

# Notes on Interveners in Financial Remedy Proceedings

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These notes are not intended to constitute as legal advice, in respect of every case, the facts of each matter will need to be carefully considered.

It is good practice to consider relevant third-party interests from the outset of a case and take full instructions as to potential interests.

## **Common examples**

- Family home purchased with the assistance of a relative or other third party;
- An elderly parent living in the former matrimonial home who may have a beneficial interest that does not appear on the official copy entry investment properties purchased by the parties with friends or relatives
- unresolved disputes arising out of either party's cohabitation with another partner before, during or after the marriage
- Family member sold their house and purchased a new property with the husband/wife
- Business interests- where one party has shares in a company or business - how will the transfer of shares or a partnership interest from one party to another impact on others within the business, and whether the transfer is permissible under the partnership agreement or articles of association, and if there is a dispute as to the true extent of a party's interest in a business, whether third parties will need to be joined into the proceedings

## **Case Law examples**

- *Tebbutt v Haynes*[1981] 2 ALL ER 238—the husband and wife lived at the husband's mother's house, where his aunt also lived, which was sold and a new house

purchased using the proceeds and placed in the husband's name to facilitate the grant of a mortgage; the husband and wife stayed in the new house for a short time before moving to live elsewhere, and the husband's mother and aunt continued to reside there—the wife made an application for a property adjustment order, with the court finding that it had jurisdiction to determine not only the rights and interests of the husband and wife, but also the rights and interests of third parties, but that where there is a dispute in relation to a third party that dispute must be resolved before the judge can make an effective order

- *Goldstone v Goldstone* [2011] EWCA Civ—the wife sought a property adjustment order in relation to a property owned by a group in Liechtenstein that was associated with the husband—the Court of Appeal agreed with Mostyn J in *TL*, that issues involving a third party are determined according to ordinary principles of property, in the same way as free-standing Chancery proceedings, but that did not mean that they should be separated from the family proceedings in which the issues were directly critical.
- In *Behbehani v Behbehani* [2019] EWCA Civ 2301, the Court of Appeal made a distinction between a claim against a property in which a third party interest is in issue and the broader position where the claimant spouse does not seek an order in relation to the specific asset, but instead financial relief generally on the basis of an assertion as to the other spouse's overall wealth and an asset in the ownership of a third party. The court may be faced with a number of issues in big money cases in particular as to the ownership of assets, with a variety of third parties potentially identified as beneficial owners, and it would be 'wholly disproportionate' where the claimant spouse is not seeking the transfer of the assets for all such persons to be joined to the proceedings and for the issue of ownership to be determined before any financial remedies order could be made. Baker J said, in his lead judgment, that there may be cases where joinder is appropriate in those circumstances, but it should certainly not be the rule.
- Some extracts from the judgment; Baker LJ:- 68. The principal point in dispute in *Goldstone* was whether an issue between one of the parties to matrimonial finance proceedings and a third party as to the beneficial ownership of an asset subject to a claim for a property adjustment order within the matrimonial proceedings should be determined as a preliminary issue within those proceedings or in a separate civil claim. This court endorsed the procedure identified in *TL v ML*, supra, for the determination of third party claims within the family proceedings. 69. I do

not, however, read the decision in **Goldstone** as endorsing the proposition that whenever an issue arises in matrimonial proceedings as to whether a party is entitled to an asset it is always necessary to join every other person who asserts title. It all depends on the circumstances. If a spouse is seeking the transfer of a particular asset from the other spouse and it is asserted that the asset is the property of a third party, then it would usually be appropriate to join third party for that issue to be determined at or before the financial remedies hearing. That is what happened in **Goldstone** itself. But there are many cases when the claimant spouse, usually the wife, is not seeking a property adjustment order but another form of financial relief, for example a lump sum, on the basis of an assertion of the value of the husband's wealth which he disputes on the grounds that assets which she ascribes to him are in fact the property of a third party. As a glance of the law reports shows, it frequently happens, particularly in so-called big-money cases, that the court is faced with a number of issues as to the ownership of assets with a variety of third parties identified as the beneficial owners. It would be wholly disproportionate to insist that, even where the wife is not seeking the transfer of the assets, all such persons should be joined to the proceedings and the issue of ownership determined before any financial remedies order can be made. There may be cases where joinder is appropriate in those circumstances, but it should certainly not be the rule.

- In *Edgerton v Edgerton* [2012] EWCA Civ 181, the wife had been a party to proceedings in the Chancery Division, where the husband had operated his business through a company in which the wife had been an equal shareholder. The wife's shares were transferred to the husband who then agreed to hold the shares on trust for a third party. In subsequent family proceedings, the wife's position was at odds with the decision in the Chancery Division. The Court of Appeal held that a decision in the Chancery Division would be binding on the Family Division on the basis that it would be unfair for a third party not to be able to reply on a determination of the court. Lord Neuberger MR summarised the position as: 'As a matter of principle, any estoppel should not bind the parties if it arose out of a judgment in an earlier action which was obtained by fraud or collusion. However, that did not entitle a party against whom there was an apparently valid order of the High Court to pursue an inconsistent case in later proceedings and merely contend in those proceedings that the earlier order was obtained by fraud: either an application would first have to be made and granted to set aside the earlier judgment or an application to set aside the first judgment would have to be before the court hearing the second action.'

### ***Do you need to join a third party?***

It sounds obvious, but sometimes it is helpful to sit back and reflect on what it is that you are trying to achieve from adding a party to proceedings. If you have a dispute involving the ownership or interest in an asset of which the third party says they have an interest in which requires the courts determination, then you are likely going to need to join them. If however, it is simply information that you need that you are not or unable to get from either of the existing parties, then have a look at the other options available.

These include the following:

### **Witness Summons<sup>1</sup>**

These have now replaced subpoenas duces tecum and ad testificandum. A witness summons is defined, in FPR 2010, 24.2(1), as a document issued by the court requiring a witness either to attend court to give evidence or to produce documents to the court or, as is made clear in PD 24A, para 1(1), both. By FPR 2010, 24.2(4) the court has the power to require a witness to produce documents either on the date fixed for the hearing, or such other date as the court may direct. The only documents that a person can be required to produce are documents which that person would be required to produce at the hearing.

Section 31G of the Matrimonial and Family Proceedings Act 1984 provides that failure to attend or bring a document in answer to a witness summons can lead to a committal for up to one month or a fine of £2,500.

Permission is not needed to issue a witness summons, except where: (a) it is issued less than seven days before the final hearing; (b) the witness is to attend court on a date other than the date fixed for the final hearing; or (c) the summons is issued for a witness to attend court at a hearing which is not the final hearing. The court has power, however, to set aside or vary a witness summons that has been issued.

A witness summons is binding if it is served at least seven days before the date on which the witness is required to attend court. The court may direct that a witness summons is binding although it is issued less than seven days before the date the witness is required to attend court. The witness summons is to be served by the party on whose behalf it is issued, unless that party asks in writing when issuing the application that the court should serve the witness

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<sup>1</sup> Information taken from Rayden and Jackson Issue 15, March 20

summons: A witness who is served with a witness summons must be offered a sum to cover travelling expenses to and from the court and compensation for loss of time. PD 24A provides at para 3.3 that the sum to be offered for loss of time is to be based on the sums payable to witnesses attending the Crown Court.

One of the pitfalls with issuing a summons, rather than seeking third party disclosure, is that you will not see the documentation that witness may have until they turn up at court. An example would be whereby one of the parties' new partner is summonsed to produce details of her job, a list of receipts from the husband/wife with supporting documents and a set of redacted bank statements assuming this enquiry to be relevant. The court is likely to ask the following questions when considering an application for third party disclosure:

- How important is the information?
- Has the applicant exhausted other remedies?
- Is it a case where inferences can be drawn rather than seeking further disclosure?
- What is the relationship between the respondent and the third party?
- If disclosure is necessary do the documents contain private information that can be protected by editing?

Many of us will have had examples of where our client is adamant that their former spouses' partner's finances are relevant but the court takes a very different view. It will be very much down to the individual case, and a useful case to consider on this issue is *M v M (Third Party Subpoena: Financial Conduct) [2006] 2 FLR 1253.*

## **Trusts**

A common issue is whether to join trustees to proceedings. I have had cases whereby a party is a beneficiary of a trust but hasn't produced much documentation in respect of that trust.

### ***Beneficiary's right to trust documents<sup>2</sup>***

The right of the beneficiary to trust documentation, and the duties and powers of trustees to make disclosure, were reviewed by the Judicial Committee of the Privy Council in *Schmidt v Rosewood Trust Ltd*. The Board expressed reservation about the decision in *Re Londonderry's Settlement* basing a beneficiary's entitlement to disclosure of trust documentation on a proprietary right. Lord Walker of Gestingthorpe, giving the judgment of

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<sup>2</sup> Helpful section taken from Rayden and Jackson Issue 15, March 20

the Board, stated: "[66] Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts, even a discretionary trust. There is therefore in their Lordship's view no reason to draw any bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character)." The Board considered that the decision whether to compel trustees to provide disclosure of trust documentation to a beneficiary is a matter for the exercise of the court's discretion, where a balance had to be struck between the competing interests of beneficiaries, the trustees and third parties. It is suggested that this decision potentially widens not only those who can seek disclosure, but also the class of documents that the court will order the trustees to disclose. In practice, it would be very unlikely for a beneficiary not to be entitled to be able to obtain the trust deed, any supplemental trust deed and trust accounts.

The sort of information that is likely to be useful in respect of a beneficial interest in a trust is likely to be as follows:

- copies of the trust deed(s), any amendments, supplemental deeds, trustee resolutions, any documents executed by trustees, memoranda of wishes and deed(s) of appointment/retirement;
- copies of the trust's audited accounts for a period of X years;
- copies of any letter(s) of wishes;
- details of any income and/or capital distributions and loans to the beneficiary during the last X years with supporting documentation
- details of any income and/or capital distributions and loans to other beneficiaries during the last X years with supporting documentation (probably more pertinent when the other beneficiaries under the trust are siblings/children of the beneficiary);
- an up-to-date valuation of the trust asset(s) – this should include any shares, investments, property valuations;

Apparently, the courts have been reluctant for discretionary beneficiaries to be compelled to produce documents but it depends on the facts of the case. However, in more recent times it is understood that the court takes a wider view.

The court's powers to compel a person who is not a party to provide disclosure are broad and include:

- a. an inspection appointment order for the production of documents by a person in England or Wales;
- b. compelling a witness in England and Wales to give evidence by the issue of a witness summons or a deposition before an examiner;
- c. where documents are to be produced or oral evidence given by a person out of the jurisdiction, the issue of a letter of request

### **Disclosure or inspection of documents**

The procedure is contained in [FPR 2010, SI 2010/2955, Pt 21](#). In summary:

- a. disclosure is defined as stating that the document exists or has existed;
- b. inspection occurs when a party inspects a document disclosed by another person;
- c. an application for a person who is not a party to provide disclosure may be made without notice and must be supported by evidence;
- d. the disclosure can only be ordered if it is necessary in order to dispose fairly of the proceedings or to save costs;
- e. the order must:
  - i. specify the documents or classes of documents to be disclosed, and;
  - ii. require the respondent to specify any of documents over which they no longer have control or in relation to which they claim to have a right or duty to withhold inspection;
  - iii. the order may:
    1. require the respondent to say what has happened to any documents no longer under their control, and;
    2. specify the time and date for disclosure and inspection

Typically, the court will ask itself, the same questions as above:

- a. How important is the information?
- b. Has the applicant exhausted other remedies?
- c. Is it a case where inferences can be drawn rather than seeking further disclosure?
- d. What is the relationship between the respondent and the third party?



- e. If disclosure is necessary, do the documents contain private information that can be protected by editing?

Any application needs to be in D11, and also a statement attached. This statement should what documents are needed and *why* these are necessary.

*Overall, the key practical tips are:*

- Cost benefit- remember that costs provisions are different and the costs of bringing in a third party may outweigh the amounts involved;
- Is the case worth the expense of a protracted prelim issues hearing, or is it capable of being resolved at a FDR?
- Is it a loan or a beneficial interest? Often the parties will need to consider inviting the third party (at the very least) to be joined, or is there evidence which will mean that matters can be agreed without a prelim issue hearing, or be heard at a contested interim hearing? Is there enough in the pot to ring-fence/include the third party's interest?
- Evidence! Trust deed/ Declaration of Trust, Written agreement,
- Conflict- make sure there isn't one

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