

Bankers Trust orders: tracing misappropriated funds

April 2009

Bankers Trust orders enable defrauded parties to trace funds through bank accounts and thereby offer an effective way of policing freezing injunctions. However, they are not granted lightly. Richard Clark and Angela Taylor highlight some important issues to consider when applying for a Bankers Trust order.

A Bankers Trust order is a type of disclosure order which requires a bank to provide details ordinarily protected by the bank's duties of confidentiality. In *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 CA – the case from which the order derives – the order sought was disclosure of all relevant documents relating to the accounts of two fraudsters, including the balance of the accounts, cheques, debit vouchers and transfer applications. The order was granted on the basis that it gave effect to the right to trace which, without such disclosure, would have been impossible. It did not matter that the bank itself had not incurred any liability for the fraud.

In a clear case of fraud it should be relatively straightforward for the defrauded party to make out the relevant grounds for a Bankers Trust order. However, there are a number of practical issues to bear in mind when considering applying for such an order.

Requirements for a successful application

- **Compelling evidence of fraud:** in the *Bankers Trust* case, Waller LJ emphasised that orders of this sort should not be made lightly and that there must be very strong evidence of fraud. It is therefore important to adduce evidence of the defrauded party's funds being deposited in the relevant fraudster's bank accounts and any other third party bank account in respect of which disclosure is sought. Details of ongoing internal investigations should also be given (it is also important to establish whether a criminal investigation is under way and, if so, whether the police intend applying at the same time for equivalent injunctive and disclosure relief via the criminal courts).
- **The need for urgent action:** it is crucial to establish the immediate need to identify the whereabouts of the misappropriated monies or assets which represent them, the risks of dissipation and to demonstrate that the only way of tracing is for the court to make the order so that the movement of funds can be reconstructed as soon as possible.

- **Focused disclosure:** the court is likely to be more amenable to granting the order where the disclosure sought is focused in time and relates to specific bank accounts. It is therefore advisable to limit the disclosure sought, so far as possible, to the period of the fraud or to an otherwise reasonable date range and to give as much information on the individuals, companies and account(s) in question. This will obviously also assist in limiting costs incurred by banks in retrieving and disclosing information, the responsibility for which will rest with the applicant.
- **Notice:** it is important to give the bank(s) in question the opportunity to object to the application. Such applications create a tension between a bank's relationship with its customer and its duty to the court. However, in clear cases of fraud, banks tend to adopt a neutral position pending the outcome of the application.

Follow-up

The terms of the order sought will require the bank to respond *forthwith*, but the response rate of the bank will depend upon its internal systems and procedures. It is therefore important to ensure that the draft order and final sealed order are served as soon as possible on the correct department within the bank; once the order is with the relevant department, it may still take time for the bank to assimilate the relevant disclosures with the collection of copies of cheques possibly taking weeks or even months. It is also important for the applicant to liaise regularly with the bank to emphasise the urgency of providing the information and to monitor the costs it is incurring in complying with the order as the applicant will be liable for these.

Comment

Bankers Trust orders are a useful tool for tracing funds. They are granted rarely, but where a fraud is blatant they are relatively straightforward to obtain provided the requirements for relief are satisfied. Once obtained, it is then crucial not to lose sight of the time it will take for the bank to respond.

Key criteria for Bankers Trust relief

- The order should be granted only where there is good reason to believe that the property held by the bank required to give disclosure was the property of the claimant, and that the claimant has been fraudulently deprived of it.
- Delay might result in the dissipation of the funds before the action comes to trial.
- There must be a real prospect that the information sought might lead to the location or preservation of assets against which the claimant might make a proprietary claim.
- The documents produced by the bank should be used solely for the purpose of tracing the money, and not for any other purpose.
- The claimant should give an undertaking in damages.

This article was originally published in Butterworths Journal of International Banking and Financial Law in April 2009.

Richard Clark, Partner
Head of Dispute Resolution Group



Direct line: 020 7090 4044
Email: richard.clark@slaughterandmay.com

Angela Taylor, Associate
Dispute Resolution Group



Direct line: 020 7090 4041
Email: angela.taylor@slaughterandmay.com