In Practice

Taking control: the implications of the new 'people with significant control' register requirements

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In every area of our lives, the zeitgeist move is toward greater transparency. Although this trend is not always welcomed by family lawyers, 2016's major new piece of UK company law should be. Since 6 April 2016 all UK incorporated companies (with some exceptions, for example listed companies) and LLPs have been required to keep and maintain a register of 'people with significant control' (PSC). These rules aim to promote corporate transparency, ensuring individuals who own, control or influence the running of UK companies and LLPs are easily identifiable.

The aim is to help combat tax evasion, money laundering and terrorist financing, but for family lawyers it may well also prove to be an invaluable tool when dealing with the financially evasive spouse. In theory, at the click of a button we should be able to track through company structures to find the ultimate controller (which, in many cases, may also be the ultimate beneficiary); saving both time and money for our clients. How likely is this in practice? And will a failure to consider the register when preparing our own client's disclosure, or considering their spouse's, leave family lawyers open to complaint?

What is the PSC register?

A company's PSC register is publically disclosable and contains details of:

(1) individuals who are 'people with significant control' over the company (PSCs); and/or
(2) 'relevant legal entities' who have significant control over the company (RLEs).

A person is a PSC over a company if one or more of five conditions are satisfied. The first three conditions require the holding (directly or indirectly) of more than 25% of the shares or voting rights in the company or the right to appoint or remove the majority of directors. The fourth and fifth conditions require the person to have 'significant influence or control' either over the company itself or over the activities of a trust or a firm which meets any of the other conditions in relation to the company. A legal entity will be an RLE if:

(1) it would be a PSC of the company had it been an individual; and

(2) it is subject to its own disclosure requirements (ie it too is required to keep a PSC register).

The government has produced helpful statutory and non-statutory guidance exploring the meaning of 'significant influence and control'. Examples given include: absolute decision rights/veto rights over decisions relating to the running of the business (eg adopting/amending the company's business plan, changing the nature of the business, appointing or removing the CEO); a company founder who no longer has a significant shareholding in the company they started, makes recommendations to the other shareholder on how to vote and those recommendations are always followed; or in relation to trusts the right to direct the distribution of funds or assets, direct investment decisions or amend the trust or partnership deed.

Where there is a clear line of UK companies, each with their own PSC register, all the way to the PSC at the top of the chain, then each company need only enter on its own PSC register either the PSC or RLE immediately above it; thus making it possible to trace up through company structures to identity the ultimate PSC at the top.

What should the PSC tell you?

The information that is to be available on the register (particularly in relation to those individuals with significant influence and control) should encourage spouses to be more forthcoming about the reality of the situation from the start in their financial disclosure. The details entered on the PSC register about the PSC include their name, date of birth, nationality, the area that they live, service and residential address, but most importantly it will also set out which of the five conditions for being a PSC they meet. A spouse may find it hard to assert a lack of control over company decisions where the contrary is set out in black and white on the PSC register for all to see. Of course, control does not necessarily mean that the spouse is entitled to the relevant assets. For example, a spouse may be a trustee (and therefore in control) of a trust (with related duties), but not be a beneficiary.

The information should also be easily accessible; a company must maintain the register with its statutory books, and the register is open to public inspection, with a few limited safeguards. However, once the information is filed at Companies House it will be freely available online. PSC information should be included on the company's Confirmation Statement (which has replaced the Annual Return) every 12 months, but there are proposals to shorten the filing period of PSC information, possibly to as short a period as 14 days.

Breaking the chain

Using foreign companies in a chain will not automatically prevent disclosure. Foreign companies are not subject to the disclosure requirement so cannot be RLEs. Therefore, where there is a foreign company in the chain of ownership, the rules state that the responsibility to record the PSC at the top of the chain falls on the companies below the foreign company. In theory, the UK companies simply need to work harder to facilitate transparency, and it should still be clear on the PSC register who the ultimate beneficiary is. In practice, if the directors/shareholders of the foreign company want to be difficult may they simply be able to refuse to provide the information?

Criminal offences

Companies will be committing a criminal offence if they do not take reasonable steps to find out if there are PSCs, as will PSCs themselves if they fail to comply with the reporting requirements. Moreover, companies are expected to serve notices seeking information about PSCs from those they reasonably believe may have such information (including but not limited to lawyers, accountants, trust providers, family members, known associates etc) and if those individuals fail to respond to such notices within one month without a valid reason they will also have committed a criminal offence. This should stand as a barrier to

those hoping to duck providing information and adhering to their duty to provide full and frank disclosure. However, it is unclear exactly who is going to be enforcing the new rules and so how much they will bite in practice. Without effective policing, the new PSC requirements may fall flat and many of the intended benefits be lost.

Practical implications for family lawyers

(1) Family lawyers should be checking the PSC register on Companies House for information about the PSCs of companies relevant to their cases.

(2) Could a family lawyer be criticised for failing to check the up to date PSC register at the registered office as well?

Best practice would suggest at least discussing with clients whether this should be done and whether the cost (ie travelling to the registered office) is proportionate in all the circumstances of the case.

(3) Can and should the register be regarded by practitioners, and by the court, as definitive?

No. There are a number of safeguards to ensure that any information placed on a PSC register is accurate. However, ultimately, the information is provided / confirmed by the PSC so it is only as good as that person is accurate (a dishonest spouse may have very little incentive to disclose that they are a PSC). Furthermore, in exceptional circumstances there is a regime for a company to suppress all information relating to PSCs where there is serious risk of violence or intimidation. There is also a delay in registering PSCs whilst companies are in the 'investigation' stage of compiling the PSC register, with many currently posting holding responses and also a delay in regular filings (currently up to 12 months).

(4) What happens if the information on the PSC register is wrong and a client were to enter into a deal where they are relying on this information (and the other party is aware of this)?

The failure of a party to correct the information disclosed on the PSC register would arguably be fraudulent non-disclosure or misrepresentation of material facts, as well as a criminal offence, thus leaving the order at risk of set aside (see *Sharland v Sharland* [2015] UKSC 60, [2015] 2 FLR 1367 and *Gohil v Gohil* [2015] UKSC 61, [2015] 2 FLR 1289).

(5) Where a family lawyer or a judge discovers a failure to register a PSC, will they be under a duty to report this? Could they be subject to sanctions if they do not?

We simply do not know at present.

Conclusion

In general, the rules are lengthy and intricate and their application may well prove to be confusing, time-consuming and costly for companies. They have been drafted by company lawyers on a 'one size fits all' basis and in certain areas, for example in relation to trusts, their application is not always entirely clear. Therefore, it is highly likely that there will need to be refinements to the rules in due course. Family lawyers need to be familiar with the PSC register and the potential benefits it presents, as well as the limitations. Even with the very best of intentions, companies will no doubt have teething problems applying the rules. However, whilst the register is clearly no substitute for family lawyers undertaking their own investigations on behalf of their clients, it should prove to be a valuable aid in getting to the bottom of what can often be highly complex and opaque company structures.

For a detailed analysis of the rules please see Anthony Turner and Tim Follett, 'Tangled up in chains? Making sense of the new UK requirement to keep registers of "people with significant control" ' available on the Farrer & Co LLP website at: www.farrer.co.uk.