“Gagging orders”: an office holder’s secret weapon

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Key points

- Interim non-disclosure orders are court orders prohibiting anyone with awareness of a particular matter from relaying information about it to other parties, usually with the exception of their lawyers. The knowledge could be regarding sealed court proceedings or it could be knowledge of an order compelling the disclosure of confidential documents.
- These so-called ‘gagging orders’ can be an essential tool to office holders in unravelling fraud or other wrongdoing and can supplement the powers available under ss 235 and 236 of the Insolvency Act 1986.
- The court will conduct a balancing exercise before granting such an order and the applicant must be able to demonstrate why the order is appropriate taking into account established criteria.

Introduction

Practitioners are fully aware of the extensive powers available under ss 235 and 236 of the Insolvency Act 1986 (**IA 1986**) allowing administrators and liquidators as office holders (**OHs**) to require individuals and organisations to disgorge information. In their usual form court orders under these sections can require, respectively, directors and other parties to answer very searching questions and produce documents relevant to the business and affairs of the insolvent company beyond anything a party to litigation would be required to disclose. Often where OHs are chasing assets, particularly funds in bank accounts, their powers are enhanced even more by the court granting so-called “gagging orders”.

In the case of s 236, the OHs may suspect that funds are held by a bank belonging to the insolvent company and that if the account holder knew the OH had wind of this they would move the funds somewhere else. The court is therefore asked to add the gagging order to the list of directions it makes relating to the s236 disclosure. The person providing the information, ie the bank and its representatives, are ordered by the court not to disclose the existence of its order, nor anything relating to it including the information disclosed, to any other person. Most importantly, the holder of the account in which the funds are deposited is not informed. The OH is able then to obtain a freezing order over the funds and the account holder has no time to whisk them away before that happens. Hence gagging orders can be an essential tool in unravelling fraud or other wrongdoing.

Any comments or queries?

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What is a gagging order?
The colloquial "gagging order", more formally an interim non-disclosure order, is a court order prohibiting anyone with awareness of a particular matter from relaying information about it to other parties, usually with the exception of their lawyers. The knowledge could be regarding sealed court proceedings, for example, or it could be knowledge of an order compelling the disclosure of confidential documents.

"The gagging order allows the office holder effectively to work behind a veil of secrecy"

We now look at the basis in law, the circumstances and requirements for the OH to obtain these helpful orders.

Why would an insolvency practitioner apply for a gagging order?

The OH may be engaged in a struggle to obtain information to piece together a full picture of the insolvent company and its affairs, while directors, employees or third parties attempt to obscure and dissipate the company's assets. In these circumstances, the gagging order allows the OH effectively to work behind a veil of secrecy in order to trace assets and recover the assets before they can be further hidden or dissipated. The OH may seek to have a gagging order attached to other orders or procedures he seeks or puts in place. Their use by themselves is limited: you cannot use a gagging order by itself to trace assets, to seize assets or to compel third parties to deliver documents.

Examples

- A bank compelled to produce evidence to an OH might be gagged from revealing to a customer that their books have been examined and/or information concerning a suspect bank account is being provided.
- A director might be forbidden from reporting to other former board members that an examination under s 235 IA 1986 had taken place, or what the content of it was.
- An accountant might be barred from communicating with a client.
- In all cases the gagging order seeks to prevent information regarding an OH's state of knowledge and future intentions from being leaked to advance the cause of wrongdoers.

With what "primary" powers could a gagging order be used?

In conjunction with s 236 IA 1986

Section 236(2)(c) of the IA 1986 allows an OH to enforce responses to enquiries of a person who has the ability to give information on the insolvent company's dealings through the court. In practice, for example, OHs can use s 236 to summon the accountant of a director to give evidence as to where traceable assets might be found. Examinations under s 236 are held in private (*Bishopsgate Investment Management Ltd (in provisional liquidation) v Maxwell* [1993] Ch 1, [1992] 2 All ER 856) and risk being highly oppressive, as respondents are obliged to answer as to their dealings with the company and to produce any relevant documents, potentially also waiving their right to privilege against self-incrimination through having to reveal evidence of fiduciary wrongdoing (*Bishopsgate*). Indeed there is a counterintuitive incentive to a director who has committed criminal fraud to be as open as possible in a s 236 examination. Since examinations such as this are so oppressive, they are often inadmissible in any subsequent criminal proceedings (*Saunders v UK* [1996] ECHR 65).

Hearings under s 236 are private, but where there is a risk of the subject matter of the information disappearing (such as the bank account containing company assets described above) without a gagging order against the respondent the privacy can be of little use. The OH risks a situation whereby no sooner has he discovered an asset through a s 236 examination than it has again been moved. Courts have historically attached huge powers to s 236, and

its ancestral legislation, on the basis that the statutory purpose of the legislation is to enable OHs to place themselves in the same situation as the company would have been before insolvency rather than a better position (per Vice-Chancellor Lord Justice Nourse in *The Joint-Administrators of Cloverbay Ltd v Bank of Credit & Commerce International SA* [1991] Ch 90). As such, the OH needs to be able to convince the court that the gagging order would merely act to restore the status quo ante rather than sanctioning further powers which would have been unavailable to the company.

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In conjunction with *Norwich Pharmacal, Bankers Trust* or search orders

OHs can also pursue assets through other methods. Orders based on the authorities of *Norwich Pharmacal* [1974] AC 133 (obtainable against innocent parties "mixed up" in the wrongdoing of another) and *Bankers Trust* [1980] 1 WLR 1274 (obtainable against (usually) banks to support a proprietary claim to assets following fairly clear evidence of fraud) both oblige a respondent to provide information relating to a wrongdoer. In these circumstances, if the misfeasor were warned that their account was now known to the liquidator, he would no doubt take steps to move assets beyond the reach of creditors. For that reason *Bankers Trust* orders in particular often contain a gagging order preventing the respondent from alerting the ultimate wrongdoer.

A gagging order also allows an OH to gather information discreetly on a number of hidden assets simultaneously. Consequently they frequently accompany search and seizure orders (formerly known as "*Anton Piller*" orders) whereby an OH (through solicitors) will search private properties in order to find information to trace assets. So common are they in this context that the standard draft search order in the Civil Procedure Rules (25A PD) includes a gagging order at clause 20.

In conjunction with s 7 Bankers Books Act 1879

Section 7 of the Bankers Books Act 1879 (**BBA 1879**) allows any party who is subject to a legal proceeding to apply to the court to "inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings". Ultimately the effect of the order under s 7 BBA 1879 is likely to be very similar to that under s 236 IA 1986 (or a *Bankers Trust* order). Indeed, the effect might be less as a s7 BBA 1879 order requires only bankers' books to be disclosed whereas s 236 requires (and a *Bankers Trust* order may require) the production of "any document".

How can OHs apply for a gagging order?

Procedure

As with any court order, the OH must lodge with the court:

- an application notice
- evidence in support of the application, usually by way of witness statement
- the draft order sought – the gagging order is likely to take the form of a clause within the draft order rather than a requiring a separate application and/or order in its own right
- the appropriate fee.

The application notice and the supporting evidence will need to show why the principal order should be granted, that a gagging order is a necessary ancillary power for the order sought and why the court should overrule numerous presumptions of law in granting one. Such applications are typically made "without notice", ie unknown to the respondent, as a third party may tip-off a wrongdoer if given notice of an order, giving the wrongdoer sufficient time to disguise assets. In those circumstances, there is an onerous duty of full and frank disclosure on the OH. That duty requires the OH to make not only the case for the order he or she is seeking, but also to make all the points the respondent might make against the order.

Balancing analysis

Gagging orders remain relatively rare in English law for a number of reasons, discussed in more detail below. From a practical perspective, this means that any OH applying for a gagging order must be able to draft any order sought carefully with regard to the balancing exercise that the court will conduct and demonstrate why that order is appropriate.

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Presumption in favour of open justice

Firstly, gagging orders are anathema to the principle of open justice. There is a presumption in English law that hearings are to be heard in public (CPR r 39.2(1)); consequently, it falls on the OH to prove that the hearing, and subsequent order, should be made private (*Scott v Scott* [1913] AC 417). While the court is willing to hold hearings *in camera* it will usually only do so where the administration of justice would be rendered impracticable where the public is made aware of them. By way of example, there are a number of potential reasons listed in CPR 39.2, including "involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality".

However, it is not sufficient to demonstrate that the case falls within one of the exceptions; it is also necessary to demonstrate to the court that the case falls within the "exceptional" category of needing to be heard *in camera* and that it is "necessary and in the interests of justice to do so" (per Mr Justice Rimer in *Three Rivers District Council & Ors, Bank of Credit and Commerce International SA (In Liquidation) v The Governor and Company of the Bank of England* [2005] EWCA Civ 933). The court will give this close scrutiny: in *Re Premier Motor Auctions Leeds Ltd* [2015] EWHC 3568 (Ch) a request for a hearing to be heard in private was rejected on the grounds that the circumstances of the case were not exceptional enough to justify a derogation from the general principle of open justice.

In insolvency proceedings, if a director refuses to comply fully with the OH (as would be the case if an application is necessary), then there is a strong case that he would take action in future to frustrate any order and that therefore strong *prima facie* evidence in support of a gag exists. Similarly, if a third party against whom an information orders is sought would be professionally or contractually bound to inform a customer where they have had to disclose information, that would also provide evidence as to why a countervailing gagging order might be necessary.

Duration of the gagging order

Although a gagging order allows an OH some time to gather information before striking at assets it does not grant an eternity. In *G v Wikimedia Foundation* [2009] EWHC 3148 (QB), the court reemphasised the requirements that any gagging orders must have a "return date", a date by which the order will either be challenged or will lapse. While a shorter period is more likely to be granted, this can be a problematic issue in large multi-jurisdictional cases where multiple orders will be necessary to trace all the assets of the liquidated company.

Infringement of freedom of expression

Gagging orders can represent a great infringement upon the rights of respondents, effectively denying them freedom of expression in direct contravention of Art 10 of the European Convention on Human Rights (ECHR). This provides further pressure to keep any gagging order of limited duration.

Information still confidential?

Particularly in the era of instant social media and proliferation of instant information, gagging orders will not be granted in situations where they cannot be enforced. This is unlikely to be relevant where the information is sought from banks with their obligations of confidentiality to customers.

After the event

While a court may well be willing to assist an OH in tracing assets and making necessary gagging orders to achieve a particular purpose, a court is unlikely to permit a gagging order to continue after that purpose has been achieved. Usually this means that once judgment has been given in favour of the OH being able to recover the assets, the restrictions will be removed (by analogy *Three Rivers District Council & Ors, Bank of Credit and Commerce International SA (In Liquidation) v The Governor and Company of the Bank of England* [2005] EWCA Civ 933). This may be an issue if certain confidential information was used to obtain the order in the first place, as it would subsequently become public. Whistle-blowers, for example, while protected by statute, may nevertheless be unwilling to provide evidence of wrongdoing if they believe that there is even a slight risk that it will later be made public. In *Re Sahaviriya Steel Industries UK Ltd* [2015] EWHC 2726 (Ch) the court released a limited version of a final judgment in order both to preserve the commercial viability of an OH's plans and to comply with the demands for open justice. However, an OH should be cautious of releasing too much information in an application depending on the underlying nature of the order sought.

Worth the paper they are written on?

While gagging orders are a useful supplementary weapon to an OH there are situations where they would be inappropriate. The court will not grant a gagging order if it is unenforceable, for example where a proposed respondent is overseas in a jurisdiction without reciprocal enforcement arrangements. In other situations the information sought may already be in the public domain.

It is also worth considering the respondent to the order. Any major commercial bank is likely to be highly regulated and is therefore likely to obey any order given by the court. However, major banks are not the only potential respondents to a gagging order. The less regulated and accountable a respondent, inevitably the greater the risk that information could leak back to wrongdoers and that assets will yet again disappear.

In certain circumstances practitioners may prefer to look at other options for preventing a third party from disclosing an investigation into a potential wrongdoers accounts. If the wrongdoing could be considered a crime and the person handling the money has reasonable grounds for suspecting that it consequently constitutes criminal property, then a potential offence of money laundering may be being committed. Any person in the regulated sector has a duty to disclose this to the authorities under s 330 of the Proceeds of Crime Act 2002 (POCA 2002). Under s 333A POCA 2002 it is an offence for any person in the regulated sector to disclose the fact that they have made a report of suspected money laundering to the suspected money launderer.

Conclusion

In conjunction with other orders, gagging orders have the potential to be very useful in allowing an OH to trace assets without giving away their plans to wrongdoers.

However, an OH considering applying for such an order must be wary of the "double hurdle" in terms of what must be established both for the primary, substantive, order and for the gagging provision and keep in mind the factors that the court will consider before granting such an order.

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