In July 2010, the Court of Appeal gave its decision in the conjoined appeals of Tchenguiz v Imerman; Imerman v Imerman [2010] EWCA Civ 908 which removed the right of one spouse to rely on the other spouse's confidential material in the context of divorce proceedings and in so doing, radically altered the practice of disclosure that had developed in the Family division over the last two decades.

Mr Imerman shared offices with his wife's brother. On the breakdown of the marriage in late 2008, fearing his brother-in-law would conceal his true worth in the context of the divorce, Mr Tchenguiz accessed and made copies of documents from a shared computer server. Some of the accessed documents were printed and, after being checked for privileged material, were sent (in seven files) to the wife's solicitors (Withers LLP), whom in turn disclosed the seven files to the husband's solicitors in the divorce proceedings in accordance with what had become known as the 'Hildebrand rules'.

The 'Hildebrand rules' (so called after the eponymous case in 1992) had evolved in practice to permit a party to a divorce to take and copy their spouse's documents, so long as they did not use force; that they retained copies not originals; and that they disclosed to the other side the fact that they have such documents. Before the case of Imerman, it was accepted by the courts that such documents were admissible for the purposes of providing a just resolution to the financial claims on divorce. By being permitted to rely on the Hildebrand documents, a spouse who might otherwise be completely in the dark as to family finances could ask relevant questions, thereby creating a more level playing field.

In the High Court in Imerman, Mr Justice Moylan determined that the wife could rely in the divorce proceedings on any material in the seven files which was not legally privileged. On the husband's appeal, the Court of Appeal found that the Hildebrand rules which, had developed in the Family Division, had no legal basis, and that it would be a breach of confidence for one party, without permission, to make, retain, or supply to a third party, copies of a document with confidential content. The spouse from whom the document had been taken could restrain the use or dissemination of the document in question or enforce its return. In this case, the Court ordered the return of the documents to the husband's solicitors on the basis that a set be preserved (in case access to the documents was deemed fair and proportionate by the Court or in the event that there were documents in the seven files which the wife should see) pending the conclusion of the financial proceedings.

The fact that the parties were married did not affect the fundamental proposition that information contained in a document belonging to the other spouse was confidential. Documents can, however, lose their confidential nature, if, for example, they are left lying around the house. Depending on the actions and conduct of the parties during the marriage and the circumstances in which the document was taken, there remains scope for argument that taking documents would not be a breach of confidence.

Since 2000, family law in England has moved towards equal sharing of assets, arguably incentivising some financially stronger parties to hide assets so as to reduce the pot available for division and thus the proportionate share for their spouse. The Court of Appeal ruled that, coupled with the existing disclosure obligations on divorce (which are more extensive in England than in many other countries), there were sufficient alternative weapons in the Court's armoury including the drawing of adverse inferences and the availability of freezing and search orders, to discourage potential non-disclosers.

However, not only will the spouse seeking a search and seizure or preservation order require deep pockets, as injunction applications are very expensive and undertakings have to be given in respect of damages if the order is wrongly made, but previous decisions of the Court also indicate that such injunctions are draconian and to be granted only in exceptional circumstances e.g. where there is clear evidence that the defendant has incriminating documents or may destroy such material. Attempting to establish that without being able to rely on Hildebrand documents as evidence for an injunction will be problematic for spouses who have proper reason to believe that their husband/wife has hidden assets.

This change in the law has caused consternation amongst family law practitioners for whom the old Hildebrand rules represented a pragmatic and cost-effective alternative to expensive injunctions in complex cases with disclosure issues.

The full impact of the Court of Appeal's decision has yet to be felt but it leaves family lawyers with a myriad of practical issues in cases involving 'confidential' documents. There will inevitably be clarificatory judgments in this area in due course.
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