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1 Summons to produce documents

[97]–[98]

Among the other orders a court may make under FPR 2010, r 21.2 is an order requiring a witness to attend court and produce documents, although this is strictly unnecessary: disclosure can take place out of court (for example by email). Where, however, such a course is taken, the old rules applicable to subpoenas need to be followed. In particular, conduct money should be tendered with the summons; and the witness is further entitled to the cost of complying with the subpoena 498. In principle, a party who seeks such an order should undertake to meet the third party's expenses in full (including, if necessary, the cost of representation), without prejudice to the ultimate order for costs inter partes 499. And of course, a third party who successfully opposes the application is entitled to indemnity costs from the applicant 500. The witness may take any legitimate objection that is open to him (or her), for example that to produce documents would expose him to the risk of criminal charges (the privilege against self-incrimination) 501. Where objection is taken, the court will look at the documents privately and rule on the matter.

A bank is not obliged to produce 'any documentation, notes, etc, indicating the existence of any other accounts operated by' the defendant, because a mere witness cannot be required to search his papers 502. But where the wife, who was the daughter of a very rich man, collaborated with the family's accountant 503 to block disclosure of her means, an order was cast in wide terms requiring the accountant to bring to court files for the last eight years relating to all companies, corporations and trusts in which the wife had an interest 504.

The witness is not expected to give oral evidence at the appointment, but may nonetheless be asked any question that is necessary to enable the inspection to proceed smoothly, for example, to identify the source of a document (if not clear on its face), or how it links in with another document, or whether a document is missing and if so why 505.

Sometimes, an order is sought under this rule so as to facilitate an inquiry into the third party's means. Such an order should be refused if it would be oppressive to the witness to descend into that amount of detail 506, or would override his personal privacy to an unacceptable degree. In *Morgan's case*, Watkins J refused a subpoena to compel a father-in-law to disclose the extent of a farming business that might pass to the wife by will; in part because a 'drive-by' valuation was a simpler expedient 507. In *M v M* 508, on the other hand, the deputy High Court judge approved an edited subpoena requiring the husband's girlfriend to produce details of her job, a list of receipts from the husband (with supporting documents), and a set of redacted bank statements. Any wider enquiry, for example into the terms of separation from her previous partner, or the estate accounts of her late father, was rejected on the ground that it was disproportionate to the issues and an unwarranted interference with her Art 8 rights. In the judge's view, Art 8 reinforced the common law principle that disclosure of a third party's means should not be ordered unless it was both 'necessary' and 'proportionate', predicating an enquiry along the following lines:

- (1) How important is the information?
- (2) Has the applicant exhausted other remedies?



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- (3) Is it a case where adverse inferences can be drawn rather than seeking further disclosure?
- (4) What is the relationship between the respondent and the third party?
- (5) If disclosure is necessary, do the documents contain private information that can be protected by editing?

While there is much good sense in these observations, particularly (5), a simpler course is now to go to the actual wording of FPR 2010, r 21.2 [509](#), and apply the two-stage test set out there.

2 Inspection appointments

[99]

Inspection appointments [510](#) have gone, having been replaced by the new-style summons to produce documents [511](#). Notice that it is no longer necessary to give notice to the other side before applying [512](#).

3 Banks

[100]

Under the Bankers' Books Evidence Act 1879, a bank official may be summoned to court or directed to attend an inspection appointment, for the purpose of producing the bank's ledgers and internal memoranda relating to a given customer. Clearly, this is a wide power which must be exercised with caution and due respect for people's privacy. In contrast with ordinary subpoena procedure, the court may permit inspection and the taking of copies [513](#); however, this does not extend to correspondence files, nor to paid cheques or paying-in slips, which fall outside the definition of 'bankers' books' in s 9 of the 1879 Act [514](#) (although, in appropriate cases, it would be possible to frame *Mareva*-style relief to cover such records). If the bank co-operates by providing the relevant material in advance of the hearing, its representative may be excused from attending court [515](#). The bank is entitled to be reimbursed its expenses by the party applying for the order, who should normally give an undertaking to that effect [516](#).

4 Trusts

[101]

Until quite recently it was thought that that a beneficiary could be compelled to disclose only those documents which he had a right to demand from the trustees: that is, the founding trust deeds, and any trust accounts of an interest in possession; but not the deliberations of trustees, nor the accounts of a discretionary trust [517](#). Now however the Privy Council, in an Isle of Man case, has thrown the net rather wider by ruling that the right to seek disclosure from a trust does not depend on some claim of right on the part of a beneficiary with a proprietary interest, but rather stems from the inherent jurisdiction of the court to supervise and if necessary intervene in the administration of trusts [518](#). However, where a beneficiary has no right to see documents (as where he is merely the theoretical object of the exercise of a power), the court will balance the issue of disclosure with need for other interested parties to retain confidentiality, and may either refuse disclosure, or require only limited disclosure with suitable safeguards [519](#). In general, trust documents are 'confidential' where they relate to matters of internal



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administration, or to the exercise of dispositive powers by the trustees; and thus a letter of wishes from the settlor is inherently confidential 520.

Where there is reason to believe, however, that an offshore trust has been set up for the benefit of a husband, to protect his wealth from prying eyes, the court will be sympathetic to a request by the wife for the production of documents about the trust, or for the examination of onshore witnesses (for example, an accountant) who can be expected to know about its functioning. In this situation a bona fide request for documents will not be struck down as a 'fishing expedition', even if it cannot be shown that the documents actually exist 521.

5 The Norwich Pharmacal rule

[102]

Where a stranger becomes involved (even innocently) in the tortious acts of others, he is under a duty to assist the person wronged by giving him full information and disclosing the identity of the wrongdoers. It follows that an action may be commenced against him, or he may be joined as a party to existing proceedings, purely for the purpose of discovery: *Norwich Pharmacal Co v Customs & Excise Commissioners* 522. Thus, for example, where a defendant defaulted on a large money judgment, alleging that he had no assets or income, but there was an arguable case that he had diverted funds into a bank account in the name of Mrs A, the latter was ordered to provide detailed financial information about herself and the defendant, including particulars of companies and trusts they had formed and what assets they held 523. Similarly, where there was credible evidence that C conducted all his affairs through a complex web of companies, one of the asset-holding companies which could be said to be an 'alter ego' was added as a defendant under RSC Ord 15, r 6 and *Mareva* relief was granted 524. On the other hand, the husband's father was not to be joined merely because he controlled three Liechtenstein Anstalts in which the husband might (on the wife's case) have a substantial beneficial interest 525; nor was it correct to order a mistress (however wealthy) to attend an inspection appointment with all her financial documents for the last two years when the only evidence was that she and the husband were living together and pooling household expenses 526; in both of these cases, no relevant mixing of funds occurred.

As a general rule, a third party brought in on a successful *Norwich Pharmacal* application is entitled to have his costs paid by the applicant in the first instance, subject to the applicant's right of recovery against a wrongdoing defendant. This is particularly so where the third party has any rational qualms about giving disclosure, based on obligations of confidentiality, duties under the Data Protection Act 1998 and the like 527. Nevertheless, there may be some cases where it is appropriate that the third party should pay costs, as for instance where he is engaged with the defendant in obstructing the course of justice 528.

G Search Orders

[103]



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Suppose the husband is a very devious man: that, rather than obey orders for disclosure and inspection, he is more likely to destroy or suppress the evidence, so that the wife will be in a poor position to show the extent of his wealth. Suppose, moreover, the wife (and it would apply equally if the roles were reversed) has clear evidence that such incriminating material exists, and that it is unlikely that the court will be able to do proper justice by drawing inferences as to the size and nature of the husband's assets. In these circumstances, and only these, the court will be prepared to grant a search order (formerly known as an *Anton Piller* order) 529. The jurisdiction arises under both RSC Ord 29, r 2 530 and the inherent power of the High Court to order the detention and preservation of the subject-matter of an action.

[104]

Search orders, neatly summarised by Bridge LJ in *Rank Film Distributors Ltd v Video Information Centre* 531 as 'instant discovery granted on ex parte application', enable the claimant, accompanied by a solicitor, to make non-forcible entry into the defendant's premises for the purpose of searching for and seizing relevant documents or things and keeping them in proper custody. Because however of a variety of negative features, including the risk as to costs if things go wrong, and the potential for conflict with rights under the ECHR, the search order has fallen into desuetude in recent times, and will not be the subject of further comment here. Instead, reference may be made to the Practice Direction 532, and to sundry reported cases 533.

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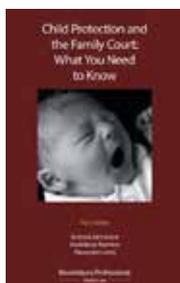


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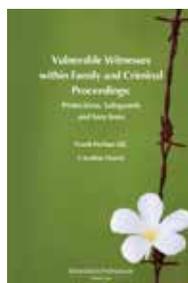
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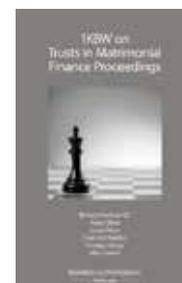
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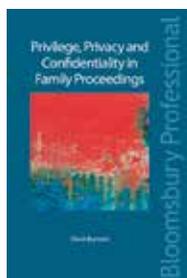
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