

## In Practice

### Asset Tracing On Divorce: Orders Available

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The reports earlier this year of the divorce proceedings between Lisa Tchenguiz and the multimillionaire food and drinks magnate, Vivian Imerman once again have brought in to focus the implications of high value divorce payments. Miss Tchenguiz is reportedly demanding a £100m share of her husband's fortune. If successful she will easily beat the current record of £48m which insurance magnate, John Charman, was ordered to pay his wife Beverley in 2006. The occurrence of high pay outs and high profile divorces, such as Paul McCartney and Heather Mills and Guy Ritchie and Madonna have increased the incentives for couples to hide their wealth from each other. A survey conducted by Grant Thornton last year suggests that one fifth of couples who divorced in 2007 and 2008 tried to conceal their assets or income from their spouse. Further, it is more common for the concealment to be by the husband.

The concealment is likely to involve a complex structure of offshore nominees, companies, accounts and trusts. The court is under a duty when determining how much is to be paid by one party to the other in divorce proceedings to have regard to all the circumstances of the case (s 25 of the Matrimonial Causes Act 1973). A consequence of this is that unless the court is provided with correct, complete and up-to-date information regarding the parties' assets and income it cannot lawfully and properly exercise its powers. The parties therefore have a clear obligation to provide full and frank disclosure of their assets and sources of income.

If parties wish to conceal their assets and income, they will inevitably attempt to deceive the court and fail to discharge the obligation to provide full and frank disclosure of their assets and income in the hope that they will not be considered by the court for the purposes of determining the divorce payment. It is therefore in the interests of the potential recipient of the divorce payment to ensure that this information is provided to the court. As a result, and where there is a suspicion that the spouse is concealing his or her assets and income, there is a tendency for the other party to rely on self help to obtain surreptitiously information concerning those assets and income.

This self help comes in many forms such as intercepting, opening and keeping mail, breaking into the spouse's office at home and accessing the spouse's computer. Its use is encouraged by the 'Hildebrand rules' (developed after the decision in *Hildebrand v Hildebrand* [1992] 1 FLR 244). These are best described as judicial guidance on the manner in which a party, who has obtained documents or information by irregular means, should disclose them in ancillary relief proceedings. They is to admit into evidence any documents or information that have been obtained irregularly obtained in order to meet the overarching duty on the parties to give full and frank disclosure. However, the wrongful taking of documents may lead to findings of litigation misconduct or an order for costs against that party.

Furthermore, the family courts have recently identified and focused on the risks and dangers associated with some measures of self help (see in particular the judgment of Tugendhat J in *L v L* [2007] EWHC 140 (QB), [2007] 2 FLR 171). These may involve the commission of civil wrongs such as trespass, breach of confidence, breach of copyright and misuse of private information. In addition, it has been identified that much of the self help is now obtained from computer records in the breach of criminal provisions of the law designed to protect the databases contained in digital form on computers (such provisions include s 1(1) of the Computer Misuse Act 1990 and ss 4 and 55 of the Data Protection Act 1998). Indeed, the risks associated with self help have been exposed by the *Imerman* divorce

proceedings (due to be heard in the Court of Appeal in May this year). The brothers of the wife secretly obtained the husband's computer records which the wife has sought to take advantage of in the ancillary relief proceedings. This has resulted in the brothers facing claims and civil proceedings for breach of confidence and misuse of private information and the wife being required to pay a significant order for costs in the divorce proceedings.

The risk of committing a civil or criminal wrong and costs sanctions suggest that parties to matrimonial proceedings will have to consider carefully the consequences of self help and the use of alternative methods for uncovering assets. The tracing and identification of assets is a common problem faced by victims of fraud. There are a range of procedural weapons that they use which are likely to be equally effective to a party that is seeking to uncover assets that a spouse is concealing in matrimonial proceedings. These weapons are usually used for the purpose of establishing the whereabouts and value of the fraudster's assets which can then be secured by a freezing order. They include search orders, third party disclosure orders ('disclosure orders') and gagging orders.

## SEARCH ORDERS

This is a key weapon in the tracing of the fraudster's assets. Its objective is to prevent the fraudster from destroying incriminating evidence regarding the commission of the fraud and the concealment of its proceeds. It is an order that is made on a without notice application and requires the permission of the court to enter premises to search and remove evidence before the fraudster has had an opportunity to put his side of the case to the court. It is a draconian order and could cause serious damage to the defendant's reputation. Accordingly, the court will not make such an order unless it is satisfied that:

- the applicant has an extremely strong prima facie claim;
- the potential or actual damage to the applicant arising from the claim is very serious;
- the defendant has possession of incriminating evidence and there is a real possibility that it will destroy or tamper with that evidence; and

- the harm likely to be caused to the defendant by such an order is not disproportionately excessive to the legitimate object of the order.

Computers and other electronic devices, such as mobile phones, blackberries and laptops, are often the most fruitful source of incriminating evidence especially where the fraudster is under the impression that he has deleted such information from these devices. The terms of a search order may therefore allow computer forensic experts to partake and take an image of the hard drive of any computer or any other electronic device found in the search. The terms of the search order contain provisions to ensure that its purpose of finding what are disclosable information and documents is carried out effectively but with safeguards for the party whose documents are being searched to prevent any civil or criminal wrong.

Accordingly, a search order can be extremely useful for the purposes of gathering evidence to support the applicant's claim but, more importantly in tracing and identifying the proceeds of the fraud and uncovering assets that are being concealed. Furthermore, the search order does not necessarily have to be restricted to a single premise so could include the spouse's office at home and work, nor does it have to be limited to premises occupied or used by the spouse.

## DISCLOSURE ORDERS

The court has the power to order disclosure of evidence from an innocent victim, such as a bank or accountant, who is mixed up in the wrongdoing which may include activity that is designed deliberately to conceal assets (CPR 31.18). The power is based on the principle established in *Norwich Pharmacal Co and Others v Commissioners of Customs and Excise* [1974] AC 133 that if a person through no fault of his own gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but comes under a duty to assist the person who has been wronged by giving full information and disclosing the identity of the wrongdoers.

Such orders are regularly used to obtain the identity and obtain details of the wrongdoer. However, the court has

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recognised that the relief provided by *Norwich Pharmacal* jurisdiction is flexible and not limited to the name and address of the wrongdoer so includes disclosure of information crucial to the claim such as details of the contents or identity of the beneficiary of a bank account. They are also recognised in a number of offshore common law jurisdictions, so are a useful weapon for obtaining information about assets that have been concealed in those jurisdictions. The requirements (as summarised by Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625) that have to be satisfied to obtain such orders are as follows:

- a wrong must have been carried out, or arguably carried out by an ultimate wrongdoer;
- there must be a need for an order to enable action to be brought against the ultimate wrongdoer; and
- the person against whom the order is sought must: (a) be mixed up in so as to facilitate the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

The application for a *Norwich Pharmacal* order is usually made before the commencement of proceedings and without notice to the wrongdoer, so minimises the risk of further dissipation and concealment of assets. It may also be without notice to the disclosing party if there is evidence to suggest that the disclosing party may notify the wrongdoer and by doing so presents a risk that the assets will be dissipated.

There may be instances where there is a third party who may not be mixed up in

the wrongdoing but is in possession of evidence that may assist in identifying the wrongdoer's assets. The court also has power to order such a party to disclose evidence if it can be shown that it is either likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or to save costs. An application for such an order may have to be accompanied by an application that it is without notice to both the wrongdoer and the third party if there is a risk of dissipation.

### GAGGING ORDERS

An obvious problem that victims of fraud and concealment face in the tracing of assets is the 'tipping off' of the fraudster. The court therefore has jurisdiction to impose an injunction on a non-party who is compelled to disclose documents whether on a search or disclosure order to prevent them from tipping-off any third party, in particular the wrongdoer about the order. Accordingly, the victim of the fraud or concealment should consider accompanying any application for a search or disclosure order with an application for a gagging order.

### CONCLUSION

Although the cost of using some of these weapons as opposed to self help in matrimonial proceedings may be substantial, they are likely to be recoverable at the end of the ancillary proceedings and may be a small price compared to the possibility of being faced with cost sanctions and a civil or criminal complaint.