Trusts in the Family Division—Privacy Issues for Trustees

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Confidential information; Disclosure; Family proceedings; Financial remedies; Private hearings; Reporting restrictions; Trustees' powers and duties

The framework

A debate is raging in the Family Division about whether hearings for a financial remedy (formerly known as ancillary relief hearings) should be heard in public or private, and what, if anything, may be reported about them. The issue may concern trustees who are joined to proceedings, who participate without being joined, or who disclose trust information to a party to proceedings which is likely to be deployed. How much information about the private affairs of the trust and its beneficiaries is likely to enter the public domain?

This article will consider:

1. the present state of the law in the Family Division;
2. the approach which might be taken in relation to an application for directions by the trustees in the Chancery Division, or in relation to other civil proceedings which might be said to involve private family affairs; and
3. what can be done to try to secure the privacy and confidentiality of proceedings in the Family Division in which trustees are involved or the trust affairs are in issue.

Present state of affairs in the Family Division

The Rules

The starting point is r.27.10 of the Family Procedure Rules (FPR):

> "(1) Proceedings to which these rules apply will be held in private, except—
> (a) Where these rules or any other enactment provide otherwise;
> (b) Subject to any enactment, where the court directs otherwise.
> (2) For the purposes of these rules a reference to proceedings held 'in private' means proceedings at which the general public have no right to be present."

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In this regard it is important to bear in mind that unlike other civil claims held in private, an accredited member of the media has a right to attend a hearing held in private to which the FPR applies (unless the hearing is within a specified excluded category, such as FDR hearings or hearings relating to adoption).[1] The Rules beg two big questions:

1. when will it be appropriate for the court to direct that a hearing is held in public?; and
2. if held in private what, if anything, may the media report of it?

In public or in private: the Family cases

On the first question, there is a judicial divergence between Holman J on the one hand and Mostyn J on the other. In *Luckwell v Limata*[2] Holman J said:

> "In my view rule 27.10 does not contain any presumption that financial remedy proceedings should be heard in private—it is no more than a starting point—and the question whether a given case should or should not be is entirely in the discretion of the court."

In deciding that the court should sit in public he identified the following points[3]:

1. the principle that courts normally sit in public underpins the rule of law in a free and democratic society;
2. there has recently been a strong shift towards greater transparency in the Family Courts: see the introduction of r.27.11 permitting the media to attend even private hearings, and the practice direction on the publication of judgments;
3. publishing judgments is not enough, because the public can only read what the judge chooses to say. For the process to be transparent, the public needs to be able to see how the judge "comports" himself and what the evidence and arguments actually are; and
4. appeals are heard in public, and so it is or would be anomalous for a different approach to be adopted at first instance.

He endorsed this approach in *Fields v Fields*.[4] Unless there is specific reason which calls, at least in part, for privacy (e.g. particular and substantiated commercial confidentiality concerns), the hearing will be held in public.

By contrast, the position of Mostyn J as explained in *DL v SL*[5] is that hearings for financial remedies should be heard in private, unless either: (a) there is misconduct by a party, which deserves publicity; or (b) where so much information is in the public domain, some of it wrong, there is more to be gained from publishing it than keeping it private.

His reasons for this approach were said in *DL* to be[6]:

1. publicity of proceedings is not an absolute principle;
2. some categories of court business are so personal and private that "in almost every case where anonymisation is sought the right to privacy will trump the right to unfettered freedom of expression".[7] These cases are those where the subject matter of the proceedings can rightly

[1] FDR r.27.11.
[2] *Luckwell v Limata* [2014] EWHC 502 (Fam); [2014] 2 F.L.R. 168 at [3].
[3] *Luckwell* [2014] 2 F.L.R. 168 at [5].
[4] *Fields v Fields* [2015] EWHC 1670 (Fam); [2015] Fam. Law 883.
[5] *DL v SL* [2015] EWHC 2621 (Fam); [2015] Fam. Law 1474.
[6] *DL* [2015] Fam. Law 1474 at [11].
[7] Although see *Appleton v Gallagher* [2015] EWHC 2689 (Fam); [2016] E.M.L.R. 3, where Mostyn J said "I may have expressed the proposition too strongly."

be categorised as "private business". Financial remedy proceedings are quintessentially private business;

3. highly personal and private information is extracted under compulsion. The recipient may not use it save for the purposes of the proceedings. It would undermine that collateral undertaking if the hearing were to be in public;
4. art.14 of the 1966 International Covenant on Civil and Political Rights (to which the UK is a signatory) says that "the press or public can be excluded from all or part of the trial when the interest of the private life of the parties so requires; and that judgment is not required to be made public where the proceedings concern matrimonial disputes". This creates, he says, a presumption against public judgment in matrimonial disputes; and
5. the Judicial Proceedings (Regulations of Reports) Act 1926, which precludes reporting of all but, broadly, the names, addresses and occupations of the parties and witnesses, a summary of the "charges" the legal points made and the judgment, in his view applies to financial remedy hearings. However, it is in fact controversial whether the 1926 Act applies to financial remedy hearings at all.[8] If it applies, it would apply to hearings in public.[9]

A further factor in favour of the privacy of financial remedy proceedings (and that reporting of them should be limited) was espoused by Roberts J in *Cooper-Hohn v Hohn*[10]:

> "I have no difficulty in accepting the proposition that a party may well feel constrained in answering questions or providing transparent answers during the course of cross-examination if he or she believes that what is said will be on the nation's breakfast tables the following morning."

The converse argument is that people are more likely to tell the truth about their affairs if they know that their evidence will be subject to public scrutiny.

Reporting

As for what can be reported, the mere fact that a hearing is in private does not mean that the reporting of what happened constitutes a contempt of court (except in the case of proceedings relating to the maintenance of a child or to proceedings brought under mental health legislation, including the Mental Capacity Act 2005).[11]

But does this mean that absent specific reporting restrictions, the press is free to publish anything revealed at the hearing? If so, in what real sense is the hearing "private"?

On the other hand what is the point of the press being present if they cannot report? It is said that "the press [has] the right, as watchdogs, to observe private business being dealt with by the court, but not to report specific details of the case" (per Mostyn J in *Appleton*[12]) but that casts the press in the role of an unlikely public servant.

Legislation had been enacted stipulating what could be reported, but was never brought into force.[13] The law concerning what can be reported in the family courts is "a mess" (per Mostyn J in *Appleton*[14]).

[8] At first instance in *Clibbery v Allan* [2001] 2 F.L.R. 891; [2001] 2 F.C.R. 577 Munby J expressed the obiter view that it would; in *Clibbery v Allan* [2002] EWCA Civ 45; [2002] Fam. 261 Thorpe LJ, obiter, expressed the contrary view.

[9] In *Appleton* [2016] E.M.L.R. 3, Mostyn J said that that Act applies only to hearings in public.

[10] *Cooper-Hohn v Hohn* [2014] EWHC 2314 (Fam); [2015] 1 F.L.R. 19 at [126].

[11] Section 12 of the Administration of Justice Act 1960 and *AF Noonan (Architectural Practice) Ltd v Bournemouth & Boscombe AFC Ltd* [2006] EWHC 2113 (Ch).

[12] *Appleton* [2016] E.M.L.R. 3 at [14].

[13] Children Schools and Families Act 2010 Pt 2, now repealed. Interestingly it would have permitted the reporting of financial information, and "sensitive" information which could not be reported mainly related to medical conditions or treatments.

[14] *Appleton* [2016] E.M.L.R. 3 at [6].

Summary of the status quo in the Family courts

The position can be summarised as follows:

1. although there is a starting point that hearings for a financial remedy are heard in private, at least one judge will in practice conduct a hearing in public and others in private (absent some strong freestanding reason to the contrary in either scenario); and
2. it is unclear what can or cannot be reported, even if the hearing is conducted in public and certainly if conducted in private. In practice, if a party wishes to ensure that there is a limit on what can be reported, an application must be made for specific reporting restrictions, whether or not the hearing in public or private. That will involve an application of the principles articulated in *JIH v News Group Newspapers Ltd*.[15]

Life in the Chancery Division

It is not all that much clearer in the Chancery Division whether a hearing of an application for directions by trustees is likely to proceed in public or in private.

The Rules

CPR r.39.2(1):

> "the general rule is that a hearing be in public"

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CPR r.39.2(3):

> "A hearing or any part of it may be in private if:
> (a) publicity would defeat the object of the hearing;
> (b) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
> (c) a private hearing is necessary to protect the interests of any child or protected party;
> (d) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
> (e) the court considers this to be necessary, in the interests of justice."

CPR Pt 39A PD (miscellaneous provisions relating to hearings) r.1.5:

> "The hearings set out below shall in the first instance be listed by the court as hearings in private under rules 39.2(3)(c) namely:
> (9) proceedings brought under … the Inheritance (Provision for Family and Dependants) Act 1975
> (10) an application by a trustee or PR for directions as to bringing or defending legal proceedings."

CPR Pt 64B para.3 (applications to the court for directions by the trustees in relation to the administration of the trust)

> "the proceedings will in the first instance be listed in private (see para 1.5 of the PD 39A and rule 39.2(3)(f)). Accordingly the order made as well as the other documents among court records (apart from a claim form which has been served) will not be open to inspection by third parties without the

[15] *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] 1 W.L.R. 1645.

court's permission (rule 5.4(2)). If the matter is disposed of without a hearing the order made will be expressed to have been made in private." (Emphasis added.)

These rules are not entirely consistent with each other:

1. a claim for directions does not necessarily, or even usually, involve "uncontentious matters arising in the administration of the trust or estate". It is far more likely to be the case that there is an element of dispute or argument, otherwise a court application would in most cases not be necessary; and
2. para.1.5 of CPR Pt 39A talks only of claims for directions as to whether or not to bring proceedings (*Beddoe* applications) being listed in private. In those applications there is an obvious reason why the proceedings should be in private, namely that the trustees' views of the merits of the litigation and the trust's ability to fund proceedings should not normally be accessible to the "other side".

There is in the Chancery Division an increased judicial resistance to litigation taking place in private. In *V v T*,[16] an application for a variation of a trust under the Variation of Trusts Act 1958, Morgan J said

> "open justice is a fundamental principle so that derogations from it can only be justified in exceptional circumstances when they are strictly necessary to secure the proper administration of justice. There is no general exception to the principles of open justice where privacy or confidentiality is in issue. The burden of establishing a derogation from the general principle lies on the person seeking it and it must be established by clear and cogent evidence … the subject matter of an application under the 1958 Act may be regarded by the parties as a private family matter involving a discussion of the family's private financial affairs. The parties may take the view that those matters concern no-one but themselves and that is a sufficient justification for the hearing to be in private. If that is their view, the law is clear that it is not a sufficient justification for the hearing to be in private."

In the end Morgan J did put in place reporting restrictions and, as is evident from the title, anonymised the judgment because of the evidence before him that the family had striven to protect their minor children (who were parties) from the knowledge of their wealth so that they would not be deterred or disincentivised from making their own way in the world.

It would appear that trustees and other parties seeking directions in the administration of a trust are now much less likely to be able to rely on the provision in CPR Pt 64B PD (applications to the court for directions by trustees in relation to the administration of the trust) to justify hearings continuing in private. CPR Pt 64B PD is about the initial "listing" of the matter. There is a good argument that at most it reflects the fact that applications for directions may be more likely than other hearings to contain freestanding elements that would justify their being heard in private (e.g. considerations of confidentiality or defeating the objects that are always present in *Beddoe* applications). *V v T* suggests that the mere fact that an application involves a family's private family affairs is unlikely to be enough by itself to justify privacy in the Chancery Division.

Trustees' position in the Family Division: practical tips

If the trustees are parties, they can make an application for the hearing to be in private and/or for reporting restrictions to apply. If they are not parties they can encourage the beneficiary spouse to make such an application. Is there anything which trustees can say in the financial remedy proceedings to encourage at least a degree of privacy and confidentiality attaching to the proceedings?

[16] *V v T* [2014] EWHC 3432 (Ch); [2015] W.T.L.R. 173 at [19]–[20].

1. they can draw attention to the starting point of privacy in relation to applications for directions in the Chancery Division, though they cannot claim that to be an unalterable rule;
2. the fact that the trustees are not the primary protagonists (and may not be parties at all) may be a reason why privacy/confidentiality should be afforded to their affairs. The financial remedy proceedings are not of their creation and nor do they have any ability, in most cases at least, to insist on arbitration or to bring them to an end by compromise; and
3. if there are children or protected parties, the trustees should seriously consider putting in evidence specifically about the disadvantages to the children/protected parties of publicity regarding the trust's affairs or their own financial position.

Disclosure

The prospect that the hearing may take place in public should also be taken into account when trustees come to consider what their approach should be to disclosure.

Disclosure by court order: powers of the Family Court

Disclosure by parties is primarily governed by PD 21A of the FPR 2010 (disclosure and inspection):

"2.2 In proceedings for a financial remedy, the process of disclosure is staged. First, Form E (the financial statement referred to in rule 9.14(1)) is served together with the documents which are required to be attached to it.

The second stage occurs by the parties requesting (further) disclosure of each other by a questionnaire served before the first appointment; the questionnaire can request both information and documents. With the court's permission, a further questionnaire can be served later in the proceedings.

2.4 In any family proceedings, the court may order 'specific disclosure', which is an order that a party must:—

(a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order; or

(c) disclose any documents located as a result of that search."

Non-parties

The court also has the power to order disclosure against a non-party (r.21.2 FPR 2010):

"21.2 (1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application —

(a) may be made without notice; and

(b) must be supported by evidence.

(3) The court may make an order under this rule only where disclosure is necessary in order to dispose fairly of the proceedings or to save costs."

Trustees within the jurisdiction

An order made against trustees who are either within the jurisdiction or who have submitted to the jurisdiction will be enforceable against them in the normal way, subject to any application that could be made to discharge or vary that order.

Trustees outside the jurisdiction

If the trustees are offshore and have not submitted to the jurisdiction, the Family Court may issue a letter of request to the court of the jurisdiction where the trustees are based, asking that court to enforce its order for the disclosure of documents or the production of evidence (e.g. taking a deposition).[17]

The foreign court may give effect to the letter of request either because the foreign court is a signatory to the Hague Convention, which requires it to facilitate such requests because the relevant EU Regulation applies,[18] or because there is a local law requiring them to do so. But the foreign court may decline the letter of request, or modify its terms, if it perceives that the request is excessive (according to what the Convention or local law permits).[19]

In the absence of a letter of request, trustees outside the jurisdiction against whom a disclosure order has been made should seek the directions of their home court before providing disclosure. That protects the trustees from later criticism by the beneficiaries of the trust that they should or should not have provided the requested documents. It may also be useful in trying to persuade the court dealing with the divorce proceedings that the trustees are acting properly, and in accordance with their duties, in relation to the provision (or non-provision) of documents.

The "home" court is not a legal term or a term of art. It is suggested that the appropriate court from which to seek directions is:

1. the court, if any, which the trust instrument specifies has jurisdiction; or
2. the court of the jurisdiction with which the trust has its closest connection (this will normally correspond with the jurisdiction whose law governs the trust).

The same approach applies where the trustees are considering making voluntary disclosure either directly to the court, to a party or to another beneficiary in the context of divorce proceedings.

Voluntary disclosure

The trustees may be requested by the spouse beneficiary to provide information about the trust with a view to its being disclosed to the court and to the other parties. Sometimes both spouses will be beneficiaries. In that case they may take differing views about what, if any, trust documents should be disclosed.

In deciding whether to comply with such a request, the trustees must have regard to the interests of the beneficiaries as a whole. They must also take into account the fact that some trust documents may have greater confidentiality attaching to them than others. Letters of wishes; trustees' minutes which contain the reasons for the exercise or non-exercise of dispositive powers; and requests for the exercise of powers from other beneficiaries are all much more likely to have a degree of confidentiality attaching to them than the trust instrument and accounts.

Trust documents

As a matter of English law, following *Schmidt v Rosewood*[20] and *Breakspear v Ackland*,[21] a beneficiary cannot be said to have an absolute right to see trust documents. The governing principle is what is in the interests of the administration of the trust and of the beneficiaries as a whole. In practice, however, there are some documents which a beneficiary (who has anything more than a remote or speculative interest) would be entitled in all normal circumstances to see as a matter of English law e.g., the trust deed, any

[17] FPR r.24.12.
[18] Regulation 1206/2001 of 28 May 2001.
[19] See, e.g. the letter of request to the Supreme Court of Bermuda in *Charman v Charman* [2005] EWCA Civ 1606; [2006] 1 W.L.R. 1053.
[20] *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26; [2003] 2 A.C. 709.
[21] *Breakspear v Ackland* [2008] EWHC 220 (Ch); [2009] Ch. 32.

deeds or other documents showing changes of trustees and trust accounts. If that is the nature of the information requested by a beneficiary, then it is likely that the trustee should provide it. But the trustees may still wish to obtain the court's blessing of their decision to do so and should seek the court's directions in a case where there is a dispute amongst the beneficiaries about what should be provided.

In addition, the trustees may wish to consider whether it is appropriate to provide disclosure of some or all of that documentation on the basis of confidentiality undertakings or on the basis that certain of the documents are available for inspection only (though this may not achieve much if the beneficiary with sight of the documents may be compelled to give evidence about them). Linked to the previous discussion of whether the hearing is likely to take place in private, the trustees might, in an appropriate case, make it a condition of provision that the recipient should use his best endeavours to ensure that it does not enter the public domain.

The trustees should be particularly cautious before releasing information in other categories (e.g. letters of wishes, requests for distributions). If information of that nature is required, then again the court's directions should be sought.

The trustees may also need to be wary of providing potentially confidential information to other beneficiaries if they may later become involved in the proceedings. In *Tchenguiz-Immerman v Immerman*[22] the Family Division made an order that certain beneficiaries could only be parties to the proceedings if they disclosed the documents relating to proceedings brought by the trustees for directions in the Jersey court.

But it would be wrong for trustees to assume that withholding documents is in all, or even most, cases likely to be in the best interest of the beneficiaries. The problem is that if the trustees do not disclose documents, the Family Court may well draw inferences adverse to the beneficiary spouse about what the true position is. The court may not give sufficient weight to the prospect that the trustees might not in fact exercise their powers in the manner contended for by the non-beneficiary spouse. In several cases the Jersey court has authorised or directed the trustees to disclose trust information to the requesting beneficiary, even where such documents are confidential (e.g. a letter of wishes).[23] It has even done so in a case where neither spouse was a beneficiary.[24] The rationale is twofold: first that the non-disclosure would not protect the beneficiaries since the non-beneficiary spouse could still pursue her contentions about the value of the fund; the nature of her spouse's interest; and the likely exercise of the trustees' powers. Secondly, that disclosure would prevent the English court from proceeding on an erroneous basis.

Summary of approach to disclosure

Where the trustees who are subject to the court's jurisdiction have a disclosure order made against them there is no issue.

In other situations:

1. the trustees must consider the interests of the beneficiaries as a whole. It will not necessarily be in their interests to withhold disclosure;
2. there may well be a distinction to be drawn between different sorts of trust documents and information: some will be more confidential to the trust than others;
3. where there is a concern about confidentiality, the trustees might consider supplying documents to the requesting beneficiary on the basis of confidentiality undertakings or undertakings on the part of the recipient to use best endeavours to protect the confidentiality of those documents if disclosed in the family proceedings; and

[22] *Tchenguiz-Imerman v Imerman* [2013] EWHC 3627 (Fam); [2014] W.T.L.R. 145.
[23] *Re Rabaiotti 1989 Settlement* [2000] W.T.L.R. 953; (1999–2000) 2 I.T.E.L.R. 763 and *Re H Trust* [2006] J.L.R. 280.
[24] *Re U Ltd* [2011] J.L.R. 452.

4. in the case of doubt or dissent amongst beneficiaries, the court's directions should be sought.