Barristers' Chambers

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Issue 21
Tchenguiz v Imerman; Imerman v Imerman [2010] EWCA Civ 908
Imerman – No Reprieve for Hildebrand

Introduction:

The practice developed under what has been known as the 'Hildebrand Rules' have enabled wives, in the main, up to now, to garner evidence of their husband's lack of full and frank disclosure, which either they had no knowledge of previously and discovered only by accident or chance or which they always suspected but the process of disclosure had failed to reveal and belated 'self help' to accessible material appeared to be the most cost effective way of exposing such conduct.

The Court of Appeal, strategically assembled with the Master of the Rolls sitting as lead judge in this appeal, has effectively dismantled the Hildebrand process in family cases in preference to requiring both parties to adhere to the criminal and civil law without exception and notwithstanding one party's real concerns in ancillary relief that the other has 'duped' the Court system of full and frank disclosure and, effectively, got away with it.

The Court of Appeal expressed surprise that the Profession in ancillary relief cases had not made greater use of the Anton Pillar (search order etc) procedure, whilst in the same breath admitting that in some cases the same may not be cost effective and that previous reported decisions in family cases dealing with such applications had not exactly given great encouragement to practitioners that such use was appropriate.

Well, now the door to such applications such as Mareva injunctions and Anton Pillar applications has been opened widely by the Court of Appeal with a big welcome sign hanging from it – the truth is, however, that there will be no rush for the very reason that the Hildebrand procedure was developed because the existing remedies in this area were seen by practitioners up and down the country as inadequate and too unwieldy to meet the growing problem of parties willing to divert funds and hide their resources.

In *FZ v SZ and others* [2010] EWHC 1630 (Fam), Mostyn J, had recently pleaded for a more constructive outcome in this appeal, when he stated:-

> "*I hope very much that the Court of Appeal will not outlaw the use of Hildebrand material. In many cases in which I was involved when in practice the existence of substantial undisclosed funds, in some cases running to millions of pounds, was revealed by virtue only of the wife*

having obtained Hildebrand documents. But for the obtainment of the documents the funds would not have been found and a gross iniquity perpetrated on both the wife and the court."

For those looking for some snippets of encouragement in this bleak landscape occupied by the law of confidence and trespass and, of course, the criminal law – there is discussion of what type of material may yet not be privileged and protected from lawful copying in family cases at pp 5 and 6 below – but don't get too excited!

Facts:

H worked and shared a computer system with the W's brothers. When the W commenced her ancillary relief proceedings against H, at least one of her brother's copied information and documents of the H's from the office computer and forwarded them to his and his brother's solicitor. Following a preliminary sift to exclude potentially privileged material, the solicitor then forwarded several files to the W's solicitors, who then disclosed the same to the H's solicitors in the ancillary relief proceedings.

In an application to Eady J sitting in the QBD, the Judge granted the H an injunction against the brothers and their solicitor (i) directing them to return all copies to the H and (ii) prohibiting disclosure of any material taken from the computer to any third party, including the W and her solicitors. By further application in the Family Division, Moylan J directed that the W's solicitors were to return only those files claimed to contain no privileged material to the H for confirmation this was so and then to return the same to the W's solicitors.

Both sides appealed and the Court of Appeal confirmed Eady J's order, whilst amending Moylan J's order. In particular, the W was directed to deliver all of the files her solicitors had received together with any copies taken to the H's solicitors to enable them in the ordinary course to properly advise the H as to his required disclosure. In addition, the W and her solicitors were restrained, for the present, from using any information they might have gleaned from the files received.

The Application of the Law of Confidence to Ancillary Relief:

After reviewing the FPR (paras 25to 35), the so called Hildebrand procedure and the various legal dicta (mainly by Wilson LJ as he is now) on the application of the procedure (paras 36 to 53) and conducting an extensive review as to the development of the law of confidence and the right to privacy under the HRA 1998 (paras 54 to 67), the Court concluded that, whilst there was no tort of invasion of privacy, following the House of Lords decision in *Campbell* v *MGN Ltd* [2004] UKHL 21, [2004] 2 AC 457, there is now a tort of misuse of private information, which has been "shoehorned" into the law of confidence (see Lord Phillips of Worth Matravers MR in *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125).

The Court of Appeal considered that the touchstone suggested in *Campbell*, paras [21] and [85], namely whether the claimant had a "reasonable expectation of privacy" in respect of the information in issue, is, a good test to apply when considering whether a claim for confidence

is well founded (see para 66). The law should be developed and applied consistently and coherently in both privacy and 'old fashioned confidence' cases, even if they sometimes may have different features. Consistency and coherence are all the more important given the substantially increased focus on the right to privacy and confidentiality, and the corresponding legal developments in this area, over the past twenty years (para 67).

Accordingly, as the law of confidence applies to a defendant who 'adventitiously, but without authorisation', obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. Intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence (see para 68 and also Copland v United Kingdom *(2007) 25 BHRC 216*).

At para 69, the Court stated that 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. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence. As a matter of principle, 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. Without the court having the power to grant such relief, the information will, through the unauthorised act of the defendant, either lose its confidential character, or will at least be at risk of doing so. The claimant should not be at risk, through the unauthorised act of the defendant, of having the confidentiality of the information lost, or even potentially lost (any suggestion in *White v Withers LLP* [2008] EWHC 2821 (QB) to the contrary was not correct (see paras 70 & 71).

The Relief:

An injunction to restrain passing on, or using, the information, would seem to be self-evidently appropriate – always subject to any good reason to the contrary on the facts of the case. If the defendant has taken the documents, there can almost always be no question but that he must return them: they are the claimant's property. If the defendant makes paper or electronic copies, the copies should be ordered to be returned or destroyed, again in the absence of good reason otherwise (para 73).

A claim based on confidentiality, being an equitable claim, the normal equitable rules apply and normally a court granting the type of relief above would have a discretion whether to refuse some or all such relief on familiar equitable principles. The precise nature of the relief which would be granted must depend on all aspects of the particular case: equity fashions the appropriate relief to fit the rights of the parties, the facts of the case, and, at least sometimes, the wider merits. Where the confidential information has been passed by the defendant to a

third party, the claimant's rights will prevail as against the third party, unless he was a bona fide purchaser of the information without notice of its confidential nature. An example of refusal was in *ISTIL Group Inc v Zahoor* [2003] EWHC 165 (Ch); [2003] 2 All ER 252, Lawrence Collins J held (para [74]) where he concluded (para [115]) that an injunction should be refused "on the ground of the public interest in the disclosure of wrongdoing and the proper administration of justice" (see para 75).

The H's claim for confidence:

Communications 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, and are specifically covered by article 8 of the Convention, which confers the right to respect for privacy and expressly mentions correspondence. Hence, H here had an expectation of privacy in respect of the majority of his documents stored on the computer, so that issue can properly be answered in his favour even at this interlocutory stage. Indeed, the very justification offered for the actions of her brothers by the W was the fear that her husband would seek to maintain the secrecy of the information which she sought by clandestine means. Hence, much of the information contained in the documents was, at least in the absence of a good reason to the contrary, confidential to the H. Many emails sent to and by and on behalf of the H, 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 (see paras 76 & 77).

It was disproportionate and absurd to suggest in such a case that the H should first identify which of the 2.5m documents copies the H claimed a breach of confidence. The fact that the documents were stored on the server, which was, as he knew, owned by one of the brothers, who enjoyed physically unrestricted access to the server, cannot deprive the H of the reasonable expectation of privacy, and the consequent right to maintain a claim for breach of confidence, in respect of the contents of any of his documents stored on the computer. The fact that a defendant has a means of access into a claimant's room or even into his desk does not by any means necessarily lead to the conclusion that he has the right to look at, let alone to copy, or even disseminate, the contents of the claimant's private or confidential documents contained therein. The fact that the H may have been a bare licensee of particular rooms in the office and may have shared rooms with a brother could not possibly mean that the brother was entitled to look at his otherwise confidential personal or business papers, just because those papers were kept in those rooms. Confidentiality is not dependent upon locks and keys or their electronic equivalents (see paras 78 & 79).

Confidence between husband and wife:

The Court stated, at para 80, that it did not agree with any contention that there is no right of confidence as between husband and wife or as between civil partners or, in particular, as was argued, their separate lives and personalities (see *Duchess of Argyll v Duke of Argyll* [1967] Ch 302. Any dicta from *Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618* did not support such a contention. The notion that a husband cannot enjoy rights of confidence as against his wife in respect of information which would otherwise be

confidential as against her if they were not married, is simply unsustainable. The idea that a husband and a wife should be regarded as a single unit in law was a fiction which the law has been abandoning for a long time (see para 82).

Hence, in relation to financial matters, English law recognises that although marriage may be a partnership of equals there is nonetheless a sphere in which each spouse has, within and as part of the marriage, a life separate and distinct from the shared matrimonial life. It is implicit in the protection which article 8 HRA affords each spouse in relation to his or her personal and individual private life, in contrast to their shared family life (see para 84). Subject to the court being satisfied that the normal equitable principles would otherwise be in play, a claimant is not to be denied equitable relief merely because the defendant is, or has obtained the material or information in question from, his or her spouse (para 85).

The fact that two parties live together, especially if they are married, civil partners, or lovers, will often affect the question of whether information contained in certain documents is confidential and will often be a relevant factor on the issue of whether the information was confidential as between the two parties. The court may well hold that, as a result of their relationship – what they have said to each other or how they have acted to each other's knowledge – the husband has no right as against his wife (or vice versa) to confidence in relation to particular information which, in the absence of the marriage and the way they conducted themselves, he would otherwise have enjoyed (see para 87).

The question must, inevitably, depend on the facts of the particular case. Thus, 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. However, the wife might well be able to maintain, as against her husband, the confidentiality for example of her personal diary or journal, even though it was kept visible and unlocked on her dressing table (see para 88). However, once it is established that the information or document is to be cloaked with confidentiality, the relationship has no further relevance in relation to the remedy for breach of that confidentiality (see para 89)

Alleged breaches of the criminal law:

The surreptitious removal of papers may, depending upon the circumstances, involve offences such as theft or burglary and there may also be criminal offences under the Computer Misuse Act 1990 and the Data Protection Act 1998 (se para 90).

Upon the brief arguments presented, there was a real possibility that those defendants responsible for accessing the H's computer records stored in early 2009 were guilty of an offence under section 1 of the 1990 Act. There may conceivably be a defence based on the proposition that they believed that they had (or that they actually had) authority to access the

H's material, within the meaning of the Act, because they had, to his knowledge, physically unrestricted access to the computer. However at an interlocutory stage it was undesirable to make definitive rulings as to this issue (see para 94) and even if a crime the same did not necessarily give rise to a civil cause of action.

Under the 1998 Act, the alleged breach of statutory duty imposed upon a "data controller" (see s 4(4)) is to comply with "the data protection principles", set out in schedule 1, in relation to "all personal data [of] which he is data controller". It was strongly arguable that two of the brothers may have been data controllers in the circumstances and that they were in breach of their statutory duties in this respect (see paras 95 to 97) .

The brothers relied upon section 35(2), which permits disclosure of data if it "is necessary ... for the purpose of, or in connection with, legal proceedings ... or is otherwise necessary for the purpose of establishing, exercising or defending legal rights" and in so doing it was argued that there is or should be a special dispensation in the Family Division permitting the W to retain copies of documents, prior to the time at which the rules dictate she was entitled to them and without court order. However, as set out below, the Court resolved that she was not so entitled since the W could have applied to the court for a search and seize order or a preservation order rather than her brother, or brothers, taking the law into his, or their, own hands (see paras 98 & 99). There was also some basis for accepting that some of the defendants were guilty of breaching section 55(1) of the 1998 Act (i.e. knowingly or recklessly" and "without the consent of the data controller" "obtaining or disclosing personal data).

Tortious liability:

At para 105, the Court stated that, leaving aside all questions of copyright, where confidential papers are surreptitiously copied, even in situ, without the knowledge of the owner, then the same may give rise to an action in trespass to goods: see the discussion in Salmond and Heuston on the Law of Torts, ed 21, page 95 and in particular *Thurston v Charles* (1905) 21 TLR 659 per Walton J and the discussion by Ward LJ in *White v Withers*, paragraphs [44]-[50]. It is also clear that in some cases the conduct may amount to the tort of conversion: see the discussion by Ward LJ in White v Withers, paragraphs [51]-[61].

The relevance of the Hildebrand rules:

The Court pointed out that the assumption has hitherto been that, provided no force is used, a spouse may, like the W in this case, profit from an unlawful breach of confidence (or tort) to the extent that, whilst she will be required to return originals and disclose the existence of copies, she may retain those copies. However, the fear of the other side behaving wrongly and failing to give full disclosure could not justify by the Court such condonation of illegal self help (see para 106 & 107).

This was a case where material was copied before any consideration could be given as to how the same was to be used (see para 109). The Court accepted that lack of candour on the part of spouses determined to conceal their wealth in ancillary relief cases was a very real problem and that the existence of the so-called Hildebrand rules is a recognition of that fact (see para 110). See *Araghchinchi v Araghchinchi* [1997] 2 FLR 142, Ward LJ and *FZ v SZ and others* [2010] EWHC 1630 (Fam), Mostyn J. However, the Court was not prepared to accept that 'illegal self help' in such circumstances could be described as lawful, either as based upon some unrecognised, "substantive defence", as Sedley LJ put it in *White v Withers* or, as Wilson LJ suggested in the same case, because of some public policy exception founded on the words of section 25 of the 1973 Act? (see paras 115to 118 and cf dicta of *L v L* [2007] EWHC 140 (QB)**;** [2007] 2 FLR 171, paragraphs [1]-[2] and Ward LJ in *White v Withers*). Indeed, '…The tort of trespass to chattels has been known to our law since the Middle Ages and the law of confidence for at least 200 years, yet no hint of any defences of the kind now being suggested is to be found anywhere in the books'.

Whilst, the special role of the court in ancillary relief cases was accepted and it was acknowledged that there the jurisdiction is inquisitorial and not purely adversarial, this cannot be a justification for riding roughshod over established legal rights nor for permitting a litigant without sanction to evade by lawless recourse to self-help the safeguards of the Anton Piller (search order) jurisprudence (discussed below), which are not merely enshrined in our domestic law but are indeed essential if there is to be proper compliance with the Convention: see *Chappell v United Kingdom* (1989) 12 EHRR 1 (see para 118). Nor was it accepted that any reading of s 25 could require a court to admit any evidence and every document which relates to issues such as the parties' financial resources, irrespective of the circumstances in which they were obtained. Afterall, s 25 refers to the financial circumstances as assessed by the court and if certain evidence has been excluded because of how it was obtained then it is not relevant to the exercise the court has to carry out. Further, section 25(2)(g) requires the court to conduct '…if inequitable to disregard it" and therefore there are specific statutory grounds for excluding such evidence (or admitting all or some of it on terms) (see para 119).

The Court concluded, therefore, that there was no legal basis for the so-called Hildebrand rules save in the limited sense only as to the time when copies obtained unlawfully or clandestinely should be disclosed to a spouse (see paras 42 & 120). Accordingly the so-called Hildebrand rules could not act as any defence or justification to a spouse or his or her lawyers or any other third parties who could not establish the bona fide purchaser of the information without notice defence. Indeed, in appropriate circumstances it may be necessary to go so far as to enjoin the offending spouse from continuing to instruct his or her solicitors in the proceedings: cf, (see para 120 and *Re Z (Restraining Solicitors From Acting)* [2009] EWHC 3621 (Fam)**,** [2010] 2 FLR 132)**.**

Life without Hildebrand – Other Routes:

A matrimonial Court would still be prepared to draw adverse inferences where there was a failure to give full and frank disclosure (see Ward LJ pointed out in *Araghchinchi v Araghchinchi* [1997] 2 FLR 142, page 146 and also (see paras 121 to 123) and e.gs in Al-*Khatib v Masry* [2002] EWHC 108 (Fam), [2002] 1 FLR 1053 and in *Ben Hashem v Al*

Shayif [2008] EWHC 2380 (Fam)**,** [2009] 1 FLR 115, and, in *Mahon v Mahon* [2008] EWCA Civ 901**.** The Court referred to the risk taken by any party who attempted to hide assets in such ways from the Court in both the adverse inferences drawn and the indemnity costs liability which was likely to befall such a party (see paras 123 to 125 and Wilson LJ in *Mahon v Mahon* [2008] EWCA Civ 901, para [6] and Coleridge J in *J v V (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam), [2004] 1 FLR 1042, paragraphs [16]-[17]. That said, the Court accepted the assessment of whether, and, if so, to what extent, a husband is concealing his assets must be an inexact and unsatisfactory exercise in many cases and that many would say that it is a poor substitute for determining the level of relief by reference to knowledge of the full extent of the husband's assets (see para 126).

However, the Court referred to its existing powers of Mareva (freezing) and more particularly Anton Piller (search) orders and questioned the lack of use in family cases of the Anton Piller order to search and seize, freeze, preserve, and other similar orders, to ensure that assets are not wrongly concealed or dissipated, and that evidence is not wrongly destroyed or concealed. There was no reason why such orders should not be sought or granted in the same way, as in civil cases, in the Family Division in ancillary relief cases where a wife has evidence that her husband is threatening to conceal or dissipate assets or to conceal or destroy relevant documents. The Court rejected the notion that a family court would be less willing to grant such relief or that *Emanuel v Emanuel* and another (1982) 3 FLR 319, *Burgess v Burgess* [1996] 2 FLR 34 and *Araghchinchi v Araghchinchi* [1997] 2 FLR 142, demonstrated such reluctance in practice. Of course, such orders can be expensive to obtain and execute, particularly in cases where the amount at stake is not substantial and the Court accepted in such cases, the cost-effectiveness, or proportionality, of seeking such an order may be questionable. However in many cases where a wife has reason to be concerned that her husband may be in the process of concealing assets or documents, or the like, seeking ex parte peremptory relief would be both appropriate and effective (see paras 127 to 135)

Instead of the Court having to deal with breach of confidence, tort, or statutory crime having been committed through accessing and copying electronic documents and rights of confidence being invaded, the determination of whether any documents, and if so what documents, were to be seized, inspected, checked, preserved would have been determined, supervised, regulated and approved by the court, and any such exercise, having been approved by the court, would be lawful, both in domestic law, and in the eyes of the Strasbourg Court: *Chappell v United Kingdom* (1989) 12 EHRR 1 (see para 136).

The rules, and the judges' application of the rules, must be robust to prevent such cheating. In However, the fact was that the Wife in this case was not entitled to the confidential information at the stage she obtained it. The Family Proceedings Rules prevented it. The law forbids it. She should not be allowed to obtain an advantage over her husband who, for all the court knows, would have been honest when the time came for him to be honest, namely at the time the Rules required him to disclose his assets through Form E.

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