



## Hildebrand (Dec' d) & Imerman

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### Part 1 - The Legal Position

#### Imerman v Tchenguiz [2010] 2 FLR 814

Not so new...

- White v Withers Ward LJ:
  - (S57) “*The Matrimonial Causes Act 1973 can be invoked to justify admitting the evidence contained in the documents: but one cannot construe the Act as authorising the commission of the torts of trespass or conversion. Thus it seems to me to resort to self-help is to take a risk.*”
  - (S67) “*Furthermore, it must always be remembered that solicitors are officers of the court and if they are shown to have done wrong they should face the judgment of the court. It is not conducive to the administration of justice that such claims are simply swept under the carpet.*”



### Tughnat J in L v L:

- The other party has rights, including privacy, confidentiality and legal professional privilege, in relation to relevant documents;
- In the past measures of self-help might typically have included the commission of civil wrongs (e.g. trespass to property, breach of confidence and/or copyright), but in the last 20 years, increases in the protection of electronically stored data raised issues as to whether such conduct was also in breach of the criminal law;
- It was a matter for considerable concern that parties to litigation should conduct searches which lack any of the safeguards built into a search order issued by the court (all the more so if they do so because they not expect to be able to satisfy the much higher threshold applicable to such an order);
- Whatever the balance between the public interest (a) in protecting privacy, and (b) ensuring fair trials by ensuring that evidence was not destroyed and concealed, it was not in the public interest that the law be flouted.



### **Ratio of Imerman (1)**

- §42 - *Hildebrand v Hildebrand*, in our judgment, is authority only as to the time when copies obtained unlawfully or clandestinely should be disclosed to a spouse
- §69 - *In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant*
- §69 *It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document or copy.*
- §121 *Neither wives who purloin their husbands' confidential documents nor the professional advisors who receive them (or copies of them) can plead the so called Hildebrand rules in answer to a claim for relief [e.g. by injunction]*



## Ratio of Imerman (2)

- “Back to basics” - Start with the FPR.
- 2.61B Procedure before the first appointment...
  - (6) No disclosure or inspection of documents may be requested or given between the filing of the application for ancillary relief and the first appointment, except -
    - (a) copies sent with Form E, or in accordance with paragraph (5); or
    - (b) in accordance with paragraph (7).
- ...
- 2.61D The first appointment
- ...
- (2) At the first appointment the district judge -
  - (a) must determine -
    - (i) the extent to which any questions seeking information under rule 2.61B must be answered, and
    - (ii) what documents requested under rule 2.61B must be produced, and give directions for the production of such further documents as may be necessary;
    - (b) must give directions about -
  - ...
  - (iii) evidence to be adduced by each party and, where appropriate, about further chronologies or schedules to be filed by each party.



## Ratio of Imerman (3)

- *The duty on both parties to make full, frank and clear disclosure of their means to the other and to the Court (Livesey v Jenkins [1985] FLR 813 - and many others), **does not arise until 35 days before the First Appointment.***
- *Self-help causes practical problems: the suspicion engendered by the contents of a few documents often turns out, after thousands of pounds spent on lawyers and accountants, to be ill-founded. The temperature and costs have been increased pointlessly.*
- *But there are more principled objections:*
  - *The “offending” party steals a march on the other.*
  - *Proportionality - both in terms of the level of information required to be provided and of the costs incurred in the disclosure process - is impossible to impose/police.*
  - *Fundamental human rights are breached without judicial sanction.*
  - *Under the “Hildebrand Rules”, none of this is even known - potentially for weeks/months.*
- *The most important mischief of what has over the years been excused under the “Hildebrand Rules” is the usurpation of the Court’s rôle as the arbiter and controller of the process of disclosure by the spouse herself/himself.*



## What is Confidential? (1)

- Confidentiality is the key.
    - BUT Imerman is not an exhaustive authority on what is “confidential”. For that, the QBD has developed a considerable body of jurisprudence.
    - The CoA summarised the position:
      - “Communications which are concerned with an individual’s private life, including his personal finances, personal business dealings, and (possibly) his other business dealings are the stuff of personal confidentiality”
      - “Many emails sent to and by and on behalf of Mr Imerman, whether connected with his family or private life, his personal and family assets, or his business dealings must be of a private and confidential nature”
- NOTE THAT IF A DOCUMENT IS CONFIDENTIAL, YOU MAY NOT EVEN LOOK AT IT:
- (S69) “In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant.”



## What is Confidential? (2)

- If a husband leaves his bank statement lying around open in the matrimonial home, in the kitchen, living room or marital bedroom, it may well lose its confidential character as against his wife.
- The court may have to consider the nature of the relationship and the way the parties lived, and conducted their personal and business affairs.
- Thus, if the parties each had their own study, it would be less likely that the wife could copy the statement without infringing the husband’s confidence if it had been left by him in his study rather than in the marital bedroom, and the wife’s case would be weaker if the statement was kept in a drawer in his desk and weaker still if kept locked in his desk.
- Confidentiality is not dependent upon locks and keys.
- Thus a wife might well be able to maintain, as against her husband, the confidentiality of her personal diary or journal, even though it was kept visible and unlocked on her dressing table.



## What is Confidential? (3)

- It matters not, in principle, whether a document has come into a spouse's possession:
  - from the other spouse, if within *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 - viz “secrets of the plaintiff relating to her private life, personal affairs or private conduct, communicated...in confidence during the subsistence of [the] marriage...and not hitherto made public property.”
  - by a trick: *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431; or
  - by chance: *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109;



## What Imerman is NOT authority for (1)

- That improperly (i.e. tortious or criminally) obtained documents and information is **INADMISSIBLE**.
  - §170 After all, the use in court as evidence of material which has been improperly obtained (whether in breach of confidence, tortiously, or even criminally) is permissible, though such use may be refused by the court or permitted only on terms. Subject to certain exceptions, notably information obtained by torture, the common law does not normally concern itself with the way evidence was obtained when considering admissibility... Accordingly, in the present case, it appears to us that information derived from the documents obtained, albeit unlawfully, from Mr Imerman's computer records is, subject to questions of privilege and relevance, admissible in the ancillary relief proceedings.



## What Imerman is NOT authority for (2)

- The test for Anton Pillar orders established in the QBD has been watered down for the Family Division.
  - §130: *The applicable principles, and the requirements which a claimant has to satisfy, where the court is invited to grant relief are no different in the Family Division from those in the other two Divisions of the High Court, although, of course, in all three Divisions, the application of the principles has to be made to the facts and features of the particular case before the court.*
  - *“In our view, at least in general, such applications should be seriously considered where there are substantial reasons for believing that a husband is concealing or dissipating assets, or intending to conceal or destroy documents.”*



## What Imerman is NOT authority for (3)

- That advisors will have to cease to act if they have read the contents of improperly obtained documents.
  - §106-122: *where the information has been passed on whether by the wife or those acting in her interest, the court might think it right in appropriate circumstances necessary to go so far as to enjoin her from continuing to instruct those solicitors in the proceedings.*



## Practical Considerations

- The importance of a full proof at the first meeting where you are handed a bag of paper.
- Topics to cover
  - How was information dealt with during the marriage?
  - Where was information kept?
  - Were there passwords on computers?
  - Is W in fact an officer of any private company in question?
  - Without looking at them(!) are any of the documents originals?
  - If they are copies what became of the originals?



## Practical Considerations (2)

- When do you explain the rules to a client?
- Have you changed your client care letter?
- Be wary of how you draft petitions (“*he was always secretive about money...*”)
- Always at the outset send an “Imerman letter” - i.e. ask as a matter of routine for all copy and original documents that may belong to you client.
- Seek detailed instructions on what documents are left in the FMH.



## Remedies from the Court?

- First request an undertaking from the solicitor to whom you return the documents and (*or?*) from their client to give irrevocable instructions to their solicitor to preserve them.
- A preservation order (a lower species of Anton Piller) will at least keep the documents safe.
- Your client can rely on their memory. This can form part of evidence for an application for preservation order.
- BUT the most the court can do is “hold the ring”.



## Salutary Tale?

- R v Walters [2007] EWCA Crim 222
  - Parties in acrimonious divorce proceedings.
  - H suspected W had undisclosed assets.
  - H installed on W’s home computer “spyware” to try and find evidence of hidden assets.
  - Convicted under the Computer Misuse Act 1990
  - No previous convictions at all
  - Sentence?

**4 MONTHS IMPRISONMENT**



THANK YOU

*These notes will be available (shortly)  
for downloading as a black & white  
document from our chambers website*

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