9 of E.U. Directive 2004/48/EC. In this context, based on the wording of Article 9 paragraph 2 it would appear that provision has been made for the type of relief that common lawyers would compare to Bankers Trust, Norwich Pharamacal and Mareva type relief. Article 9 paragraph 2 states:

> "In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer***, including the blocking of his bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information***."[Our emphasis]

Given the wording of the Article, it appears that the explicit development of sealing and gagging relief as a further support for the relief contemplated under the Article could become realized.

Conclusion

In asset tracing and recovery proceedings, many tools are used. Strategic use of the rules of court is required. Tools range from freezing orders, Mareva injunctions, search and seizure orders, Anton Piller orders, interrogatories, requests for judicial assistance, letters rogatory, to the use of treaties and agreements such as mutual legal assistance treaties.

The super injunctions an important tool. As indicated above sealing and gagging relief is an essential aspect of a litigant's asset tracing and recovery arsenal and when used properly can

reap great rewards and benefits. On the advice of counsel, such a tool can often be vital in recovering the proceeds of fraud.