

This is the ‘super-injunction’ which Trafigura and Carter-Ruck used to gag the *Guardian* (and “persons unknown”) on September 11. It was granted in private by Mr Justice Maddison, who was until last year a crown court judge in Manchester. It is being published for the first time in order to allow a wider public to see how these gagging orders are constructed and shielded from public view.

BEFORE THE HONOURABLE MR JUSTICE MADDISON (IN PRIVATE)
FRIDAY 11th SEPTEMBER 2009

BETWEEN :



(1) RJW
(2) SJW

Applicants/Intended Claimants

- and -

(1) GUARDIAN NEWS AND MEDIA LIMITED
(2) THE PERSON OR PERSONS UNKNOWN

who in or about September 2009 offered or supplied to the publishers of *The Guardian* and/or to David Leigh a copy of, or information contained in or derived from, the document described in the Confidential Schedule C to this Order relating to the operations or affairs of the First Applicant and/or the Second Applicant

Respondents/Intended Defendants

ORDER

(1) RJW (2) SJW

Note that the order does not mention the name of Trafigura. The document has been "anonymised" – using initials apparently plucked at random – so that no one can tell who is bringing the action. The claimants are listed as "RJW and SJW" rather than Trafigura. No one searching any court list could ever guess that this was a large trading company going to court. The second defendants are listed as "persons unknown" because Carter-Ruck doesn't know who leaked the Minton Report to the Guardian. Whoever they are, they are covered, too.

PENAL NOTICE

The order begins by warning of the possible penalties for infringing the breach of a court order. When Carter-Ruck warned that the Guardian would be in contempt of court if they published the parliamentary question by Paul Farrelly, they knew of the possible penalties for disobedience: directors of the Guardian could be imprisoned or fined – and the assets of the newspaper seized. There is no specific defence to this kind of contempt of court.

PENAL NOTICE

IF YOU THE RESPONDENTS DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOU AND/OR YOUR DIRECTORS MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED

ANY PERSON WHO KNOWS OF THIS ORDER AND DISOBEYS THIS ORDER OR DOES ANYTHING WHICH HELPS OR PERMITS ANY PERSON TO WHOM THIS ORDER APPLIES TO BREACH THE TERMS OF THIS ORDER MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED

NOTICE TO ANYONE NOTIFIED OF THIS ORDER

You should read the terms of the Order and the Guidance Notes very carefully. You are advised to consult a Solicitor as soon as possible. This Order prohibits you from doing the acts set out in Paragraphs 7 and 8 of the Order and obliges you to do the acts set out in Paragraph 9 of the Order. You have the right to ask the Court to vary or discharge the Order. If you disobey this Order you may be found guilty of Contempt of Court and you may be sent to prison or fined or your assets may be seized.
UPON HEARING LEADING COUNSEL FOR THE CLAIMANTS AND THE FIRST DEFENDANT

A The Guardian agrees not to publish any part of the Minton Report, or cause or authorise anyone else to do so. The order envisages that there will be a further hearing on 18 September.

B The newspaper has to keep any copies of the document it may have. This can be significant if the claimants want to try and have the document returned or if, for instance, they want to see if they can identify the source who leaked it.

AND UPON THE FIRST RESPONDENT/DEFENDANT UNDERTAKING THAT:

A. Until the 18 September 2009 or other order, the First Respondent will not use and will not publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings for the purpose of obtaining legal advice in relation to these proceedings (ii) otherwise for the purpose of these proceedings or (iii) for the purpose of carrying this Order into effect):

(a) all or any part of the document(s) described in Schedule C at the end of this Order or any of them ("the Documents") or any information or purported information derived solely from any of the Documents; and

must not cause or authorise any other person, firm or company to do any of those acts.

B. Until the 18 September 2009 or other order, the First Respondent will preserve all and any copies of the document described in Schedule C (if any) which are in their possession, power, custody or control.

THE COURT ORDERED AS FOLLOWS

1. This is an Injunction with other orders as set out below made against the Intended Defendants ('the Respondents') on 11 September 2009 by the Judge identified above ('the Judge') on the application ('the Application') of the Intended Claimants ('the Applicants').
2. The Judge:
 - (a) read the documents listed in Schedule A at the end of this Order;
 - (b) was given further information orally by Leading Counsel on behalf of the Applicants;
 - (c) heard the Application in private pursuant to the Civil Procedure Rules 1998 ("the CPR"), Rule 39.2(3)(a), (c) and (g);
 - (d) accepted the undertakings set out in Schedule B at the end of this Order; and
 - (e) considered the provisions of section 12 of the Human Rights Act 1998.
3. This Order was made at a hearing without notice or notice to the Respondents. The Respondents (and anyone served with or notified of this Order) have a right to apply to the Court to vary or discharge the Order (or so much of it as affects them): see paragraph 14 below.
4. If there is more than one Respondent:
 - (a) unless otherwise stated, references in this Order to 'the Respondent' mean both or all of them; and
 - (b) this Order is effective against any Respondent on whom it is served or who is given notice of it.

ANONYMITY OF THE APPLICANT

5a Here the judge worries about the possibility that publicity about the injunction could "unfairly ... damage the interests of" Trafigura. He therefore orders that the court hearing must remain a secret: no one is allowed to describe it, or the claim.

5b The judge orders the "alphabet soup" approach to naming the case. No one will be able to see Trafigura has been to court.

5c Just in case there's any doubt about the total secrecy of the proceedings, there can be no reference to any "persons or places" related to the case.

6 All the papers relating to the case will be sealed. That means no one (snooping journalists or MPs, for instance) can inspect any of the witness statements or any other papers to do with the case.

7 Having effectively pronounced an injunction on the injunction and put a wall of secrecy around the whole affair, we move on to the injunction itself. It says that everything about the Minton Report is secret and nothing about it can be published by the Guardian.

5. UPON it appearing to the Court (i) that the action is one likely to attract publicity, (ii) that publicity revealing the identity of the Applicants is likely unfairly to damage the interests of the Applicants, and (iii) that accordingly publication of details revealing the Applicant's identity ought to be prohibited AND pursuant to the Contempt of Court Act 1981, section 11, the CPR Rules 5.4 and 39.2(4), and the inherent jurisdiction of the Court until the 18 September 2009 or other order:

- (a) The application hearing to which this Order relates was held in private and the publication of all information relating to these proceedings or of information describing them or the intended claim is expressly prohibited.
- (b) There be substituted for all purposes in this action in place of references to the Applicants by name, and whether orally or in writing, references to the letters 'RJW' and 'SJW'.
- (c) To the extent necessary to conceal the identity of the Applicants, any other references, whether to persons or to places or otherwise, be adjusted appropriately, with leave to the parties to apply in default of agreement as to the manner of such adjustment.

ACCESS TO DOCUMENTS ON COURT FILE

6. Pursuant to CPR 5.4(7) the court file will be sealed and no copies of the court file including (without limitation) (i) witness statements, (ii) the Claim Form, (iii) statements of case, (iv) applications will be provided to a non party without further order from the Court. Any non party seeking access to or copies of the above-mentioned document from the court file must make an application to the Court proper notice of which must be given to the Applicants' solicitors.

INJUNCTION

7. A. Until after the trial of this claim or further Order of the Court in the meantime, the Second Respondent must not use and must not publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings for the purpose of obtaining legal advice in relation to these proceedings (ii) otherwise for the purpose of these proceedings or (iii) for the purpose of carrying this Order into effect):

- (a) all or any part of the document(s) described in Schedule C at the end of this Order or any of them ("the Documents") or any information or purported information derived solely from any of the Documents; and
- (b) (save for the purpose of carrying this Order into effect) (i) the information that the Applicants have obtained an injunction and/or (ii) the existence of these proceedings and/or (iii) the Applicants' interest in these proceedings; and

must not cause or authorise any other person, firm or company to do any of those acts.

B. Until the 18 September 2009 or other order, the First Respondent must not use and must not publish or communicate or disclose to any other person (other than (i) by

way of disclosure to legal advisers instructed in relation to these proceedings for the purpose of obtaining legal advice in relation to these proceedings (ii) otherwise for the purpose of these proceedings or (iii) for the purpose of carrying this Order into effect: (i) the information that the Applicants have obtained an injunction and/or (ii) the existence of these proceedings and/or (iii) the Applicants' interest in these proceedings; and must not cause or authorise any other person, firm or company to do any of those acts.

8. The Second Respondent must within 48 hours of the service of this Order upon the Second Respondent deliver up or cause to be delivered up to the Applicants' solicitors to be held by them to the Order of the Court any and all documents or other material falling within Schedule C, however stored (electronic, paper or otherwise) that are in its possession, control or power and must, in the meantime, preserve the same and not part with possession or control or power over the same.
9. The Second Respondent must within 48 hours of the service of this Order upon the Second Respondent make and serve on the Applicants' solicitors a statement (a) verifying that it has complied with paragraph 8 above and (b) stating what has become of all and any of the documents or other material referred to above which was once but is no longer in its possession, control or power.

10 More blood-curdling clauses about the secrecy of the proceedings. The Guardian must not publish any papers, documents, witness statements or letters to do with the case.

PROTECTION OF HEARING PAPERS

10. The Respondent must not publish or communicate or disclose or copy or cause to be published or communicated or disclosed or copied (i) the documents listed in Schedule A at the end of this Order (ii) any witness statements and any exhibits thereto that were made or that may subsequently be made in support of the Application (iii) the Applicants' solicitors' notes of or any transcript of the hearing of the Application; and (iv) any Skeleton Argument(s) prepared or that may be subsequently be prepared on behalf of the Applicant in support of the Application ('the Hearing Papers') PROVIDED THAT:
 - (a) the Respondent shall be permitted to disclose and deliver to Counsel and solicitors instructed in relation to these proceedings ('the Respondent's legal advisers') for the purpose of these proceedings copies of the Hearing Papers; and
 - (b) the Respondent's legal advisers shall be permitted to disclose any information contained in the Hearing Papers to third parties to such extent as the Respondent's legal advisers consider necessary for the conduct of these proceedings and, in particular, preparation of evidence in respect thereof PROVIDED THAT the Respondent's legal advisers shall first inform any such third party of the terms of this Order and so far as practicable obtain their written confirmation that they understand that they are bound by the same.
11. The Hearing Papers must be preserved in a secure place by the Respondent's legal advisers on the Respondent's behalf in order to ensure that the Respondent shall be in a position to comply with any Order the Court may subsequently make in relation to them.

PROVISION OF DOCUMENTS AND INFORMATION TO THIRD PARTIES

12 The order specifically disappplies the usual rule which provides that, where a third party who did not attend the hearing is served with the order, it is entitled to ask to see the materials presented to the judge. This disapplication is another common feature of these sort of super-injunctions.

13 Costs. The order makes no specific order about costs at this stage - this is because the judge is not able at this point to decide where the overall merits of the case lie. The Guardian agreed to pay some of the costs of this action - this was because the judge found that the Minton report was, indeed, a confidential document on account of the legal privilege attached to it. He said on the basis of the evidence he had been shown at this time there was no public interest in publishing it. Other issues, to do with whether the document was effectively in the public domain already; whether the whole proceedings should be secret and anonymous; and to do with parliamentary reporting of the injunction, were either never fully argued over or never argued at all because the parties had not yet returned to court. The Guardian paid only a fraction of the costs it believed Carter-Ruck would have demanded, or would have incurred.

18 The order was directed at the Guardian. But this clause warns that anyone who was aware of it and knowingly breached it would also be in contempt of court and could be locked up or have their assets seized.

12. Notwithstanding the provisions of paragraph 9 of the Practice Direction to CPR 25, the Applicant is not required to provide to anyone served with a copy of this Order on request (a) a copy of any materials read by the Judge, including material prepared after the hearing at the direction of the Judge or in compliance with the Order; and/or (b) a note of the hearing PROVIDED THAT any such third party shall be at liberty to apply to the Court for such materials and/or such a note to be provided to them or to their legal advisers.

COSTS

13. The costs of and occasioned by the Application are reserved.

VARIATION OR DISCHARGE OF THIS ORDER

14. The Respondent and anyone served with or notified of this Order may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but before so doing they must first give Applicants' solicitors no less than 48 hours notice in writing. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicants' solicitors in advance.

15. The Respondent/anyone notified of this Order may agree with the Applicants' solicitors that this Order should be varied or discharged, but any agreement must be in writing.

INTERPRETATION OF THIS ORDER

16. A Respondent who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

17. A Respondent which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

PARTIES OTHER THAN THE APPLICANT AND THE RESPONDENT

18. **Effect of this order**

It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned, fined or have their assets seized.

NAME AND ADDRESS OF THE APPLICANT'S LEGAL REPRESENTATIVES

19. The Applicants' solicitors are Carter-Ruck, 6 St Andrew Street, London EC4A 3AE
Telephone numbers during office hours 0207 353 5005
Telephone numbers out of office hours 07966 150963

COMMUNICATIONS WITH THE COURT

20. All communications to the court about this order should be sent to:

Room WG08, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number.
The telephone number is 020 7947 6010.

The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday.

DIRECTIONS FOR THE HEARING ON 18 SEPTEMBER

21. The First Respondent shall serve any evidence on which it intends to rely by 4.00pm by Monday 14 September 2009.
22. The First Respondent shall serve its Skeleton Argument for the hearing by 1.00pm on Tuesday 15 September 2009.
23. The Claimants shall serve any evidence and Skeleton Argument in response to that served by the First Respondent by 4.00pm on 16 September 2009.
24. There be a hearing on 18 September 2009, time estimate 1 day.

SCHEDULE A

DOCUMENTS

The Applicants relied on the following documents:

The Witness Statement of Adam James Tudor dated 11 September 2009 together with exhibits thereto.

SCHEDULE B

UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANTS

- (1) If the Court later finds that this Order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicants will comply with any order the Court may make.
- (2) If the Court later finds that this Order has caused loss to any person or company (other than the Respondent) to whom the Applicants has given notice of this Order, and decides that such person should be compensated for that loss, the Applicant will comply with any Order the Court may make.
- (3) As soon as practicable the Applicants will (a) issue a Claim Form claiming the appropriate relief and (b) cause a witness statement or witness statements to be made and filed confirming the substance of what was said to the Court by the Applicants' Counsel and exhibiting a Note of the Hearing.
- (4) The Applicants will as soon as practicable serve on the Respondent (a) this Order (b) the Claim Form and (c) copies of the witness statement(s) containing the evidence relied upon by the Applicants.
- (5) Anyone notified of this Order with the intention of binding them will on request be given a copy of it by the Applicants' legal advisers.

(6) If this Order ceases to have effect, the Applicants will immediately take all reasonable steps to inform in writing anyone to whom the Applicants has given notice of this Order, or who the Applicants has reasonable grounds for supposing may act upon this Order, that it has ceased to have effect.

SCHEDULE C

The contents of the report (in the form of a letter) of 14 September 2006 by Minton Treharne & Davies to Messrs Waterson Hicks entitled "RE: Caustic Tank Washings, Abidjan, Ivory Coast."