4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Bank of Scotland v (1) A Ltd (2) Mr B (3) C Ltd & The Serious Fraud Office (Interested Party) (2000)

The Times 18 July 2000

26/06/2000

Court
Chancery Division

Facts
An applicant for an ex parte order had to make a full and frank disclosure. Sections 93A and 93D of the Criminal Justice Act 1988 could operate to put a bank in a difficult position and consequently the court set out a procedure to reduce the adverse impact of the money-laundering legislation in civil proceedings.

Defendants' application for an order that proceedings by the claimant bank be struck out or stayed and that an order made in private and in their absence in the Chancery Division, which froze certain bank accounts, be discharged. The first defendant ('the company') was a customer of the bank. The other defendants were associates of the company and passed to it substantial sums of money that were paid into accounts in the company's name with the bank. The bank became suspicious as to the substantial sums passing into the company's account. It suspected that those sums were part of a money laundering operation, or other serious crime, and was fearful that it might be held to be a constructive trustee of any monies passing through the account. It consulted the Serious Fraud Office (SFO), which revealed that it was investigating the company in relation to certain suspected financial frauds. In order to avoid any potential liability, the bank wished to stop the company from operating its accounts, but was concerned that in doing so it might be guilty of "tipping-off" the defendants that the company was the subject of a criminal investigation, contrary to s.93D Criminal Justice Act 1988. The bank applied without notice and in private to the Chancery Division (Ch.D) for directions. No evidence was put before the court, since the bank had none of its own (other than its suspicions) and the SFO had placed an embargo on the bank using any of the information that it had passed on. The judge of his own motion suggested that a freezing order would be the best way forward, which the bank accepted. An order was made freezing the company's accounts without any time-limit. The order also provided that the company was neither to see anything that the bank had put before the court, nor was it to be served with, or informed of the making of, the order. No notice of application was to be given, and no cross-undertaking in damages was offered or required. On learning that its accounts had been frozen, and after the bank had failed to respond to requests by the company for an explanation, the company applied to the Commercial Court. Part of that hearing had to be conducted in the absence of the company, because of the terms of the earlier order. The bank was ordered to pay over the monies in the accounts unless it applied again to the Ch.D. By now the company suspected that the bank was concerned as to the effect of s.93D of the Act, hence

appreciated that it was probably the subject of a serious criminal investigation. On a further private application by the bank to the Ch.D, at which the SFO made representations, the freezing order was modified so as to bring all proceedings into the Ch.D and permit the bank to inform the company of the proceedings and the freezing order. Some six months after the freezing order was first made, and in light of the bank's acceptance that there was no basis for suspecting any of the defendants of any criminal activity, the defendants applied for the relief set out above and for their costs.

Held

HELD: (1) Not one of the safeguards ordinarily included in a freezing order had been expressly included. The duty to ensure inclusion of such safeguards lay primarily with the bank, notwithstanding that it had not initially sought such an order. No regard at all had been paid to the legitimate interests of the defendants, nor to the possibility, now demonstrated to be a fact, that they might be shown to have done nothing wrong. (2) A fundamental reason why the order should never have been granted was that no evidence had been put before the court that could justify the making of the order: the only material before the court was a three-page skeleton argument, on the basis of which it was impossible for the court to evaluate fairly or at all the bank's and the company's respective positions. If the bank was prepared to accept the SFO's embargo on information being put even before the judge, then it, and not the defendants, had to live with the consequences of that acceptance. This defect was not remedied by the subsequent variation of the order. (3) Absent evidence of actual or suspected wrongdoing, it was difficult to see how the bank could possibly have been faced with the risk of being held constructive trustee. (4) Equally fundamentally, it was wholly wrong that the company should have been kept in the dark both about the fact that the order had been made and the material that had been used to obtain it. There could be no justification for denying the defendants the materials with which to mount a challenge to the order after it had been executed. (5) The order made was pointless. The very secrecy with which the entire procedure was cloaked only served to make clear to the defendants the bank's fear, namely a breach of s.93D of the Act. (6) Although the bank had expressly refrained from giving a cross-undertaking in damages, one would be implied in any event. The court would direct an inquiry as to whether the bank should be called upon to honour that undertaking by paying the defendants' costs of the various proceedings. (7) Guidance was given as to what financial institutions should do in the future when faced with similar suspicions.

Order accordingly.

Permission