

• DISCLOSURE OF DOCUMENTS IN MATRIMONIAL PROCEEDINGS

A party to matrimonial proceedings is under a duty to give full and frank disclosure of his or her finances. Frequently when party A (who for the purposes of this article will be referred to as the wife) suspects that party B (the husband) has not given such disclosure the wife takes matters into her own hands and sets about acquiring the documents which she believes will tell the full story. These will be documents that are in theory confidential to the husband.

Previously, under the authority of the line of cases beginning with *Hildebrand v Hildebrand* (which came to be known as the 'Hildebrand Rules'), the wife could use those documents provided that they were not obtained forcibly. If the documents had been left lying around then it was acceptable for the wife to make copies of and use them in the course of proceedings. However, if the obtaining of the documents involved the removal of a computer hard drive or the interception of personal mail, then that was not acceptable. The *Hildebrand Rules* also provided that the wife had immediately to notify the husband that she had the documents and the original documents had to be returned to the husband as soon as possible. They operated to protect the wife (and her lawyers) against any claims for wrongful interference with property or trespass to goods.

The *Hildebrand Rules* caused some disquiet amongst the judiciary, particularly given the now every day use of the computer, and in a recent case between a Mr and Mrs Imerman, *Tchenguiz v Imerman* [2010] EWCA Civ 908, the English Court of Appeal has turned the matter on its head. The case highlights the conflict between the need to preserve an individual's right to confidentiality on the one hand and the need, in matrimonial proceedings, to ensure that a just resolution

is achieved on the basis of a truthful and comprehensive identification of the parties' assets, on the other.

Mrs Imerman is seeking at least £100 million from her husband, dubbed 'the Man from Del Monte' by the media as he once owned that company. Mrs Imerman's brothers, who shared an office with Mr Imerman, downloaded thousands of documents from Mr Imerman's office computer believing that Mr Imerman would seek to conceal his assets. The computer that ran on the same system as the brothers' office system was password protected and the brothers were found to have accessed the office server and copied the information stored there. The brothers provided the documents to their solicitor who reviewed them to remove any privileged material. The documents were then forwarded to Mrs Imerman's solicitors who then sent them on to Mr Imerman's solicitors. Mr Imerman issued proceedings against the brothers injuncting them from disclosing the documents that they had obtained. He also sought an order from the family court that Mrs Imerman could not use any of the documentation until it had been returned to him to allow him to remove any privileged information. Both orders were granted. Both Mrs Imerman's brothers and Mrs Imerman appealed against the decisions. Mrs Imerman argued that the law should recognise her right to truthful disclosure, even if that can only be achieved by unlawful methods.

When reaching its decision the Court of Appeal noted that whilst the court is under a duty to have regard to all the financial circumstances of the parties, that cannot require the court to admit relevant documentary evidence irrespective of the circumstances in which it was obtained. Certainly this would not be the case in any other civil proceedings.

The Court of Appeal stated that where the wife suspects that documents or information is being concealed she should turn to the legal methods available for obtaining that information including *Mareva* injunctions (freezing orders) and disclosure orders and *Anton Piller* (search) orders. It is for this reason that Imerman has been described as a 'cheat's charter'. Applications for these orders will cost money and the costs initially will have to be borne by the wife. Furthermore, when applying for such orders, the party seeking the orders has to give an undertaking in damages to the injuncted party in case nothing is found. These are risks that must be carefully considered and are likely to prevent many from seeking such orders. It is also likely to draw out an already lengthy process and could lead to many women having to resort to even dirtier means in an attempt to stop their husbands concealing assets. Family lawyers are concerned that the decision has effectively given the green light to wealthy men to conceal assets.

Mrs Imerman has been refused the right to appeal by the Court of Appeal but she may still appeal directly to the Supreme Court.

What, then, is the likely effect of this case for people trying to resolve financial issues after the end of a marriage? Where Jersey has no local authority on a point in family law, English authority is regarded as highly persuasive. But this is not inevitably so and this may be one of the instances where the Royal Court will choose to follow its own sense of what the justice of the case requires.

Imerman would indeed appear to weaken the hand of a wife who has little knowledge of her husband's financial affairs – a surprisingly common situation, and particularly so where the husband is a businessman. The wife's legal advisers are in no better position than

the wife herself, since they cannot advise their client whether a proposed settlement is fair without a complete financial picture. A full knowledge of the financial picture can often allow quite creative terms of settlement to be reached, tailored to that particular family, its resources and the parties' and the children's needs.

The English Court of Appeal, in suggesting that a party can avail themselves of other court processes to protect their position, might seem to most ordinary people as adopting an unrealistic position. The cost and the uncertainty of the outcome are off-putting enough, but it is also the case that such orders are not granted at all if to the applicant is simply on a 'fishing expedition'. How can a wife apply for disclosure of an asset that she doesn't know exists, or to freeze a bank account or assets that she has no knowledge of?

What the wife might in this situation choose to do is to find out the information by foul means or fair, and then tell her lawyer that she simply believes there is a trust, or a bank account, which the lawyer can then go on to ask his or her opponent about. If she does not say how she came by this information then there would be no difficulty in the lawyer pressing for confirmation that it exists and disclosure of the relevant documents. But if the existence of the assets continue to be denied, the need for the pre-emptive application will remain. Furthermore, if it is the sort of information that the husband will know can only have been unlawfully obtained, then the wife might find herself in all sorts of difficulties with the court.

Overall, the 'level playing field' that should exist in matrimonial litigation appears to have been significantly tilted as a result of this case. The party with the weaker financial muscle now is in an even more difficult position than before, playing uphill all the way, unless they have a fair-minded and honest husband. It remains to be seen how the Royal Court will respond to this English law development.

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