

SEEK HELP BEFORE YOU HELP YOURSELF

Overview

English family law has always allowed use in evidence of confidential private documents obtained by one spouse concerning the affairs of the other where it will assist in finding out the full circumstances and wealth of the parties especially where one spouse may be attempting to hide assets or evade disclosure. Such “self help” has sometimes been absolutely vital in learning the truth. In a groundbreaking decision by the Court of Appeal in late July 2010, it has now mostly forbidden use of such documents and instead imposed stringent duties on those spouses who obtain such documents, and the lawyers who receive them. It will undoubtedly now make it harder to show disclosure where one party seeks to hide it, and more expensive in costs to ascertain the full facts

Introduction

On 29th July 2010 the Court of Appeal handed down its decision in *Imerman* .

The Master of the Rolls, Lord Neuberger, gave judgment with two other Lord Justices, only one being a recognised family law judge, on the most definitive self help case to date since *Hildebrand* in 1992. *Hildebrand* is cited by lawyers as authority for the proposition that provided no force is used, a spouse can rummage around in their partner’s personal documents, including computers, and provide copies of documents found to their solicitors and the court, so long as they disclose the existence of those copies and return the originals. The documents should in any event be disclosed in due course by the husband in giving financial disclosure. The opportunity to use the self help evidence arises when there is anxiety that the assets would not otherwise be disclosed. Such self help action on behalf of a litigant is normally overlooked by the courts on the basis that it may be the only way for the wife as applicant to obtain information from a non-disclosing husband.

In *Imerman*, the Court of Appeal determined that this proposition and practice, above, on behalf of the entire family law profession, including exalted and highly regarded members of the family law judiciary, was wrong. The practice should cease immediately.

The judges placed considerable weight on the civil law of “confidence” whereby a person’s confidential personal documents should not be seen, supplied, retained and relied on by anyone else, which they said included spouses and divorcing spouses and their lawyers, even in the context of financial proceedings ancillary to divorce

The facts of the case

On any basis they were extreme. The husband shared office space with his wife’s brothers. He had free use of the office computer system of which the brothers-in-law had unrestricted access including to all of the husband’s electronic data. The husband was immensely wealthy, perhaps worth £100 million or more. Shortly after she issued divorce proceedings and unbeknown to the husband, her brothers-in-law accessed his computer via the office server and made copies of e-mails and other documents stored by Mr *Imerman*, being between 250,000 and 2.5 million pages. The explicit reason for the raid on the husband’s records was that he had apparently made repeated threats that if there were to be a divorce, his wife would never find out about his true wealth e.g. his wife would “never be able to find my money” because it was “well hidden”. On any basis it was a pre-emptive strike and self help in circumstances where there was a genuine fear that the full truth of his finances would never be known

Findings

The judges made a number of findings:

1. At the time that the husband's computer was accessed, Mr Imerman was under no duty of financial disclosure. This duty of disclosure of financial circumstances does not arise until a spouse lodges his financial statement, Form E, disclosure documents at Court. Discovery of documents, technically separate to disclosure, only arises in limited part at the time of the financial statement and in part as ordered by a court in replies to questionnaire. It is the family court and family court procedural rules which controls what documents are to be disclosed (technically "discovered") and tendered by way of evidence, and when.
2. Hildebrand is not authority for the presumption of admittance of such self help evidence. In *Hildebrand* itself, the judge refused to order the wife to answer a questionnaire served on her by her husband who by self help knew the answers in advance and was seeking to entrap her in the context where she had previously not made disclosure forthrightly. The Court of Appeal in Imerman said Hildebrand was authority only for the importance of the early return of such documents, at least on service of a Questionnaire or earlier if asked
3. A person who accesses another person's confidential information not only commits the tort of misuse of private information, but also breaches the ancient law of confidence, as well possibly other criminal laws. Lord Neuberger was particularly scathing of the submission made by Mrs Imerman's lawyers that there is no "confidence" as between husband and wife i.e. there is no such duty enforceable against the other in relation to their separate lives and personalities. He added:

"The submission that there is no confidence as between husband and wife is particularly unacceptable, indeed, deeply unattractive, in circumstances such as arise in this case. The submission invokes a special relationship between husband and wife in order to defeat Mr Imerman's claim for confidentiality against her. But it is invoked at a time when that relationship had broken down, for the material was copied after Mrs Imerman had petitioned for divorce and Mr Imerman had left the matrimonial home. And it is invoked for the purpose of justifying an action which was and is solely concerned with financial terms on which the parties are to be divorced."
4. Had Mrs Imerman been so concerned that her husband would not comply with his disclosure obligations at the appropriate time, she could have applied to the court for a Search and Seize Order or a Preservation Order rather than her brothers taking the law in to their own hands. He said Mareva ("freezing") orders and Anton Piller ("search") orders should be used more often. He said there was no reason why such orders should not be sought or granted 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. Lord Neuberger did however acknowledge that historically judges have regarded such applications as "draconian" and "exceptional".
5. He also reminded the Court that where evidence cannot be obtained for concealment of particular assets, but where it is felt that those assets exist, the Judge is able to draw adverse inferences against the non-disclosing husband.

Lord Nueberger made some quite powerful assertions in this case which served to warn litigants and lawyers alike to watch their step in the future:

"Are the courts to condone the illegality of self help consisting of breach of confidence

(or tort) because it is feared that the other side will itself behave unlawfully and conceal that which should be disclosed? The answer, in our judgment, can only be: No”.

“It follows that nothing in the so-called Hildebrand Rules can be relied upon in justification of, or as providing a defence to, conduct which would otherwise be criminal or actionable ... nor as providing any reason why the relief ... which would otherwise be available should not be granted. More particularly it follows that neither the wives who purloin their husband’s 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 ... and we add that where the information has been passed on, whether by the wife or by those acting in her interests, to the solicitors acting for her in the ancillary relief proceedings, the Court might think it right and indeed in appropriate circumstances necessary to go so far as to enjoin [stop] her from continuing to instruct those solicitors in the proceedings.”

Following a very robust judgment which was highly critical of Mrs Imerman and her brothers, the Court ordered them to surrender up all copies of the confidential information to the husband’s lawyers. They would retain them so that they might properly advise the husband as to his disclosure obligations when the time came. The wife and her solicitors were forbidden from using any information they might have gained from reading the self-help files. The court was realistic enough to acknowledge that there was “no process by which the wife’s recollection of what she had learned from the documents could be removed”. As such, it was unlikely that the husband would be able to resist reliance by the wife on such evidence merely by saying that part of the information she relied upon had been culled from documents unlawfully obtained.

The court then seemed to soften its approach as it headed towards the conclusion of the judgment. It accepted that many determined spouses are “dishonestly hiding their assets with a view to avoiding their responsibilities”. It reminded itself that a judge has a discretion to admit documentation. In exercising that discretion, the judge could have regard to the conduct of the party in obtaining that evidence. Whilst no party to litigation should profit from a breach of the law, the judge is still at liberty, in his discretion, to allow any evidence. The judges also went on to say that the question must, inevitably, depend on the facts of the particular case. If a husband leaves his bank statement lying around open in the family home, it may well lose its confidential character as against the 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.

So in the end, it is still comes down to judicial discretion to allow evidence obtained by self help.

iFLG commentary

It would be wrong to overestimate the relevance of this case law development for the totality of financial disputes on divorce in England. So called Hildebrand self-help documents feature in only a few.

However for those of us practising in the field of difficult disputes involving complex assets, often substantial assets and wealth held abroad, self-help documents are a regular feature. It arises in a material respect in at least 10% of these cases. For these clients, especially for the applicant wives, this case is a major development.

In our system of law which has a starting point on divorce of equality of division of all assets, fairness and justice can only be done if the totality of those assets is known. If some assets are hidden, deceitfully disguised or prematurely transferred away, any settlement will be immediately unfair and unjust; the victim will be the applicant for financial provision. Finding out the truth is fundamental to this system.

Refusal or evasiveness in disclosure crosses the wealth spectrum. It ranges from the cash in hand plumber through the family company proprietor with sole control of the accounts, and profits, through to the multi-millionaire with assets hidden in offshore accounts, trust funds and corporate entities in tax havens. Of course the court can make inferences about the true level of wealth from the standard of living and suspicious interbank transfers and similar. But even better is providing evidence of specific details of assets, hitherto undisclosed, and obtained by self help.

iFLG's experience in common with many other specialist solicitors, barristers and judges in this field is that in a considerable number of complex cases the true financial affairs of the nondisclosing spouse often only come to light with self-help documents. An admission of the concealed assets is then often forthcoming and a better, fairer settlement results. The Court of Appeal has now said that such self help documents cannot be used, must be returned immediately and should not be shown to the solicitors. It is little wonder that the general response to this judgement has been to call it a Cheat's Charter. It is.

The general perception of the English family lawyers is that the Court of Appeal has placed far too much weight on the civil law of "confidence"; a law more often used in cases of corporate espionage, protecting the lives of celebrities and employment disputes. Many of us feel it is thoroughly out of place both generally regarding husbands and wives and specifically in the context of the duty of full and frank disclosure in the context of financial settlement on divorce.

The alternative remedies given by the Court of Appeal show a lack of awareness of the realities of family law in 2010. Suggesting that family lawyers should more often obtain a freezing orders and search orders, where a group of lawyers descend on a house or commercial premises with a High Court order to inspect the contents and take away documents, ignores the fact that these orders are usually expensive in costs and financially well out of reach of most applicant wives. Such actions inevitably raise the temperature of the case so as to make prospects of settlement prior to a final hearing almost impossible. What may be appropriate in heavy commercial litigation between two PLCs is not possible or appropriate between two co-parents now out of love!

Relying on the court to make an inference regarding the true level of wealth is unreliable although sometimes necessary. The family court will take a robust view against a spouse perceived as not giving honest disclosure. However an inference can only go so far and moreover in many cases the inference arises precisely because of available self-help documents. In future there may be very little on which to make any reliable judicial inferences. Forensic accountants will be unable to prepare reports stating what in their professional opinion may be the true level of wealth based on such self help documents

The statement by Lord Neuberger that the court might stop a client continuing to instruct lawyers who had seen the self-help documents will strike terror into the hearts of solicitors practising in this field. All of us who specialise in this area of complex financial matters on divorce have been well-used to advising clients that so long as they replace the originals and do not use force to obtain, they can avail themselves of their spouse's confidential financial information. To face now the risk that the lawyer may face costs orders and damages in trying to advance the disclosure process on behalf of an applicant client and moreover perhaps even be unable to continue to act for the client is unreasonable and unacceptable in our opinion. It does not allow us to represent clients forthrightly and boldly to their best interests in the face of what the Court of Appeal themselves admitted was the problem of "*litigants in all jurisdictions driven by their greed or other unworthy motives to lie and cheat*".

All lawyers and judges in this area of work must take note of this case. Not only will a spouse have to be extremely careful with taking their spouse's confidential information, but a solicitor will need to consider whether or not they are even prepared to hear about such evidence, much less receive it from their client, if it means that they may be removed from the case by a judge at some point in the future with possible damages and costs orders. In our opinion, each case needs to be determined on its facts, and a decision made as to what action should be taken in a cautious and careful manner. If that

is not done, then it is possible that not only will be spouse be debarred from using the solicitor of their choice, but they may well face penalties in costs and, crucially, be unable to utilise the information that they have gleaned.

The most important lesson from the case is to take specialist legal advice before taking any self-help measures to obtain disclosure.

This note is for information only and specialist legal advice should always be taken. For further details contact Punam Denley and David Hodson of The International Family Law Group at 020 3178 5668 and www.iflg.uk.com.

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