



Difficult Business Partners and Trustees: What sway do you have?

Andrzej Bojarski
Barrister | Arbitrator | Mediator

Twitter: @AndrzejBojarski
36Family, 4 Field Court, Grays Inn



► Outline

Sway over third parties

36
FAMILY

(1) Disclosure

(2) Unlocking the Assets

36
THE GROUP

► Disclosure - Businesses

36
FAMILY

What is the business structure?

- Sole trader.
- Partnership
 - Unincorporated
 - LLP
 - Who are the partners?
- Private (closed) company
 - Who are the shareholders
 - Wholly owned by Spouses
 - Family owned
 - Multiple third party owners
- PLCs

36
THE GROUP

► Disclosure

Can the business be used as a shield against disclosure?

- Duties of disclosure of the spouse
 - *'Full, frank and clear'*
 - *'custody, power or control'*
- Duties of the spouse to the company as director / shareholder
 - Director and company secretary have rights to inspect the company books etc but not power to disclose: H v H (Disclosure by Third Party) (1981) 2 FLR 303
 - The company's right to object: B v B (Matrimonial Proceedings: Discovery) [1978] Fam 181

► Disclosure

Routes to disclosure:

- Self-help
 - *Companies House*
 - *Company officer / employee : Imerman v Tchenguiz*
- Questionnaire and request for information
 - *Relevant*
 - *Proportionate*
 - *Best endeavours: documents which already exist: cannot compel third party to generate new documents: G v G (Financial Provision: Discovery) [1992] 1 FLR 40*
- Disclosure order against non-party
- Witness summons
- Joinder
- Oral disclosure hearing

► Disclosure

36

FAMILY

Disclosure order against non-party (i.e. company / directors / partners)

- Limited to 'documents' which exist
- No 'fishing' against a third party
- Do not have to prove existence of document as precondition to disclosure
 - **Charman v Charman [2006] EWCA Civ 1606 [22]-[56]**
 - Factors to consider: *M v M* [2006] 2 FLR 1253 at [116]

36
THE GROUP

► Disclosure

Procedure for disclosure order

- FPR r.21.2
- The test (r.21.2(3)): *'only where disclosure is necessary in order to dispose fairly of the proceedings or to save costs'*
- D v D (Production Appointment) [1995] 2 FLR 497: *'where there is such manifest evidence and inference of an avoidance of the duty of full and frank disclosure, the exercise of discretion as to the bounds of production should be broad rather than narrow'*
- Notice to 3rd party?

► Disclosure

36
FAMILY

Joinder:

- Improper if for purposes of disclosure only: *Re T (Divorce: Interim Maintenance: Discovery) [1990] 1 FLR 1*: 'it is settled that one cannot get discovery against someone who has no connection with the litigious matters other than that he might be called as a witness either to testify or to produce documents at the trial'
- The benefits of joinder
- The disadvantages of joinder

36
THE GROUP

► Disclosure

Witness summons – FPR r.24.2

- Is the court's permission required?
- Khanna hearings
- The scope to cross-examine
 - *Frary v Frary* [1993] 2 FLR
 - *Charman v Charman* [2005] EWCA Civ 1606 at [20] and [24]
 - *Wynne v Wynne* [1981] 1 WLR 69
 - *W v W (Disclosure by Third Party)* (1981) 2 FLR 291
- Oral Disclosure Hearings – *OS v DS* [2005] 1 FLR 675

► Disclosure

36
FAMILY

- The nuclear weapon: Search Orders ('Anton Piller')
- A more focussed conventional order for disclosure / delivery up of documents / computers etc
- Injunction to prevent destruction of documents ancillary to a conventional disclosure order

36
THE GROUP

► Disclosure

36
FAMILY

The Non-Party's Rights:

- FPR r.21.3(3): permission to withhold inspection of a document
- Legal representation
- Costs of compliance
- Privilege C v C (Privilege) [2008] 1 FLR 115 at [67]
- Commercial confidentiality: SK v WL (Ancillary Relief: Post-Separation Accrual) [2011] 1 FLR 1471 at [25]
- Data protection
- Oppressive, disproportionate or irrelevant

36
THE GROUP

▶ Trusts – Disclosure Issues

- The beneficiary's rights to trust documents is limited (discretionary trust): *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26
 - Best endeavours
- Settlers: *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11
- Trustees
 - Duties to the beneficiaries as a whole
 - Directions from the court
 - Inferences

► Disclosure - Offshore

Lateral Thinking – attacking from the flanks – the on-shore options

- Accountants
- Tax advisors
- Wealth advisors
- Business associates
- Lawyers: *Kerman v Akhmedova* [2018] EWCA Civ 307

► Disclosure - Offshore

Disclosure orders against parties overseas:

- Other parts of the UK
- Member states of the EU (until Brexit)
- Letters of Request
- The importance of local advice

▶ Unlocking the Assets – Companies

Understanding corporate governance – the Companies Act 2006

- Directors control the day to day management of the company and can contract on behalf of the company.
- Shareholders in general meeting appoint directors
 - Ordinary shares – carry voting rights
 - Preference shares – preferential right to fixed dividend (usually no vote)
 - Varying classes of shares and rights
 - Shareholders agreements?

▶ Unlocking the Assets - Companies

36
FAMILY

Understanding corporate governance – the Companies Act 2006

- <5% - very limited rights
- 5% – various minor rights including right to call a general meeting.
- 10% - right to call for poll vote on resolution
- >10% - right to prevent meeting being held on short notice
- 15%: right to apply to the court to cancel a variation of class rights, provided such shareholders did not consent to, or vote in favour of, the variation.
- More than 25%: right to prevent the passing of a special resolution.

36
THE GROUP

▶ Unlocking the Assets - Companies

36
FAMILY

Understanding corporate governance – the Companies Act 2006

- >50% = ordinary resolution – ability to appoint and remove directors (CA s.168)
- 75% - right to pass a special resolution – required to change constitution of company
- 90% - right to call meeting at short notice
- >95% - full control over right to call a general meeting

36
THE GROUP

▶ Unlocking the Assets - Companies

36
FAMILY

Understanding corporate governance – the Companies Act 2006

- Articles of association
- Shareholders agreements – quasi partnership?
- Different classes of share with different rights

36
THE GROUP

▶ Unlocking the Assets - Companies

36
FAMILY

- 'Judicious encouragement' – *Thomas v Thomas* [1995] 2 FLR 668
- But now see Mostyn J quoting a Hong Kong case ‘ *"it would be better if the term 'judicious encouragement' were no longer to be used". I agree with that. The term is liable to give rise to irrelevance and confusion.*’ (*Quan v Bray* [2018] EWHC 3558)
- The Charman test: a question of fact: “*would be likely to advance the capital immediately or in the foreseeable future*”
- What leverage is there?
 - Benefits for other shareholders
 - Buy out / share transfer

36
THE GROUP

▶ Unlocking the Assets - Companies

Common problems:

- Pre-emption rights on share transfers;
- Restrictions from shareholders agreements;
- Fixed share prices from articles / shareholders agreements
- Directors' right to refuse registration of shares

Options

- Shares in trust
- Contingent deferred lump sum
- Conditional performance of other parts of order
- Order for sale

▶ Unlocking the Assets - Companies

36
FAMILY

Preventing prejudicial actions:

- Injunctions
- Unfair prejudice petitions (s.994 CA 2006)
- Which court?
 - *Poon v Poon* [1994] 2 FLR 857
 - But if arms-length third parties involved: the Companies Court?

36
THE GROUP

▶ Unlocking the Assets - Partnerships

36
FAMILY

- PA 1890 s.1: Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.
- No separate legal identity
- Relationship governed by contract, equity and statute
- Partnership deed or agreement (PA 1890 as default)
- Effective control (in law / in practice)

36
THE GROUP

▶ Unlocking the Assets - Partnerships

- Cannot generally sell or transfer a share
- Dissolution and retirement – right to buy out outgoing partner
- But have an entitlement upon dissolution – can therefore liquidate more easily than company shares
- Issue is quantification
 - Ownership of partnership property
 - Partnership current account and capital account

▶ Unlocking the Assets - Trusts

36
FAMILY

- Trusts as a resource (s. 23 orders).
- Trusts as a nuptial settlement (s.24(1)(c)(d)).
- Enforcement: Offshore 'firewall' legislation

36
THE GROUP

▶ Unlocking the Assets - Trusts

Trusts as a resource:

- (1) Type of trust: bare, fixed or discretionary.
- (2) 'Cipher trusts': BJ v MJ [2011] EWHC 2708.
- (3) The Charman question: "*would be likely to advance the capital [in the trust to the spouse] immediately or in the foreseeable future*" [2007] EWCA Civ 503
- (4) The need for detailed evidence gathering.
- (5) Options: 'judicious encouragement', offsetting, adjournment of claims.

▶ Unlocking the Assets - Trusts

36
FAMILY

- Nuptial settlements:
- What is a nuptial settlement?
- Look beyond the individual structures for a wider 'settlement' - BJ v MJ
- The effect of the corporate veil.
- The scope of the court's discretion.
- Joinder of trustees / beneficiaries.
- Offshore trusts: local 'firewall' legislation.
 - The importance of early local advice.

36
THE GROUP



The 36 Group (formerly 36 Bedford Row)
4 Field Court, London WC1R 5EF

DX 360 LDE

T 020 7421 8000

F 020 7421 8035

E clerks@36family.co.uk

W 36family.co.uk

TWITTER [@FamilyLawTeam](https://twitter.com/FamilyLawTeam) [@AndrzejBojarski](https://twitter.com/AndrzejBojarski)

36
THE GROUP