

## Tricky 3rd Parties

*What pressure can you apply to a difficult business partner or trustee (who is outside the marriage and resistant to providing disclosure) when valuing a company or trust?*

### 1. Understand the context

- Why is the third party being tricky? Do they not want to assist (if not, why not) or are they more concerned about the consequences if they do?
- What is behind any obstructive behaviour – legal/professional duties, fear or litigation reprisal (eg claims for breach of confidence)?
- What is the quality of the connection between the third party and the spouse in question?
- Understand history between the spouse and the third party – it is surprising how often relationships founded on years of harmonious co-operation can disintegrate spontaneously on the issue of a divorce petition.

### 2. Consider the following, insofar as they may permit or hamper co-operation on the part of the third party:

- Fiduciary duties (on the part of trustees – nb the additional regulatory requirements on the part of offshore professional trustees)
- Fiduciary duties (on the part of company officers/directors)

- Fiduciary duties (on the part of partners)
- Cost and proportionality?
- Litigation risk.

### 3. Understand the strategy – theirs and yours!

- Give clear thought to what you want to achieve and why, and what is the best way of achieving it
- Give clear thought to what the other side are trying to achieve

### 4. Substantive and procedural remedies

- Be clear in your own mind as to where pressure is best applied – directly against the relevant third party, or as against the spouse
- Understand the scope of third party inspection orders, issuing witness summonses/subpoenas, letters of request and so forth
- Understand what can be sought at a multi-jurisdiction level
- Consider substantive remedies as well as procedural ones
- Consider the use of adverse inferences
- Understand the substantive law – eg where duties of confidence can be overridden by the court

### 5. Lay the groundwork

- Obtain, or at least seek whatever information can be sought from the spouse in question. Once the court has determined that a particular piece of information is relevant, necessary and proportionate, then even if it is not in the 'possession custody or power' of the spouse in question, the question of principle has been resolved: thereafter it is a question of how to obtain the information in question.
- Where you suspect there may be a lack of co-operation, gather evidence from the outset: make careful telephone attendance notes, record discussions and agreements in correspondence and take careful notes of the other side's submissions at the first appointment as to why there should not be a valuation (or why the valuer should not be X)
- When instructing valuers (especially on a SJE basis) Identify key areas in the letter of instruction. Be prepared to argue the point if necessary, and be prepared to ask pertinent questions pursuant to part 25 following receipt of a report
- Give many and repeated warnings in open correspondence about the power of the court to draw adverse inferences and your intention to invite the court to do so.
- Where possible, develop useful professional relationships – eg overseas lawyers, shadow accountants etc

#### 6. Consider issues of budget/cost/proportionality

- Obtaining information from reluctant third parties can be expensive – does your client have the wherewithal to pursue the

point? How deep are your opponent's pockets (and the third party's) compared to yours?

- Turn disadvantages into pressure points where you can – eg if you are unable to pursue a point further on grounds of proportionality, make clear in correspondence that this is the case, and repeat the warning that you will invite the court to draw appropriate inferences
- Understand when costs orders can be made against third parties, and make sure the unco-operative third party knows as well!

29 Bedford Row

L O N D O N

CHRISTOPHER WAGSTAFFE QC

7 November 2017