Imberman and self help – Where are we now?
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We are all familiar with the case of Imerman v Tchenguiz [2010] EWCA Civ 908, but how has this affected where we are in practice.

The starting point in any discussion has to acknowledge the need for “full and frank disclosure” – for it is the documents disclosed which allow the court to properly exercise its discretion under the section 25 criteria. However, as we all know too well there are, and will always be, a number of spouses who believe that they can buck the system and seek to hide the true extent of their wealth in order to achieve a better settlement or order. This pervades all cases, small to large, and the question arises as to what can we, as practitioners, actually do or advise our clients to do, to provide a clearer picture of the matrimonial pot and a level playing field.

Until 2010 we thought that we understood the parameters of “self help” as since Hildebrand [1992] 1FLR244 the position was pretty clear – and helpfully defined by Ward LJ in White v Withers LLP [2010] 1FLR859 as follows:

*It may be appropriate to summarise the Hildebrand rules as they apply in the Family Division as follows. The Family Courts will not penalise the taking, copying and immediate return of documents but do not sanction the use of any force to obtain the documents, or the interception of documents or the retention of documents nor I would add, though it is not a feature of this case, the removal of any hard disk recording documents electronically. The evidence contained in the documents, even those wrongfully taken will be admitted in evidence because there is an overarching duty on the parties to give full and frank disclosure. The wrongful taking of documents may lead to findings of litigation misconduct or orders for costs.*

This left us in the pretty comfortable position of being able to advise our clients that self help, within that definition, was acceptable. Provided force wasn’t used, mail wasn’t intercepted and original papers retained it was open season.

In my view, and somewhat regrettably, we are no longer in that place.

Chinks in the Hildebrand rules began in 2007 with the case of L v L [2007] EWCH 140. In that case the wife, fearing that her husband was destroying evidence, took the husband’s laptop and copied the hard drive. The court found that the husband had successfully argued that he was entitled to relief – although the court did not hypothesise on whether or not she had contravened the civil or criminal law. Interestingly however the husband’s application was pursued in the QBD thereby circumventing the Hildebrand rules.

In White v Withers supra, whilst we saw the court accepting the general Hildebrand principles, they would not sanction the use of force, interception or retention, or the removal of a hard disk. Hildebrand was alive but tarnished. Wrongful interference with another’s property would be punished.
The landscape of Hildebrand was destroyed in the Imerman decision. In short, the wife’s brothers downloaded hundreds of thousands of pages from the husband’s computer. A barrister considered the paperwork and removed those papers subject to privilege. 11 volumes were reduced to 7, and these were handed to the wife’s solicitor and copies sent to the husband’s solicitors.

The husband issued proceedings in the Queens Bench and Family Divisions for injunctions. In a variety of cross appeals the court dismissed the wife’s appeal, stating that it was a breach of confidence for a person to intentionally obtain another’s information secretly where the other party could reasonably expect the information to be private.

It was also found that at the time that the wife received the information concerning her husband’s finances the point had not been reached whereby he was obliged to provide disclosure – in short, she was not, yet, entitled to the information. Perhaps also of influence was the availability for the wife to adopt other courses of action, namely by way of Mareva Injunction, Anton Pillar order or section 37 application.

It is interesting to note that just a few weeks before the Court of Appeal gave judgement in Imerman that Mostyn J had strongly advocated in favour of the continuation of the Hildebrand rules. In FZ v SZ [2011] 1 FLR 64 at [80]:

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.

I tend to agree with Mostyn J’s comments – we operate in a system which requires full and frank disclosure and in my view that should be paramount in order to avoid injustice, or put another way, to ensure “fairness” – the buzzword for all that we strive to achieve. Without disclosure how can we realistically achieve fairness?

So where does this actually leave us:

- Self help is not allowed unless permitted by the law
- The duty of disclosure does not arise under the FPR until Form E is required to be served – and we cannot assume that less than full and frank disclosure will be made
- We cannot, as practitioners, advise a client to undertake a course of conduct which could well be tortious
- If you receive documents that have been obtained in breach of confidence do not read them (or if received electronically, open them) and return them immediately
- If you receive information from your client that may have been obtained by breach of confidence do not make a note of it as you cannot take advantage of it by recording the information if it is subsequently not disclosed
- Consider whether your recollection of the information (above) can be used in an application for further disclosure
- Take full and detailed instructions from your client as to how they came about the documents before you look at them
• Try to reach an agreement with your opponent – it could be a more cost effective solution than seeking an injunction, particularly in cases other than those in the ultra high net worth arena
• Hildebrand probably still applies where there is no confidentiality issue – the classic “kitchen table” situation (See the judgment of Neuberger LJ on the point)
• Consider alternative procedures in cases where there is sufficient risk and it remains a cost effective option – otherwise you will be relying upon your forensic accountant to find the holes and asking the court to draw adverse inferences

This is a developing area of law and one where you will have to advise carefully, or else you might find yourself in the uncomfortable place that Withers found themselves not too long ago.