Court of Appeal

Imerman *v* Tchenguiz and others

Imerman *v* Imerman

[2010] EWCA Civ 908

2010 May 10, 11, 12; July 29

Lord Neuberger of Abbotsbury MR, Moses, Munby LJJ

Confidential information Breach of confidence Injunction Wrongful access to confidential information Wife petitioning for divorce and initiating ancillary relief proceedings Wife's brother gaining electronic access to and copying husband's files and e mails without husband's consent to avoid concealment of assets by husband Documents copied and transmitted to wife's solicitors before parties required to disclose assets and documents in ancillary relief proceedings Whether husband entitled to injunction restraining use of information in documents and return of documents and copies Whether information in documents to be used in ancillary relief proceedings

Husband and wife Financial provision Identification of assets Confidential information wrongfully accessed for use in ancillary relief proceedings and transmitted to wife's solicitors Whether husband entitled to return of all information Whether wife entitled to non privileged information wrongfully obtained for use in ancillary proceedings Matrimonial Causes Act 1973 (c 18), s 25(2)(a)(g) (as substituted by Matrimonial and Family Proceedings Act 1984 (c 42), ss 3, 48(2) and amended by Pensions Act 2008 (c 30), s 120, Sch 6, para 4(3))[1]

The claimant husband shared an office and a computer system with his wife's brother, the first defendant. When the marriage broke down and the wife petitioned for divorce, the first defendant, fearing that the husband would conceal his assets to prevent the wife from obtaining a fair financial settlement, accessed the claimant's computer without his permission and copied information and documents stored there. The material printed out filled 11 files, which were handed to his solicitor, who arranged for a barrister to check through them for privileged documents, which were removed. The remaining seven files were passed to the wife's solicitors for use in the divorce proceedings in relation to her application for ancillary financial relief. The wife's solicitors, having already given notice to the husband of the wife's intention to seek ancillary relief, sent copies of the seven files to the solicitors acting for the husband in the divorce proceedings. The husband issued proceedings in the Queen's Bench Division seeking, inter alia, an injunction to restrain the defendants (the wife's two brothers, two employees of a company owned by the first defendant and the first defendant's solicitor) from using information obtained from the documents obtained from his computer, and applied for summary judgment under CPR Pt 24. On the application the judge granted, inter alia, injunctions restraining the defendants from communicating or disclosing to third parties, including the wife and her solicitors,

[1] Matrimonial Causes Act 1973, s 25(2), as substituted and amended: "As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire; . . . (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; . . ."

any information contained in the documents or from copying them or using any information in them, and ordering delivery up of all copies of the documents. On the husband's application in the divorce proceedings for the return of the files from the wife and her solicitors the judge ordered, inter alia, that the files be handed back to the husband for the removal of any material for which he claimed privilege but that the remaining material was then to be handed back to the wife for use in the ancillary relief proceedings.

On appeal by the defendants against the injunctions and by the husband against the order to return the files to the wife's solicitors after the removal of privileged material, and on the wife's cross appeal in relation, inter alia, to the removal of privileged material

Held, (1) dismissing the defendants' appeal, that it was a breach of confidence for a person intentionally to obtain another person's information secretly and without authorisation, knowing that he reasonably expected it to be private, and, without that other person's authority, to examine or copy a document the contents of which were or ought to have been appreciated by the person who obtained the information to be confidential to that other person, or to supply copies of that document to a third party; that in principle a claimant who established a right of confidence in information in a document was entitled in equity to an injunction to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of or communicate or utilise the contents of, the document or any copy and to enforce the return or destruction of any such document or copy; that misuse of private information was not a prerequisite for a claim for breach of confidentiality to succeed; that the husband had an expectation of privacy at common law and in accordance with article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the majority of documents stored on the server which had been accessed without his authority at a stage in the divorce proceedings before he was required to disclose his assets; that there was no requirement of law that in every case a claimant had to identify each and every document for which he claimed confidence and why, and in the circumstances it was unnecessary and would be disproportionate, unfair and oppressive to require the husband to do so; and that, accordingly, he was entitled to the relief granted against the defendants, and it made no difference that the documents had been stored on a computer, and in an office, owned by the first defendant (post, paras 68 69, 70, 71, 72 74, 76 79, 153, 155).

Lord Ashburton v Pape [1913] 2 Ch 469, CA, *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, HL(E) and *Campbell v MGN Ltd* [2004] 2 AC 457, HL(E) applied.

(2) That each spouse had, within and as part of the marriage, a life separate and distinct from the shared matrimonial life so that a spouse had a right of confidentiality enforceable against the other in relation to that separate life, and accordingly an action for breach of confidence could be brought by one spouse against the other; that whether a right of confidentiality in the particular information in issue could be established would depend on all the circumstances of the case, one relevant factor being the fact that the parties lived together, especially if they were married, civil partners or lovers; but that, once it was determined that a document was properly to be regarded as confidential, the relationship between the parties had no relevance to the remedy for breach of that confidentiality (post, paras 80 82, 84 85, 87 89).

Dicta of Lord Nicholls of Birkenhead and of Baroness Hale of Richmond in *McFarlane v McFarlane* [2006] 2 AC 618, paras 16, 20, 123, HL(E) considered.

(3) Allowing the husband's appeal in part and dismissing the wife's cross appeal, that in proceedings for ancillary relief on divorce the clandestine obtaining by one spouse of confidential documents belonging to the other to prevent the concealment of assets properly to be disclosed to the court could not in law be justified; that the duty of the court under section 25 of the Matrimonial Causes

Act 1973 to have regard by section 25(2)(a) to the income, earning capacity, property and other financial resources of the parties could not be relied upon to provide a defence to conduct which would otherwise be criminal or actionable since the court was required in addition by section 25(2)(g) to have regard to the conduct of the parties; that on the facts, because at the time when the information was obtained the husband had been under no obligation to disclose his assets in the ancillary proceedings, the wife had not been entitled to the confidential information when she had obtained it, and accordingly she ought not to be allowed to obtain a premature advantage over her husband; that the appropriate remedy was an order for delivery up of the copies obtained by the wife and an order restraining the wife and her solicitors from using any of the information obtained from the copies in question, at least until a subsequent order had been made, the copies to be kept in the custody of the husband's solicitors for consideration of whether the files disclosed any information which ought to be passed on to the wife's solicitors for use in the proceedings (post, paras 42, 106 107, 117, 119 121, 137, 139 140, 141 143, 147 153, 156).

Hildebrand v Hildebrand [1992] 1 FLR 244 explained.

White v Withers LLP [2010] 1 FLR 859, CA not followed.

Per curiam. (i) *Hildebrand v Hildebrand* [1992] 1 FLR 244 is authority only as to the time when copies obtained unlawfully or clandestinely should be disclosed to a spouse; it is no authority for the proposition that a spouse may, in circumstances which would otherwise be unlawful, take, copy and retain copies of confidential documents. There is no authority or legal basis for the so called "*Hildebrand* rules". It remains the obligation of a wife who has obtained access to her husband's documents unlawfully or clandestinely to disclose that fact promptly if asked by her husband's solicitors or at the latest when she serves her questionnaire (post, paras, 41, 42, 117, 120).

(ii) Where in ancillary relief cases a spouse is suspected of concealing his assets an application can be made to the court for peremptory orders for search and seizure, freezing, preservation and similar orders to ensure that assets are not wrongly concealed or dissipated or documents destroyed or concealed. That would be far more satisfactory than an unauthorised, inequitable, tortious, and quite possibly criminal, accessing, copying, dissemination and proposed use, of the spouse's documents (post, paras 128 129, 134, 136).

(iii) In ancillary relief proceedings, while the court can admit evidence confidential to one spouse and wrongly obtained for the benefit of the other spouse, it has power to exclude it if unlawfully obtained, including power to exclude documents the existence of which has only been established by unlawful means. In exercising that power, the court will be guided by what is "necessary for disposing fairly of the application for ancillary relief or for saving costs", and will take into account the importance of the evidence, "the conduct of the parties", and any other relevant factors, including the normal case management aspects (post, paras 176, 177).

Decision of Eady J [2009] EWHC 2024 (QB); [2010] 2 FLR 735 affirmed.

Orders of Moylan J [2009] EWHC 3486 (Fam); [2010] 2 FLR 752; [2010] EWHC 64 (Fam); [2010] 2 FLR 802 varied.

The following cases are referred to in the judgment of the court:

Al Khatib v Masry [2002] EWHC 108 (Fam); [2002] 1 FLR 1053
Albert (Prince) v Strange (1849) 1 Mac & G 25; (1849)2 De G & Sm 652
Araghchinchi v Araghchinchi [1997] 2 FLR 142, CA
Argyll (Duchess of) v Duke of Argyll [1967] Ch 302; [1965] 2 WLR 790; [1965] 1 All ER 611
Ashburton (Lord) v Pape [1913] 2 Ch 469, CA
Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E)

A *Baker v Baker* [1995] 2 FLR 829, CA
Barwell v Brooks (1784) 3 Doug 371
Ben Hashem v Ali Shayif [2008] EWHC 2380 (Fam); [2009] 1 FLR 115
Burgess v Burgess [1996] 2 FLR 34, CA
Calcraft v Guest [1898] 1 QB 759, CA
Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995, HL(E)
B *Chappell v United Kingdom* (1989) 12 EHRR 1
Charman v Charman [2005] EWCA Civ 1606; [2006] 1 WLR 1053, CA
Coco v AN Clark (Engineers) Ltd [1969] RPC 41
Copland v United Kingdom (2007) 45 EHRR 858
Douglas v Hello! Ltd (No 3) [2005] EWCA Civ 595; [2006] QB 125; [2005] 3 WLR 881; [2005] 4 All ER 128, CA
Dubai Aluminium Co Ltd v Al Alawi [1999] 1 WLR 1964; [1999] 1 All ER 703
C *Emanuel v Emanuel* [1982] 1 WLR 669; [1982] 2 All ER 342
F v F (Divorce: Insolvency: Annulment of Bankruptcy Order) [1994] 1 FLR 359
FZ v SZ (Ancillary Relief: Conduct: Valuations) [2010] EWHC 1630 (Fam); [2011] 1 FLR 64
Gottliffe v Edelston [1930] 2 KB 378
Hellewell v Chief Constable of Derbyshire [1995] 1 WLR 804; [1995] 4 All ER 473
Hildebrand v Hildebrand [1992] 1 FLR 244
D *Hytrac Conveyors Ltd v Conveyors International Ltd* [1983] 1 WLR 44; [1982] 3 All ER 415, CA
ITC Film Distributors Ltd v Video Exchange Ltd [1982] Ch 431; [1982] 3 WLR 125; [1982] 2 All ER 241
Istil Group Inc v Zahoor [2003] EWHC 165 (Ch); [2003] 2 All ER 252
J v V (Disclosure: Offshore Corporations) [2003] EWHC 3110 (Fam); [2004] 1 FLR 1042
E *Jenkins v Livesey (formerly Jenkins)* [1985] AC 424; [1985] 2 WLR 47; [1985] 1 All ER 106, HL(E)
Jones v University of Warwick [2003] EWCA Civ 151; [2003] 1 WLR 954; [2003] 3 All ER 760, CA
Kuruma v The Queen [1955] AC 197; [1955] 2 WLR 223; [1955] 1 All ER 236, PC
Kuwait Airways Corpn v Iraqi Airways Co (No 6) [2005] EWCA Civ 286; [2005] 1 WLR 2734, CA
L v L [2007] EWHC 140 (QB); [2007] 2 FLR 171
F *Lamb v Evans* [1893] 1 Ch 218, CA
Lifely v Lifely [2008] EWCA Civ 904; The Times, 27 August 2008, CA
Lock International plc v Beswick [1989] 1 WLR 1268; [1989] 3 All ER 373
Lonrho plc v Fayed (No 5) [1993] 1 WLR 1489; [1994] 1 All ER 188, CA
McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618; [2006] 2 WLR 1283; [2006] 3 All ER 1, HL(E)
Mahon v Mahon [2008] EWCA Civ 901, CA
G *Marcel v Comr of Police of the Metropolis* [1992] Ch 225; [1992] 2 WLR 50; [1992] 1 All ER 72, CA
Memory Corpn plc v Sidhu (No 2) [2000] 1 WLR 1443, CA
Midland Bank Trust Co Ltd v Green (No 3) [1979] Ch 496; [1979] 2 WLR 594; [1979] 2 All ER 193
Morison v Moat (1851) 9 Hare 241
Parra v Parra [2002] EWCA Civ 1886; [2003] 1 FLR 942, CA
H *R v R* [1992] 1 AC 599; [1991] 3 WLR 767; [1991] 4 All ER 481, HL(E)
R v Sang [1980] AC 402; [1979] 3 WLR 263; [1979] 2 All ER 1222, HL(E)
Robb v Green [1895] 2 QB 1; [1895] 2 QB 315, CA
S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)
T v T (Interception of Documents) [1994] 2 FLR 1083

Thurston v Charles (1905) 21 TLR 659
Wainwright v Home Office [2003] UKHL 53; [2004] 2 AC 406; [2003] 3 WLR 1137; [2003] 4 All ER 969, HL(E)
Wales (HRH Prince of) v Associated Newspapers Ltd [2006] EWHC 522 (Ch); [2008] Ch 57; [2007] 3 WLR 222; [2006] EWCA Civ 1776; [2008] Ch 57; [2007] 3 WLR 222; [2007] 2 All ER 139, CA
White v Withers LLP [2008] EWHC 2821 (QB); [2009] 1 FLR 383; [2009] EWCA Civ 1122; [2010] 1 FLR 859, CA
Z (Restraining Solicitors From Acting), In re [2009] EWHC 3621 (Fam); [2010] 2 FLR 132

The following additional cases were cited in argument:

A v B [2000] EMLR 1007
Archer v Williams [2003] EWHC 1670 (QB); [2003] EMLR 869
Browne of Madingley (Lord) v Associated Newspapers Ltd [2007] EWCA Civ 295; [2008] QB 103; [2007] 3 WLR 289, CA
Clibbery v Allan [2002] EWCA Civ 45; [2002] Fam 261; [2002] 2 WLR 1511; [2002] 1 All ER 865, CA
Company's Application, In re A [1989] Ch 477; [1989] 3 WLR 265; [1989] ICR 449; [1989] 2 All ER 248
Derby & Co Ltd v Weldon (No 8) [1991] 1 WLR 73; [1990] 3 All ER 762, Vinelott J and CA
Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661; [2007] FSR 63, CA
Durant v Financial Services Authority [2003] EWCA Civ 1746; [2004] FSR 573, CA
Goddard v Nationwide Building Society [1987] QB 670; [1986] 3 WLR 734; [1986] 3 All ER 264, CA
Industrial Furnaces Ltd v Reaves [1970] RPC 605
McKennitt v Ash [2006] EWCA Civ 1714; [2008] QB 73; [2007] 3 WLR 194, CA
Mersey Care NHS Trust v Ackroyd [2003] EWCA Civ 663; [2003] EMLR 820, CA
R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Government of the United States of America [2000] 2 AC 216; [1999] 3 WLR 620; [1999] 4 All ER 1, HL(E)
R v Department of Health, Ex p Source Informatics Ltd [2001] QB 424; [2000] 2 WLR 940; [2000] 1 All ER 786, CA
Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2001] UKHL 16; [2003] 2 AC 1; [2001] 2 All ER 513, HL(E)

The following additional cases, although not cited, were referred to in the skeleton arguments:

A v A [2007] EWHC 99 (Fam); [2007] 2 FLR 467
Ablitt v Mills & Reeve The Times, 25 October 1995
Apvodedo NV v Collins [2008] EWHC 775 (Ch)
Atos Consulting Ltd v Avis plc [2007] EWHC 323 (TCC); [2008] Bus LR D20
Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd [2001] HCA 63; 208 CLR 199
B v B (Matrimonial Proceedings: Discovery) [1978] Fam 181; [1978] 3 WLR 624; [1979] 1 All ER 801
Balabel v Air India [1988] Ch 317; [1988] 2 WLR 1036; [1988] 2 All ER 246, CA
Bataille v Newland [2002] EWHC 1692 (QB)
Beloff v Pressdram Ltd [1973] 1 All ER 241
Bray v Deutsche Bank AG [2008] EWHC 1263 (QB); [2009] EMLR 215
Buttes Gas and Oil Co v Hammer (No 3) [1981] QB 223; [1980] 3 WLR 668; [1980] 3 All ER 475, CA

Campbell v Frisbee [2002] EWCA Civ 1374; [2003] ICR 141, CA
Cartwright v Cartwright (1853) 3 De G M & G 982
Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) (1987) 74 ALR 428
D v D (Production Appointment) [1995] 2 FLR 497
D v National Society for the Prevention of Cruelty to Children [1978] AC 171; [1977] 2 WLR 201; [1977] 1 All ER 589, HL(E)
Daimler AG v Sany Group Co Ltd [2009] EWHC 1003 (Ch); [2009] ETMR 1074
Derbyshire County Council v Times Newspapers Ltd [1993] AC 534; [1993] 2 WLR 449; [1993] 1 All ER 1011, HL(E)
Dun & Bradstreet Ltd v Typesetting Facilities Ltd [1992] FSR 320
ED & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472; [2003] CP Rep 51, CA
Enderby Town Football Club Ltd v Football Association Ltd [1971] Ch 591; [1970] 3 WLR 1021; [1971] 1 All ER 215, CA
Faccenda Chicken Ltd v Fowler [1987] Ch 117; [1986] 3 WLR 288; [1986] ICR 297; [1986] 1 All ER 617, CA
Fashion Gossip Ltd v Esprit Telecoms UK Ltd (unreported) 27 July 2000; [2000] CA Transcript No 1735, CA
Francome v Mirror Group Newspapers Ltd [1984] 1 WLR 892; [1984] 2 All ER 408, CA
Fraser v Evans [1969] 1 QB 349; [1968] 3 WLR 1172; [1969] 1 All ER 8, CA
G W v R W (Financial Provision: Departure from Equality) [2003] EWHC 611 (Fam); [2003] 2 FLR 108
Geveran Trading Co Ltd v Skjevesland [2002] EWCA Civ 1567; [2003] 1 WLR 912; [2003] 1 All ER 1, CA
Gray v Thames Trains Ltd [2009] UKHL 33; [2009] AC 1339; [2009] 3 WLR 167; [2009] 4 All ER 81, HL(E)
Green Corns Ltd v Claverley Group Ltd [2005] EWHC 958 (QB); [2005] EMLR 748
Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027; [1987] 2 All ER 716, CA
Highgrade Traders, In re [1984] BCLC 151, CA
Home Office v Harman [1983] 1 AC 280; [1982] 2 WLR 338; [1982] 1 All ER 532, HL(E)
Hubbard v Vosper [1972] 2 QB 84; [1972] 2 WLR 389; [1972] 1 All ER 1023, CA
Hyde Park Residence Ltd v Yelland [2001] Ch 143; [2000] 3 WLR 215, CA
Hyman v Hyman [1929] AC 601, HL(E)
ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725, CA
Initial Services Ltd v Putterill [1968] 1 QB 396; [1967] 3 WLR 1032; [1967] 3 All ER 145, CA
K v K (Financial Relief: Management of Difficult Cases) [2005] EWHC 1070 (Fam); [2005] 2 FLR 1137
Khan v United Kingdom (2000) 31 EHRR 1016
Kimber v Brookman Solicitors [2004] EWHC 3480 (Fam); [2004] 2 FLR 221
Lion Laboratories Ltd v Evans [1985] QB 526; [1984] 3 WLR 539; [1984] 2 All ER 417, CA
London Regional Transport v Mayor of London [2001] EWCA Civ 1491; [2003] EMLR 88, CA
M v Secretary of State for Work and Pensions [2006] UKHL 11; [2006] 2 AC 91; [2006] 2 WLR 637; [2006] 4 All ER 929, HL(E)
Maccaba v Lichtenstein [2004] EWHC 1579 (QB); [2005] EMLR 109
McE v Prison Service of Northern Ireland (Northern Ireland Human Rights Commission intervening) [2009] UKHL 15; [2009] AC 908; [2009] 2 WLR 782; [2009] 4 All ER 335, HL(NI)
Minton v Minton [1979] AC 593; [1979] 2 WLR 31; [1979] 1 All ER 79, HL(E)

Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB); [2008] EMLR 679
Murray v Express Newspapers plc [2007] EWHC 1908 (Ch); [2007] EMLR 583
Napier v Pressdram Ltd [2009] EWCA Civ 443; [2010] 1 WLR 934, CA
North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, CA
OBG Ltd v Allan [2007] UKHL 21; [2008] AC 1; [2007] 2 WLR 920; [2007] Bus LR 1600; [2007] 4 All ER 545, HL(E)
Quinton v Peirce [2009] EWHC 912 (QB); [2009] FSR 699
R v K (A) [2009] EWCA Crim 1640; [2010] QB 343; [2010] 2 WLR 905; [2010] 2 All ER 509, CA
R (Countryside Alliance) v Attorney General [2007] UKHL 52; [2008] AC 719; [2007] 3 WLR 922; [2008] 2 All ER 95, HL(E)
Reynolds v Times Newspapers Ltd [2001] 2 AC 127; [1999] 3 WLR 1010; [1999] 4 All ER 609, HL(E)
Richards v Richards [1984] AC 174; [1983] 3 WLR 173; [1983] 2 All ER 807, HL(E)
St Albans City and District Council v International Computers Ltd [1996] 4 All ER 481, CA
Saunders v United Kingdom (1996) 23 EHRR 313
Science Research Council v Nassé [1980] AC 1028; [1979] 3 WLR 762; [1979] ICR 921; [1979] 3 All ER 673, HL(E)
Secretary of State for the Home Department v British Union for the Abolition of Vivisection [2008] EWHC 892 (QB); [2009] 1 WLR 636
Sofola v Lloyds TSB Bank [2005] EWHC 1335 (QB)
Swain v Hillman [2001] 1 All ER 91, CA
Teixeira de Castro v Portugal (1998) 28 EHRR 101
Theakston v MGN Ltd [2002] EWHC 137 (QB); [2002] EMLR 398
Thomas (PA) & Co v Mould [1968] 2 QB 913; [1968] 2 WLR 737; [1968] 1 All ER 963
Thunder Air Ltd v Hilmarsson [2008] EWHC 355 (Ch)
Tournier v National Provincial and Union Bank of England [1924] 1 KB 461, CA
W (Children) (Family Proceedings: Evidence), In re [2010] UKSC 12; [2010] 1 WLR 701; [2010] PTSR 775; [2010] 2 All ER 418, SC(E)
W v W (Financial Provision: Form E) [2003] EWHC 2254 (Fam); [2004] 1 FLR 494
Webster, In re; Norfolk County Council v Webster [2006] EWHC 2733 (Fam); [2007] 1 FLR 1146
West London Pipeline and Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm); [2008] 2 CLC 258
Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd [1986] AC 368; [1986] 2 WLR 24; [1986] 1 All ER 129, HL(E)
Woodward v Hutchins [1977] 1 WLR 760; [1977] 2 All ER 751, CA

Imerman v Tchenguiz and others

INTERLOCUTORY APPEAL from Eady J

By a claim form dated 26 February 2009 the claimant, Vivian Saul Imerman, claimed against the defendants, Robert Tchenguiz, Vincent Tchenguiz, Tim McClean, Nouri Obayda and Sarosh Zaiwalla, inter alia, an injunction restraining the defendants from using information obtained from documents wrongfully accessed from the claimant's computer without his knowledge or consent. A number of interlocutory applications led to the making of orders restraining the defendants from using information obtained from those documents, including an interlocutory injunction, granted by Eady J on 20 March 2008, restraining the defendants from handing over to the claimant's wife, Elizabeth Tchenguiz Imerman, or to her

A solicitors, Withers LLP, a report prepared by forensic accountants based on information obtained from documents made available to them through the fifth defendant. The claimant applied for summary judgment on its claim pursuant to CPR Pt 24, seeking orders (i) precluding each defendant from communicating or disclosing to third parties (including the claimant's wife and her solicitors), any information contained in the documents, (ii) restraining the defendants from copying or using any of the documents or B information contained therein and (iii) requiring the defendants to hand over all copies of the documents to the claimant. On 27 July 2009 Eady J [2010] 2 FLR 735 made the orders sought.

By an appellant's notice dated 1 October 2009 and subsequently amended, the defendants appealed on, inter alia, the following grounds. (1) The judge had been wrong to hold that, on the claimant's application C under CPR Pt 24, he was entitled to give summary judgment against all the defendants in the form of final injunctions against each defendant in very wide terms and a final order against each defendant for delivery up or destruction of documents and data storage devices. (2) The judge had failed properly to address the causes of action being advanced against each separate defendant and to consider the defence of each separate defendant in relation to each of them. Had he done so he would have been bound to D have dismissed the application. The judge had been wrong in law to grant the injunctions and make the orders for delivery up without examining the defences, simply on the basis of the nature of the information and its source. (3) The judge had failed to consider and rule on the first defendant's evidence that the information supported the case that the claimant had come to equity with unclean hands, and in consequence was E not entitled to the equitable remedy of an injunction or to an order for delivery up. (4) The judge ought to have ruled that there should be a trial in respect of the claimant's claims for injunctions and delivery up of documents containing the alleged confidential information. (5) The judge's decision had been wrong in law in that he had given no explanation as to the factual or legal basis for his decision, the case involved complex issues of law and fact unsuitable for summary judgment and the detailed F examination of all the facts of the case required where competing Convention rights were raised by the parties: see *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593. (6) The judge had failed to consider the public interest defence to liability in tort for *Hildebrand* disclosures (see *White v Withers LLP* [2010] 1 FLR 859) which rendered summary relief against the defendants wholly G inappropriate. (7) The judge had been wrong to refuse the application of the first defendant to be able to use 17 documents relating to his joint venture with the claimant in respect of the Whyte & MacKay Group plc ("the Leconfield House application"), for the purpose of preparing his pleadings in relation to his intended claim against the claimant in separate proceedings.

By a respondent's notice dated 15 February 2010 the claimant asked the H court to uphold the judge's order for limited summary judgment on, inter alia, the following different or additional grounds. (1) There was nothing novel or inappropriate about the grant of summary relief in relation to the misuse of private and confidential information: cf *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57. (2) The judge ought to have

made a specific finding that the first defendant's admitted accessing, taking and copying of the information had been a breach of confidence and/or misuse of the claimant's private information which could not be justified. (3) The judge ought to have held that summary relief ought to be granted in respect of the first defendant's taking and copying of the information, and all the defendants ought to be restrained from retaining or using the information on the principle in *Lord Ashburton v Pape* [1913] 2 Ch 469 and *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431, by which the courts would act to restrain the disclosure of confidential information, to prevent copies being made of that information and, if copies had already been made, to restrain further copying, and to restrain persons who had come into possession of the confidential information from themselves divulging or propagating it; and the fact that a document was admissible in evidence was no answer to the lawful owner's demand for its delivery up, and no answer to an application by the lawful owner to restrain that confidential information from being published or copied. (4) The judge ought to have held that summary relief ought to be granted because the information copied was a mixed bag of privileged and non-privileged private and confidential information, by analogy with *Industrial Furnaces Ltd v Reaves* [1970] RPC 605. (5) The judge ought to have held that the accessing and copying of the information amounted to a breach of statutory duty under sections 4(4) and 55 of the Data Protection Act 1998 and section 1 of the Computer Misuse Act 1990, and was prima facie unlawful. (6) The judge had been justified in granting relief against all of the defendants after correctly rejecting their public interest defence and their implied assertion of a right to retain and use the claimant's private and confidential information when they had no legal right to do so. (7) Since it was inappropriate to use even a court authorised search to see whether there was evidence of fraud (see *Hytrac Conveyors Ltd v Conveyors International Ltd* [1983] 1 WLR 44) it had to be a fortiori impermissible to use self-help to achieve such aims in relation to the 17 documents sought in the Leconfield House proceedings.

The facts are stated in the judgment of the court.

Imerman v Imerman

INTERLOCUTORY APPEALS and **CROSS-APPEAL** from Moylan J

By a petition dated 30 December 2008 the wife, Elizabeth Tchenguiz Imerman, sought divorce from the husband, Vivian Saul Imerman, and subsequently applied on form A for ancillary relief. The husband applied in those proceedings for return of seven files of documents obtained without his knowledge or consent from his computer, and the return of any copies of those documents, and an order enjoining the wife and her solicitors, Withers LLP, from using any of the information contained in those documents. On 11 December 2009 Moylan J [2010] 2 FLR 752 ordered that the seven files be handed back to the husband for the purpose of enabling him to remove any material for which he claimed privilege, but the husband was required to return the remainder of the seven files to the wife for her use in connection with the matrimonial proceedings. On 13 January 2010 Moylan J [2010] 2 FLR 802 gave judgment on consequential matters, inter alia ordering the wife to pay the costs of the

A applications determined on 11 December 2009 on an indemnity basis, ordering the parties to file and serve forms E, and refusing the husband permission to appeal or a stay of execution of his order for the return to the wife's solicitors of the seven files after removal of those documents for which he claimed privilege.

By an appellant's notice dated 19 January 2010 and pursuant to permission granted by the court the husband appealed on, inter alia, the B following grounds. (1) The judge had erred in law in not following *L v L* [2007] 2 FLR 171 by refusing to grant orders designed to prevent the wife from making use of the illegitimate advantage she had obtained from receipt of the irregularly obtained documents. (2) The judge had erred in law in failing to hold that *Lord Ashburton v Pape* [1913] 2 Ch 469 and *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431 had established a C general rule which the judge ought to have applied and ordered the delivery up of the irregularly obtained material by the wife. (3) The judge ought to have concluded that the wife's brothers had no defence to the application for delivery up and accordingly, since they could pass on no better title to the wife, she likewise had no defence to an order for delivery up: see Eady J in *Imerman v Tchenguiz* [2009] EWHC 2024 (QB). (4) The judge, having correctly held that he had been required to carry out a balancing exercise in D respect of the competing Convention rights of the husband and wife and correctly identified the factors, had made fundamental errors in carrying out the balancing exercise. The judge ought to have held that there was nothing to weigh in the balance for the wife as against the plain interference with the husband's article 6 and 8 rights in respect of whether there should be an order for delivery up. The judge had erred in not carrying out a balancing E exercise in relation to that issue because he had wrongly determined, as a prior question, the issue of what use the wife ought to be able to make of the files containing the husband's documents ("the Withers files"). Had the judge carried out the balancing exercise he would have ruled in favour of the husband. (5) The judge had erred in holding that he was unable to determine the issue of whether the wife ought to be permitted to make use of the Withers files in the proceedings without permitting the wife to make use F of them for the purpose of the husband's application. (6) The judge had compounded those errors by making orders requiring the delivery up by the wife's solicitors to the husband's solicitors of the Withers files and their subsequent return to the wife's solicitors, as redacted by the husband's solicitors to remove privileged information, the effect of which had been to require the return to the wife of *irrelevant* documents, which she would G never have been able to obtain on the disclosure process under the rules of court. (7) The judge had erred in law in holding that the imposition of a costs order was a sufficient deterrent in respect of behaviour such as the wife's. (8) The refusal of the judge to grant a stay of execution of para 4 of his order of 11 December 2009 was wrong in that his appeal would have been rendered nugatory if the Withers files had been returned to the wife. In consequence the refusal of the stay created a real risk of injustice to the H husband if his appeal succeeded, but, by contrast, the granting of a stay would cause no prejudice or injustice to the wife since she would not ordinarily, absent her brothers' misconduct, have had possession of such documents at the present stage in the ancillary proceedings. (9) The appeal raised important issues about the application, extent and effect of the

so-called *Hildebrand* rules (*Hildebrand v Hildebrand* [1992] 1 FLR 244), including whether they survived the enactment of the Human Rights Act 1998 and *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593; their application in an electronic age where vast quantities of documents could be downloaded in minutes; their application where a password had been breached, or they had been obtained in circumstances amounting to the commission of a crime; the requirements concerning the timing of disclosure, and the co-existence of the admissibility in the family courts of documents secretly obtained with a tortious and possible criminal liability on the part of those who had obtained them or who shared the responsibility for their having been obtained. (10) It was important that those matters be clarified so as to ensure consistency of decision-making by the courts both within the Family Division and between the Family Division and other divisions; and to bring certainty in relation to the professional ethical position of legal representatives who gave advice in relation to the irregular obtaining of documents and/or were asked to take possession of material obtained in breach of the *Hildebrand* rules.

By a respondent's notice dated 2 February 2010 the wife cross-appealed on the grounds, inter alia, that the judge (1) ought to have conducted a substantive investigation to resolve any claims of legal professional privilege asserted by the husband in respect of any of the material or information in issue, and/or ought to have specified a precise mechanism for the resolution of such claims and, in the particular circumstances, ought to have permitted the wife to use any material or information in respect of which any such claim be made for the purpose of investigating and litigating that claim; (2) ought to have made an order restraining the husband from disposing of the memory sticks and information contained on them, because that information was potentially relevant to the wife's claim for financial ancillary relief and the husband had declined to give a categorical assurance that the same would be preserved until the conclusion of the ancillary relief proceedings; and (3) ought not to have made an order for costs against the wife in respect of the summonses before him.

The facts are stated in the judgment of the court.

Desmond Browne QC, *Stephen Nathan QC* and *David Hirst* (instructed by *Zaiwalla & Co*) for the defendants in *Imerman v Tchenguiz*.

There is a unique practice in the Family Division which allows material belonging to one spouse and surreptitiously obtained by the other to be used in ancillary relief proceedings where there is a fear that otherwise the owner would conceal the full extent of his/her assets despite the duty to give full and frank disclosure of all means: see *Hildebrand v Hildebrand* [1992] 1 FLR 244. This practice does not extend to the use of force, the interception of mail or the retention of original documents: see *T v T (Interception of Documents)* [1994] 2 FLR 1083 and *White v Withers LLP* [2010] 1 FLR 859. A balancing exercise has to be undertaken by the court to determine whether the taking of documents without permission affects third party rights, rights under the Convention for the Protection of Human Rights and Fundamental Freedoms or confidentiality rights: see *Campbell v MGN Ltd* [2004] 2 AC 457. The precise boundaries of the principle, particularly where a tort or a crime may have been committed, and the defences available

require certainty so that parties who are divorcing or on the verge of taking proceedings know what they can legitimately do.

Before an order to restrain the copying of documents can be obtained there must exist a proprietary right in need of protection. The tort of misuse of private and confidential information is not committed where a person copies information without the owner's permission for the purpose of handing it to a party's solicitors for use in ancillary relief proceedings where there are good grounds for believing that the other party intends to conceal assets: see *White v Withers LLP* [2010] 1 FLR 859. Where the commission of a tort is made out, then whether there is a public interest defence based on iniquity is judged by weighing in the balance the competing article 6, 8 and 10 Convention rights, not merely of the parties but of third parties, including family members and the public. It is necessary to examine documents in order to make an assessment of them: see *L v L* [2007] 2 FLR 171. To establish an actionable wrong there must be a reasonable expectation of privacy: see *Campbell v MGN Ltd* [2004] 2 AC 457. There is no reasonable expectation of privacy in information on a shared server which is not adequately password-protected. For a party to a matrimonial dispute to obtain a court order to obtain documents from the other party it is not enough to show dishonesty and concealment. What is required is an intention to destroy: see *Araghchinchi v Araghchinchi* [1997] 2 FLR 142. Where some documents are privileged and others are not it is not appropriate to order the return of all of them if their proposed use is to obtain a fair trial in ancillary relief proceedings: contrast *Industrial Furnaces Ltd v Reaves* [1970] RPC 605.

Relief may be obtained to preserve a close confidence between husband and wife: see *Duchess of Argyll v Duke of Argyll* [1967] Ch 302. That confidence is inconsistent with one party having secrets from the other in relation to matrimonial assets. The status of a modern marriage is a partnership with equal sharing: see *McFarlane v McFarlane* [2006] 2 AC 618. To achieve a fair distribution of assets on divorce, access to information about family assets for the purpose of section 25 of the Matrimonial Causes Act 1973 precludes confidentiality as between husband and wife. That is consistent with the general rule that confidential information is required to be disclosed where the public interest in preserving confidentiality is outweighed by a countervailing public interest which favours disclosure: see *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 282. At an interlocutory stage nothing is confidential between husband and wife because it will likely be caught by section 25(2)(a) of the 1973 Act.

For information to be confidential it must have the necessary quality of confidence and be imparted in circumstances importing an obligation of confidence, and the particular use of the information to the claimant's detriment must be unauthorised: see *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41. In the present context "unauthorised" must be given a wide meaning so that the use must be unlawful or unjustified in law. It must trouble the defendants' conscience: see *R v Department of Health, Ex p Source Informatics Ltd* [2001] QB 424, 439. In the unusual circumstances of the present case, whether the taking of the claimant's information from a shared server for the purposes of ancillary relief proceedings between the claimant and the sister of the first and second

defendants constitutes misuse of confidential information is an issue for trial which cannot be determined summarily. A defendant is entitled to rely on the iniquity defence and the public interest to justify limited disclosure of confidential information: see *In re A Company's Application* [1989] Ch 477. For allegations of wrongdoing to be relied on, there must be a prima facie case that the allegations have substance: see *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 262. A judge is required to consider whether there is an arguable defence with a reasonable prospect of success before granting relief. The more complicated cases are unlikely to be suitable for summary judgment: see *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, 261 and *Mersey Care NHS Trust v Ackroyd* [2003] EMLR 820. After the balancing exercise to weigh up competing Convention rights the claimant is entitled to relief only if he is more likely to succeed at trial after account has been taken of the public interest defence: see *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, para 43 and *McKennitt v Ash* [2008] QB 73, para 11.

Antony White QC and *Lorna Skinner* (instructed by *Berwin Leighton Paisner LLP*) for the claimant husband in *Imerman v Tchenguiz*.

Where defendants have no prospect of establishing that there is any lawful justification for the accessing, taking and copying of the claimant's confidential information, or any lawful right to retain or use it, the claimant is entitled to orders to restrain its use and for delivery up. Court procedures, including disclosure and preservation orders, freezing orders and search and seizure orders, provide the mechanism for the protection of Convention rights, the parties' article 6 rights to a fair trial and the article 8 rights to privacy of the parties and others, and the striking of an appropriate balance between those rights and the need for relevant evidence to be made available: see *L v L* [2007] FLR 171. Court orders contain important safeguards to ensure compliance with article 8, including the right of the respondent to apply to the court to vary or discharge it, the opportunity to take legal advice, and the requirement that the applicant give undertakings and meet the conditions for the granting of an order to the court's satisfaction: see *Araghchinchi v Araghchinchi* [1997] 2 FLR 142. Search orders cannot be used to find out whether there is evidence of misconduct by the other party: see *Hytrac Conveyors Ltd v Conveyors International Ltd* [1983] 1 WLR 44. A fortiori it is impermissible to use "self-help" (the obtaining of information for use as evidence by irregular means) to achieve such ends. An order restraining the use of documents and for delivery up is expressly available against an innocent recipient of confidential information which he refuses to give up: see *Lord Ashburton v Pape* [1913] 2 Ch 469; *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431 and *Goddard v Nationwide Building Society* [1987] QB 670. Where privileged material forms part of private and confidential documents an order can be made for the return of them all: see *Industrial Furnaces Ltd v Reaves* [1970] RPC 605 and *Archer v Williams* [2003] EMLR 869. A court has power to apply the rules and exercise its discretion in order to prevent advantage being gained by litigants as a result of improper or underhand conduct: see *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 WLR 1964; *Marcel v Comr of*

Police of the Metropolis [1992] Ch 225; *Istil Group Inc v Zahoor* [2003] 2 All ER 252 and *Derby & Co Ltd v Weldon (No 8)* [1991] 1 WLR 73.

Where both article 8 and article 10 rights are engaged and there is an overwhelming case on the basis of the confidentiality of the information in favour of the right to privacy, summary judgment should be given: see *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57. Because none of the defendants had offered to deliver up the information or to give an undertaking to the court not to use or disclose it, the claimant was entitled to relief against them all: see *Lord Ashburton v Pape* [1913] 2 Ch 469. There is no justification for the development of another species of public interest defence to prima facie tortious liability for the secret obtaining of documents relevant to assets in ancillary relief claims, with the result that there is no actionable misuse, as posited in *White v Withers LLP* [2010] 1 FLR 859, para 84: see the dissenting judgment of Ward LJ at para 55. The hard-edged rules on data protection in statute and from the Court of Justice of the European Union are not consistent with the Family Division practice of self-help.

The duty of trust and confidence owed by one spouse to the other results in a duty not to reveal information obtained during the marriage to others: see *Duchess of Argyll v Duke of Argyll* [1967] Ch 302. There is no authority for the proposition that there is no confidentiality between husband and wife. Spouses can now give evidence against one another, and a husband and wife can sue one another in tort. Each has individual article 8 rights to privacy which are not forfeited on marriage. Any confidentiality that could be established between spouses would not extend to members of the family of a spouse. Each person has a separate right to data protection under the Data Protection Act 1998 and the Computer Misuse Act 1990.

Unauthorised access to a computer constitutes a criminal offence under sections 1(1) and 2(1) of the 1990 Act even where, by section 17, that person has authority to access the computer for some authorised purposes or to access certain data: see *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Government of the United States of America* [2000] 2 AC 216. The surreptitious access to and copying of confidential information on a computer for purposes unauthorised by the owner of that information amounts to a breach of statutory duty under sections 4(4) and 55 of the 1998 Act and an offence under section 1(1) of the 1990 Act. Breach of those provisions by parties to litigation or their advisers may justify the loss of privilege claimed by the wrongdoers: see *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 WLR 1964. Those Acts shape the expectation of privacy; if a person does not authorise disclosure of his information held on a computer that information should be private.

Browne QC in reply.

The issues between the parties should be capable of determination in the Family Division ancillary relief proceedings without the need for a separate Queen's Bench action. There is an element of discretion in an equitable jurisdiction which enables the judge to refuse an order for delivery up and to make a more appropriate order in the circumstances of the case: see *A v B* [2000] EMLR 1007 and *Istil Group Inc v Zahoor* [2003] 2 All ER 252. Where there is an intention to conceal assets the answer is not to make an *Anton Piller* (search) order, which requires evidence of an intention

to destroy, not merely to hide assets. Spouses should be permitted to act to protect their article 6 rights by safeguarding evidence which is necessary to do justice between the parties in the ancillary relief proceedings. Article 6 rights are unqualified whereas article 8 rights are qualified: see *Chappell v United Kingdom* (1989) 12 EHRR 1. The court's independent duty under section 25 of the 1973 Act to investigate and to deal justly between the parties with accurate information on a spouse's resources in determining an application for financial relief should not be fettered by one party's non-disclosure of relevant assets: see *Charman v Charman* [2006] 1 WLR 1053, para 49. Nothing in the doctrine of privilege prevents the operation of the equitable clean hands principle. Partners in marriage, like partners in law, cannot keep information about assets from each other. If the law is to avoid discrimination between the gender roles it should regard all the assets generated either in business or domestically during the marriage as family assets to be divided equally between them unless some good reason is shown to do otherwise: see *McFarlane v McFarlane* [2006] 2 AC 618, para 150. *L v L* [2007] 2 FLR 171 is distinguishable on its facts. Where an infringement of section 55 of the 1998 Act is alleged it is beholden on the persons asserting that infringement to identify the personal data which is said to have been obtained criminally, as it is necessary to establish mens rea at the time the data was accessed: see *Durant v Financial Services Authority* [2004] FSR 28. Where there is a reasonable basis for the suspicion of concealment of assets by a spouse and surreptitious access is gained to that spouse's documents for their sole use in litigation, that access is justified.

White QC in reply on the new authorities.

A v B [2000] EMLR 1007 is distinguishable on its facts, and establishes at para 20 that the principle in *Lord Ashburton v Pape* [1913] 2 Ch 469 is not limited to documents. *Charman v Charman* [2006] 1 WLR 1053 does not authorise self-help but establishes that there is a more relaxed court procedure in the Family Division in relation to searching for relevant documents.

Charles Howard QC, *Antony White QC* and *Lorna Skinner* (instructed by *Hughes Fowler Carruthers*) for the husband in *Imerman v Imerman*.

Consolidation of the Queen's Bench action and the Family Division proceedings is inappropriate as it circumvents the relief the husband is seeking. The courts will restrain the use, and order delivery up, of material subject to legal professional privilege which has been improperly or surreptitiously obtained: see *L v L* [2007] 2 FLR 171. The plundering of the husband's confidential documents before the time in the ancillary relief proceedings when he was required to give disclosure, and before the issues between the parties had been defined, is unjustifiable, gives the wife an unfair advantage and breaches the husband's article 6 and article 8 rights. It is not a sufficient response in these circumstances to penalise the wife in costs: see *Lord Ashburton v Pape* [1913] 2 Ch 469 and *L v L* [2007] 2 FLR 171. Where a mixture of privileged and non-privileged confidential material has been obtained the correct approach is to order the return of all of it: see *Industrial Furnaces Ltd v Reaves* [1970] RPC 605. *A v B* [2000] EMLR 1007 is distinguishable since it did not involve a mixed bag of privileged and non-privileged material.

A The close confidence between husband and wife does not destroy each party's right to confidentiality. Article 8 guarantees individual rights to privacy and family life which are not impaired by marriage. There is no community of property in English law: see *McFarlane v McFarlane* [2006] 2 AC 618, paras 123, 153.

Where a spouse fears that assets will be hidden from the court in ancillary relief proceedings the proper course to protect article 6 rights is to B apply for a search, preservation or freezing order once the Family Proceedings Rules 1991 (SI 1991/1247) require the parties to give disclosure. *Anton Piller* orders are exceedingly rare in the Family Division because they are unnecessary as a result of self-help. The court has power under the Civil Procedure Rules to exclude evidence which has been obtained in an underhand way, and exercises the discretion by weighing C the interference with a party's article 6 and 8 rights in restraining the use in evidence against the other party's article 6 interests in admitting it: see *Jones v University of Warwick* [2003] 1 WLR 954. In balancing competing Convention rights an intense focus on the comparative importance of the specific rights claimed is required, and the justification for interfering with or restricting each must be taken into account: see D *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17. The judge failed adequately to carry out this exercise when the wife's interests had been sufficiently safeguarded by the husband's undertaking to preserve the documents in the custody of his solicitors whereas the interference with the husband's interests required the making of an order for delivery up.

E *James Turner QC* and *David Sherborne* (instructed by *Withers LLP*) for the wife in *Imerman v Imerman*.

Self-help, although unattractive, may be necessary to permit the retention and use of documents at an early stage in ancillary proceedings in the interests of justice. The common law has long recognised that even illegally obtained evidence may be admitted in evidence: see *Calcraft v Guest* [1898] 1 QB 759. The Family Division judge has an inquisitorial or a F quasi-inquisitorial role in ancillary relief litigation: see *Parra v Parra* [2003] 1 FLR 492. If material is relevant and should be disclosed then it is permissible to "fish" for it, unlike in other divisions of the High Court, because the parties are under a duty of full and frank disclosure in quasi-inquisitorial proceedings. The initial purpose is to obtain the material before it can be disposed of. The sanction for inappropriate self-help G should be tortious or criminal liability where established. It should not be to deprive the person from using the material obtained and risk being deprived of information about assets which should be part of the ancillary relief proceedings: see *White v Withers LLP* [2010] 1 FLR 859. Such an approach would be incompatible with the court's positive duty under section 25 of the 1973 Act to take account of all relevant matters: contrast H *Jones v University of Warwick* [2003] 1 WLR 954 on the discretion to exclude evidence in CPR r 32.1(2). The court should give a spouse every assistance to ensure a fair distribution of the matrimonial assets: see *Charman v Charman* [2006] 1 WLR 1053, para 72; *Clibbery v Allan* [2002] Fam 261 and *J v V (Disclosure: Offshore Corporations)* [2004] 1 FLR 1042. The irregular obtaining of documents retained only for use in

connection with the matrimonial litigation does not constitute misuse of confidential information: see *White v Withers LLP* [2010] 1 FLR 859. Self-help is resorted to because of the difficulties of obtaining the necessary evidence for *Anton Piller* and other orders where concealment of assets is suspected: see *Emanuel v Emanuel* [1982] 1 WLR 669. There can be confidentiality between spouses, but on divorce there is no confidence between the parties.

The *Hildebrand* procedures developed by the Family Division courts acknowledge the reality of the need for self-help and require disclosure of irregularly obtained material before it is used in litigation, but do not condone the irregularity in the process by which the material is obtained: see *Hildebrand v Hildebrand* [1992] 1 FLR 244 and *T v T (Interception of Documents)* [1994] 2 FLR 1083. That pragmatic approach produces an appropriate balance between the relevant competing Convention considerations where information has been obtained other than through the rules for disclosure in the Family Proceedings Rules 1991. That irregularly obtained material provides the information from which knowledge is gained and without which it is difficult to craft the questions necessary for use in the ancillary relief proceedings. Where admissible, the evidence, however obtained, must be admitted save where otherwise specifically provided, therefore the court has no power to make an order prohibiting the wife from using the material obtained: see *White v Withers LLP* [2010] 1 FLR 859, para 83. The intense focus on Convention rights since the introduction of the Human Rights Act 1998 underlines the requirement to admit all relevant evidence, however obtained. The balancing of rights is achieved by the use of the material only as evidence in the ancillary relief proceedings. However, the more extreme the method of self-help used the more likely it is to be taken into account under section 25(2)(g) of the 1973 Act, for which the spouse responsible may be penalised in costs: see *T v T (Interception of Documents)* [1994] 2 FLR 1083 and *Jones v University of Warwick* [2003] 1 WLR 954.

The remedy of delivery up can only be obtained if there is misuse or a threatened misuse of confidential or private information: see *Prince Albert v Strange* (1849) 2 De G & Sm 652. Information disclosed under the compulsion of the *Hildebrand* procedures cannot be made use of outside the confines of the divorce proceedings so the discretionary remedy of delivery up in a separate action is not available: see *Clibbery v Allan* [2002] Fam 261. Impermissible satellite litigation should be dismissed as an abuse of process. Injunctive relief is available at the suit of the owner against persons in possession of irregularly obtained property based on trespass to property or unlawful interference with goods only where physical objects have been obtained: see *L v L* [2007] 2 FLR 171. Those torts do not extend to confidential information downloaded from a computer system. Even if article 8 rights have been infringed the 1998 Act does not create a freestanding tort of invasion of privacy: see *Wainwright v Home Office* [2004] 2 AC 406. There is accordingly no cause of action for which the husband is entitled to delivery up.

Sherborne following.

As for the tort of breach of confidence or misuse of confidential information, the fact that the material was wrongly obtained is only one of

A the factors to be taken into account. It is not sufficient by itself to justify an injunction to restrain the breach.

Howard QC in reply.

The balancing exercise required by the duty to have regard to all the circumstances imposed by section 25 of the 1973 Act is concerned with the admissibility of evidence, not with the use of information irregularly
B obtained. Whether or not information is admissible and only intended for use as evidence in court, if it consists of privileged or confidential material the owner is entitled to an order for delivery up: see *Lord Ashburton v Pape* [1913] 2 Ch 469.

White QC following.

The crucial issue between the parties is the application of the principle in
C *Lord Ashburton v Pape* [1913] 2 Ch 469. That equitable jurisdiction is based on confidentiality, not privilege, and founds a cause of action for delivery up of the originals and copies of the documents taken: see *Prince Albert v Strange* (1849) 2 De G & Sm 652; *Goddard v Nationwide Building Society* [1987] QB 670 and *Industrial Furnaces Ltd v Reaves* [1970] RPC 605.

D The court took time for consideration.

29 July 2010. **LORD NEUBERGER OF ABBOTSBURY MR** handed down the following judgment of the court.

1 This is the judgment of the court to which all members have substantially contributed.

E *Introductory*

2 These are interlocutory appeals. They arise in the context of ancillary relief proceedings between Vivian Imerman and Elizabeth Tchenguiz Imerman. They raise fundamentally important questions in relation to the so-called *Hildebrand* rules: see *Hildebrand v Hildebrand* [1992] 1 FLR 244. A preliminary overview will help to identify the key issues which arise.

F **3** Fearing that their brother-in-law would conceal his assets, one of Mrs Imerman's two brothers, possibly with the help of others, accessed a server in an office which they shared with Mr Imerman and copied information and documents which Mr Imerman had stored there. From that material her brother printed out 11 files and handed them to their solicitor, Mr Zaiwalla, who arranged for a barrister to sift the documents for those in
G respect of which it was thought Mr Imerman could claim legal professional privilege, which resulted in seven files of documents. Mr Zaiwalla then passed those files on to Withers, the solicitors acting for Mrs Imerman in her divorce, who had already issued form A, giving notice of Mrs Imerman's intention to seek ancillary financial relief. Withers then sent copies of the seven files to the solicitors acting for Mr Imerman in the divorce proceedings.

H **4** In summary proceedings in the Queen's Bench Division against the defendants who had gained access to Mr Imerman's documents stored on the server, Eady J on 27 July 2009 [2010] 2 FLR 735 restrained the defendants from communicating or disclosing to third parties (including Mrs Imerman and Withers) any information contained in the documents and

from copying or using any of the documents or information contained therein. He also required the defendants to hand over all copies of the documents to Mr Imerman. The defendants appeal.

5 Mr Imerman sought the return of the seven files, and any copies made of them, and an order enjoining Mrs Imerman and Withers from using any of the information obtained therefrom. On 11 December 2009 Moylan J [2010] 2 FLR 752 decided that the seven files should be handed back to Mr Imerman for the purpose of enabling him to remove any material for which he claimed privilege, but that Mr Imerman would then have to return the remainder of the seven files to Mrs Imerman for use by her in connection with the matrimonial proceedings. Mr Imerman appeals against that decision. Mrs Imerman cross-appeals against the decision, seeking (a) more control over the process by which Mr Imerman can assert privilege, and (b) a reversal of Moylan J's refusal to restrain Mr Imerman from disposing of certain memory sticks.

6 These decisions demonstrate and maintain an apparent conflict between the need to preserve Mr Imerman's right to protect the confidentiality of the documents stored on the server and to impose sanctions for unlawful breaches of that right and the need to ensure that a just resolution of the ancillary relief proceedings is achieved on the basis of a truthful and comprehensive identification of the parties' assets. In short, Mrs Imerman contends that the law which protects Mr Imerman's confidential information and documents should yield to the need to ensure that he cannot escape his true liability by concealing his assets. The law should, she says, recognise her right to truthful disclosure, even if that can only be achieved by unlawful methods. Feared dishonesty justifies self-help, even where that self-help is unlawful. Moylan J acknowledged this, Eady J did not. If the defendants acted unlawfully, we have to consider whether the special rules in matrimonial proceedings for determining the assets on the basis of which relief is given, and the special role of the court in that process of identification, justify the unlawful measures (described, in an attempt to disarm, as "self-help") taken to obtain the information and documents.

7 The issues thrown up by these arguments are significant, both as a matter of principle and in practice. They require consideration of the law of confidence, both in general and as between husband and wife; the power of the court to exclude or admit wrongfully obtained documents and information; and the proper attitude which the court, and lawyers advising parties, should adopt in ancillary relief proceedings when one of the parties is, or may be, concealing assets, or when the other party may have unlawfully obtained documents which may reveal such assets. While these issues involve domestic points of equity, common law, civil procedure, and statutory construction, articles 6, 8, and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (in summary terms, the right to a fair trial, the right to respect for privacy, and the right to freedom of speech, respectively) are also engaged.

8 Where we discuss these issues in relation to ancillary relief proceedings, in order to express ourselves clearly and simply, we will do so on the basis that it is the wife who is seeking ancillary relief from the husband. While that is normally the case, it is not infrequent, and we suspect

A it will become more frequent, that husbands seek ancillary relief from wives. Sometimes, each may seek ancillary relief from the other.

The relevant facts

9 Vivian Imerman and Elizabeth Tchenguiz were married in 2001; it was a second marriage for each of them. Shortly before the marriage, B Mr Imerman accepted an invitation from his prospective brothers-in-law, Robert and Vincent Tchenguiz, to share their London office at 18 Upper Grosvenor Street in Mayfair. When Robert Tchenguiz relocated his office a short distance to Leconfield House, Curzon Street, in 2003, Mr Imerman moved with him. In 2006, Vincent Tchenguiz moved his office to 35, Park Lane. From 2003 to February 2009, Mr Imerman, together with his employees, enjoyed free use of the office space at C Leconfield House ("the office"), and free use of the computer system serving the office, the system being linked to that serving Vincent Tchenguiz's office in Park Lane.

10 Mr Imerman had his own password-protected computer (although the efficacy of the protection appears to have been dubious) and his own e-mail account, and he, and his employees, used his computer for his D personal and business purposes, including in connection with companies in which he had a substantial interest and with his family trusts. As he knew, his computer was supported by a server (including a separate back-up system), to which we shall refer generically as "the server". Both the office and the server were owned or leased by Robert Tchenguiz, who therefore in practice had unrestricted access to the server. It appears likely that Vincent Tchenguiz also had unrestricted access to the server, which served his office E IT system as well. Both Robert and Victor Tchenguiz were and are in a substantial way of business, and Mr and Mrs Imerman each appears to have been independently rich.

11 Mrs Imerman petitioned for divorce on 30 December 2008. Some seven weeks later, Mr Imerman was evicted from the office by Robert Tchenguiz.

F **12** Meanwhile, on about nine occasions, between 6 January and 24 February 2009, unknown to Mr Imerman, Robert Tchenguiz, with the possible involvement of Mr McClean (the principal IT manager of R20 Ltd, a company owned by Robert Tchenguiz and operating out of Leconfield House), and Mr Obayda (an IT manager employed by R20 Ltd), accessed the server and made electronic copies of e-mails and other documents stored by Mr Imerman on his computer, and hence on the server. He then took G further copies of this material on various digital storage media, including two USB memory sticks and one hard drive. The precise extent of the material involved is a matter of dispute, but it appears to have been vast, the equivalent of between 250,000 and 2·5 million pages. Vincent Tchenguiz was aware of what was going on, and was shown copies of some of the material.

H **13** The sole reason, or at any rate the main reason, which Robert and Vincent Tchenguiz advance for accessing Mr Imerman's records was their concern for their sister's interests. This concern is said to have arisen from threats which Mr Imerman had, on the Tchenguiz brothers' evidence, made to Mrs Imerman and to her brothers, on a number of occasions from the autumn of 2007, that his assets would be concealed in any ancillary relief

proceedings. Thus, albeit often in fairly friendly, or even jocular, conversations, Mr Imerman is said to have stated that the Tchenguiz family or Mrs Imerman would "never be able to find my money", because it was "well hidden". These observations appear to have been made in the context of the Imermans' marriage "living on borrowed time" from the middle of June 2007, according to Mrs Imerman's evidence. Having moved out of the matrimonial home in autumn 2007, Mr Imerman returned in spring 2008, but the marriage irrevocably ended at the end of that year, when, according to Mrs Imerman, she discovered that he had been having an affair with his former wife.

14 The Tchenguiz brothers' concern is said to have been reinforced by their belief that Mr Imerman's temporary return to the matrimonial home in spring 2008 had been motivated by a desire to improve his position in relation to any ancillary relief proceedings. They also point to what Mr Imerman said in a subsequent telephone conversation with, and recorded by, Vincent Tchenguiz, on 28 February 2009, but that was, of course, after the last occasion on which they gained access to Mr Imerman's computer records.

15 It appears that, within a short time of their having been made, many, if not all, of the electronic recordings of the material obtained from Mr Imerman's computer records on the server were handed over to the Tchenguiz brothers' solicitor, Mr Zaiwalla, who passed the two USB memory sticks and hard drive to forensic accountants, in order to prepare a report.

16 A significant quantity of this material, consisting of those documents which were thought to be of particular relevance to Mrs Imerman in any ancillary relief proceedings, were printed out and handed over in 11 lever arch files to Mr Zaiwalla, who instructed a barrister to examine them and remove any documents in respect of which it appeared that Mr Imerman could claim privilege. This exercise was carried out on 9 February 2009, and the remaining documents ("the seven files") were collated in seven lever arch files, which were copied and passed on to Withers, the solicitors acting for Mrs Imerman in her divorce, who had already given notice of Mrs Imerman's initiation of ancillary relief proceedings. On 18 February 2009, Withers sent copies of the seven files to Ms Hughes of Hughes Fowler Carruthers, the solicitors acting for Mr Imerman in the divorce proceedings.

17 Ms Hughes had initiated contact with Ms Parker of Withers in connection with the divorce proceedings more than seven weeks earlier, on 5 January 2009, when she asked to be "provide[d] with all *Hildebrand* documents". Ms Parker replied a week later, raising various points, including a reciprocal request for "*Hildebrand* documents", and a statement that she would issue a form A application raising Mrs Imerman's ancillary relief claims. The correspondence continued with each solicitor seeking assurances that there would be no disposal or concealment of assets by the other's client. In a letter of 22 January 2009, Ms Parker made reference to specific assets of Mr Imerman, presumably as a result of what she had been told by Mrs Imerman, based on information she had been given by Robert Tchenguiz following perusal of some of the material obtained from the server. This caused Ms Hughes to ask, in a letter written the following day, "precisely how [Ms Parker had come] by this information, most of which is

A not a matter of public record". In the same letter, Ms Hughes wrote that Mr Imerman "will provide a most helpful and full form E", and expressed the hope that Mrs Imerman would reciprocate.

18 Ms Parker did not answer Ms Hughes's request in the 23 January letter, so it was repeated by Ms Hughes on 30 January 2009. In fact, no answer was given to this request until 18 February 2009, when the copies of the seven files were sent to Ms Hughes. This led to an indignant letter from
B Ms Hughes, seeking a full explanation as to how the material in the seven files had been obtained and threatening proceedings. Ms Parker replied the next day, 27 February 2009, explaining that neither Withers nor Mrs Imerman had "commission[ed or] participate[d] in the process by which the third party who obtained these documents did so", and "reject[ing the] assertion that the action by which they were so obtained was illegal".
C Ms Parker also stated that she had disclosed copies of all the seven files with which she had been furnished.

19 Meanwhile, on 26 February 2009, Mr Imerman issued proceedings against Robert and Vincent Tchenguiz, Mr McClean, Mr Obayda, and Mr Zaiwalla ("the five defendants") in the Queen's Bench Division. Various interlocutory applications and orders were made restraining the
D defendants from using information obtained from the documents. In particular, an interlocutory injunction was granted by Eady J on 20 March 2009 restraining the handing over to Mrs Imerman or Withers of a report prepared by the forensic accountants based on information obtained from the documents made available to them through Mr Zaiwalla.

20 For present purposes, the application of central importance in the
E Queen's Bench proceedings is an application heard by Eady J in June 2009. It was Mr Imerman's application for summary judgment for orders precluding each of the defendants from communicating or disclosing to third parties (including Mrs Imerman and Withers) any information contained in the documents, restraining the defendants from copying or using any of the documents or information contained therein, and requiring
F the defendants to hand over all copies of the documents to Mr Imerman. In a reserved judgment on 27 July 2009, after a three-day hearing, Eady J acceded to that application. The first appeal before us is the defendants' challenge to that decision, pursuant to permission granted by this court.

21 During this period, the ancillary relief proceedings were getting under way in the Family Division. Mrs Imerman had issued her form
G A application, and various disputes and interlocutory applications ensued. Of particular relevance for present purposes is an application by Mr Imerman, made as a result of a refusal of Ms Hughes's request to Ms Parker for the return of the seven files. This application was for return of the seven files, and any copies made thereof, and for an order enjoining Mrs Imerman and Withers from using any of the information obtained therefrom.
H

22 Mr Imerman's application came on before Moylan J in November 2009, who, after a three-day hearing, gave judgment on 11 December 2009, which is the other decision challenged before us. He delivered a supplemental judgment on 13 January 2010. He decided that the seven files should be handed back to Mr Imerman for the purpose of enabling him to

remove any material for which he claimed privilege, but that Mr Imerman would then have to return the remainder of the seven files to Mrs Imerman for use by her in connection with the matrimonial proceedings. With the permission of this court, Mr Imerman appeals against that decision. Mrs Imerman cross-appeals against the decision, seeking (a) more control over the process by which Mr Imerman can assert privilege, and (b) a reversal of Moylan J's refusal to restrain Mr Imerman from disposing of certain memory sticks.

23 We should stress one other procedural matter. On 29 January 2010 Mr Imerman and Mrs Imerman filed and exchanged their respective forms E in the ancillary relief proceedings. We emphasise this fact because it was only then that, under the relevant provisions of the Family Proceedings Rules 1991 (SI 1991/1247) (as amended), the time had come for Mr Imerman to give disclosure of his assets and disclosure (discovery) of documents and for Mrs Imerman to protest at any inadequacy in his disclosure.

24 It is convenient at this stage, first, to set out the relevant parts of the Family Proceedings Rules and, then, to set out what we understand by the *Hildebrand* rules, including our analysis of the curious process, what we venture to suggest is the unprincipled and never properly articulated process, by which what may properly be described as the "rule in *Hildebrand*" became transformed into the (very different) so-called "*Hildebrand* rules".

The Family Proceedings Rules

25 At the outset it may be helpful to distinguish between three things which, before recent changes, were more clearly distinguished as a matter of terminology: the *disclosure* of relevant facts and matters; the *discovery* of relevant documents; and the *evidence* required to establish the relevant facts.

26 *Jenkins v Livesey (formerly Jenkins)* [1985] AC 424 and, for the most part, the modern form E are concerned with *disclosure*, not *discovery*. The principle in *Jenkins v Livesey*, as stated by Lord Brandon of Oakbrook, at p 438, is that both parties to ancillary relief proceedings are under a continuing "duty to the court to make full and frank disclosure of all material facts to the other party and the court". Or, as he put it, at pp 436–437, "they must provide the court with information about all the circumstances of the case . . . and ensure that the information provided is correct, complete and up to date". This reflects the fact that section 25(1) of the Matrimonial Causes Act 1973 requires the court "to have regard to all the circumstances of the case", from which it follows, as Lord Brandon observed, at p 440, that "unless the parties make full and frank disclosure of all material matters, the court cannot lawfully or properly exercise [its] discretion [under sections 23 and 24 of the Act]". It is worth remembering that what the wife had failed to disclose in that case, and what led to the setting aside of the consent ancillary relief order by the House of Lords, was the fact of her intended remarriage, not some failure to give proper discovery.

27 The content of and need for compliance with form E are regulated by rule 2.61B of the Family Proceedings Rules 1991 (as amended by the Family Proceedings (Amendment No 2) Rules 1999 (SI 1999/3491), rule 11.

A Form E requires the spouse completing it to go on oath that the "information" contained in it "is a full, frank, clear and accurate disclosure of my financial and other relevant circumstances". The rubric on the first page of form E deals with both *disclosure* and *discovery* as follows:

> "You have a duty to the court to give a full, frank and clear disclosure of all your financial and other relevant circumstances . . . You must
B attach documents to the form where they are specifically sought and you may attach other documents where it is necessary to explain or clarify any of the information that you give. *Essential documents* that *must* accompany this statement, are detailed in the form."

In other words, form E is concerned primarily with *disclosure* of information. *Discovery* of documents is confined to (a) those which form E
C itself identifies as documents that "must" be provided and (b) those which are "necessary" to explain or clarify.

28 Procedure in ancillary relief cases is regulated by the Family Proceedings Rules 1991 (as amended by the Family Proceedings (Amendment No 2) Rules 1999, rule 6)). Rule 2.51D, (as further amended by the Family Proceedings (Amendment) (No 5) Rules 2005 (SI 2005/2922),
D rule 2(r)), the equivalent of rule 1.1 of the Civil Procedure Rules, sets out the "overriding objective" as follows:

> "(1) The ancillary relief rules are a procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> "(2) Dealing with a case justly includes, so far as is practicable— (a) ensuring that the parties are on an equal footing; (b) saving expense;
E (c) dealing with the case in ways which are proportionate— (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
>
> "(3) The court must seek to give effect to the overriding objective when
F it— (a) exercises any power given to it by the ancillary relief rules; or (b) interprets any rule.
>
> "(4) The parties are required to help the court to further the overriding objective.
>
> "(5) The court must further the overriding objective by actively managing cases.
>
> "(6) Active case management includes— (a) encouraging the parties to
G co-operate with each other in the conduct of the proceedings; (b) encouraging the parties to settle their disputes through mediation, where appropriate; (c) identifying the issues at an early date; (d) regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question; (e) helping the
H parties to settle the whole or part of the case; (f) fixing timetables or otherwise controlling the progress of the case; (g) making use of technology; and (h) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

We draw attention in particular to rule 2.51D(6)(d).

29 So far as is material for present purposes the relevant rules are rules 2.61B, 2.61D, 2.61E and 2.62. Rule 2.61B sets out the procedure before the first appointment. So far as material it provides as follows:

"(1) Both parties must, at the same time, exchange with each other, and each file with the court, a statement in form E, which— (a) is signed by the party who made the statement; (b) is sworn to be true, and (c) contains the information and has attached to it the documents required by that form.

"(2) Form E must be exchanged and filed not less than 35 days before the date of the first appointment.

"(3) Form E must have attached to it: (a) any documents required by form E; and (b) any other documents necessary to explain or clarify any of the information contained in form E.

"(4) Form E must have no documents attached to it other than the documents referred to in paragraph (3).

"(5) Where a party was unavoidably prevented from sending any document required by form E, that party must at the earliest opportunity: (a) serve copies of that document on the other party; and (b) file a copy of that document with the court, together with a statement explaining the failure to send it with form E.

" (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).

" (7) At least 14 days before the hearing of the first appointment, each party must file with the court and serve on the other party— (a) a concise statement of the issues between the parties; (b) a chronology; (c) a questionnaire setting out by reference to the concise statement of issues any further information and documents requested from the other party or a statement that no information and documents are required; (d) a notice in form G stating whether that party will be in a position at the first appointment to proceed on that occasion to a FDR [financial dispute resolution] appointment."

30 Rule 2.61D deals with the first appointment. So far as material it provides as follows:

"(1) The first appointment must be conducted with the objective of defining the issues and saving costs.

"(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 . . .

"(3) After the first appointment, a party is not entitled to production of any further documents except in accordance with directions given under paragraph (2)(a) above or with the permission of the court.

"(4) At any stage: (a) a party may apply for further directions . . . (b) the court may give further directions . . ."

A **31** Rule 2.61E deals with the financial dispute resolution ("FDR") appointment. So far as material it provides as follows:

> "(8) At the conclusion of the FDR appointment, the court may make an appropriate consent order, but otherwise must give directions for the future course of the proceedings, including, where appropriate, the filing of evidence . . ."

B **32** Rule 2.62 (as amended by the Family Proceedings (Amendment No 2) Rules 1999, rule 12) deals with the substantive hearing. So far as material it provides as follows:

> "(4) At the hearing of an application for ancillary relief the district judge . . . may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance C of any person for the purpose of being examined or cross-examined and order the disclosure and inspection of any document or require further statements . . ."
>
> "(7) Any party may apply to the court for an order that any person do attend an appointment (an 'inspection appointment') before the court and produce any documents to be specified or described in the D order, the inspection of which appears to the court to be necessary for disposing fairly of the application for ancillary relief or for saving costs."

Rule 2.66(4) gives the same powers to the judge when the case has been transferred for hearing by a judge rather than a district judge.

33 In relation to these Rules we make two general observations. First, E that the Rules do not provide for any disclosure of information or disclosure (discovery) of documents until a spouse has lodged his form E. Second, and even more significantly, that the process of disclosure (discovery) of documents both then and thereafter is closely regulated by the Rules and, in accordance with the Rules, by the court. Although there is a general and continuing duty to make full disclosure of all relevant information, there is, despite the duty imposed on the court by section 25 of the 1973 Act, no duty F of general disclosure (discovery) of documents of the kind required in ordinary civil proceedings by the CPR. And whereas in ordinary civil proceedings the parties can normally choose what documentary evidence to tender, it is the court which controls what documents are to be disclosed and tendered by way of evidence in ancillary relief proceedings.

34 Thus, judges deciding such applications have a far greater control G than they have under the CPR in normal civil proceedings, over which documents should or should not be produced in evidence.

35 But two features of ancillary relief proceedings have led to the family courts refusing to condemn, still less to impose any sanction (save very occasionally in particularly egregious circumstances), when a spouse obtains and copies the other spouse's documents, even though they are confidential, provided, according to the *Hildebrand* rules, that no force is used. First, the H necessity to adopt self-help arises, it is said, from persistent lack of candour in proceedings for ancillary relief and the frequent adoption of underhand means to salt away assets from the gaze of the court and thus avoid a fair division. If the courts refuse to permit pre-emptive acquisition of information relevant to a just resolution of a claim for ancillary relief, they

will, it is said, licence the other party to cheat and conceal. Second, and as we have described, the court is under the statutory obligation imposed by section 25 to investigate and discover the true extent of the parties' finances, a role described by Thorpe LJ as "quasi-inquisitorial": see *Parra v Parra* [2003] 1 FLR 942, para 22.

The Hildebrand rules

36 What have become known as the *Hildebrand* rules form the basis of advice by lawyers to their clients with the apparent approval of the judges of the Family Division. In essence clients are encouraged to access documents belonging to the other spouse, whether they were confidential or not, provided force is not used. Once access to such documents or information has been gained, the spouse may retain and use copies, though not the originals, but those copies should be disclosed when a questionnaire is served, or earlier if either party makes what has become a standard request.

37 An accurate statement of the *Hildebrand* rules as currently understood was given by Ward LJ in *White v Withers LLP* [2010] 1 FLR 859, para 37:

> "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."

38 It is necessary to ascertain the origin of the *Hildebrand* rules so as to understand their meaning and their juridical basis (if any). Familiarity has led to the assumption that they are good law. In the present case that assumption has been put directly in issue.

39 In *Hildebrand v Hildebrand* [1992] 1 FLR 244 the court refused to compel a wife to answer her husband's questionnaire designed, at least in part, to obtain disclosure of information of which the husband was already aware. The husband had obtained and copied documents contained in his wife's personal box file. Waite J refused to order the wife to answer the questionnaire on two grounds: first, at pp 253C–D and 254C, that the husband had taken discovery improperly into his own hands and to allow him the additional weapon of disclosure would be to condone his conduct; second, at p 254D, that the questionnaire was not a genuine attempt to obtain information of which he was ignorant.

40 But Waite J refused to resolve what he described as "deep questions" as to the propriety of the husband's conduct on the brink of the breakdown of the marriage; he left them, at p 248C, to those who frame rules of professional etiquette or to a case where it was necessary to make a ruling. He ordered disclosure by the husband of the copies.

41 *Hildebrand v Hildebrand* itself is accordingly no authority for the proposition that a spouse may, in circumstances that would otherwise be

A unlawful, take, copy and retain copies of confidential documents. In other words, it is no authority for the so-called *Hildebrand* rules. Wilson LJ, who as counsel had successfully argued in *Hildebrand v Hildebrand* that the court should not act in a way which might appear to condone such conduct, at p 253D, later acknowledged judicially in *White v Withers LLP* that the *Hildebrand* rules "can hardly be accounted robust" and that they needed to
B be tested for compatibility with principles in other areas of law [2010] 1 FLR 859, para 83. As he said, at para 79:

> "The ratio decidendi of *Hildebrand*, important though it has proved to be, relates only to the time at which copy documents thus obtained should be disclosed to the other spouse, namely no later than at the normal disclosure stage and thus in effect (albeit now subject to the
C prohibition against disclosure prior to the first appointment contained in rule 2.61B(6) of the Family Proceedings Rules 1991) at the time of service upon that spouse of the first questionnaire (or as soon after service of the questionnaire as that rule permits and in any event before service of answers to it)."

42 We respectfully agree. *Hildebrand v Hildebrand*, in our judgment, is
D authority only as to the time when copies obtained unlawfully or clandestinely should be disclosed to a spouse. On that narrow point—what we have referred to as the "rule in *Hildebrand*"—it was and remains good law. In other words, and we wish to emphasise this, subject to only one qualification it is and remains the obligation of a wife who has obtained access to her husband's documents unlawfully or clandestinely to disclose that fact promptly, either if asked by her husband's solicitors or at the latest
E and in any event when she serves her questionnaire. Disclosure in this way of the fact of what she has done is not in any way inconsistent with the Rules. And it is no answer to this obligation that it may prompt the husband immediately to commence proceedings for recovery of the original documents and any copies. The qualification we have mentioned arises in this way. Although the point had not been canvassed in argument,
F Mr Turner, in response to our draft judgment, helpfully raised the question whether a wife would not be able to rely upon the privilege against incrimination in relation to any criminal conduct. We have heard no argument on the point. We make clear, however, that nothing we have said is intended to deny a wife in such circumstances whatever recourse to the privilege against incrimination she would otherwise be entitled to. We add only this. Although there may be cases where a wife will be entitled to plead
G the privilege so as not to have to disclose *how* she acquired the documents, it does not necessarily follow, and typically will not follow, that she can similarly avoid having to disclose the *fact* that she has such documents. Moreover, a wife who wishes to deploy such documents against her husband cannot rely upon the privilege as a reason for not disclosing the fact that she has them at the time when such disclosure would otherwise be required by
H the rule in *Hildebrand*. Pleading the privilege and them waiving it at the last moment so as to ambush the husband is not acceptable.

43 In December 1993, Wilson J gave an address, an abridged version of which was published as "Conduct of the Big Money Case" [1994] Fam Law 504. He posed the question at pp 505–506, "When do you advise a wife that it is appropriate for her to 'borrow' her husband's financial documents in

order to photocopy them for your use in the case"—something he described as "essentially underhand", though adding that "in many cases one may be gravely prejudicing the client's case if one does not give one's blessing to that precaution". He continued:

> "My feeling is that, if the wife gives an account of her husband which includes any past financial dishonesty, whether to herself or to a third party, or recounts any threat or statement by him such as reasonably leads to the conclusion that he is not likely within the divorce proceedings to give a full account of his financial position, it is permissible to advise her to take photocopies of such documents as she can obtain without the use of force."

44 A few months later Wilson J gave judgment in *T v T (Interception of Documents)* [1994] 2 FLR 1083, where the wife had secretly photocopied financial documents kept by her husband in the home, obtained documents by breaking the door or window of her husband's office, scoured a dustbin, opened letters and, on one occasion, snatched his diary whilst he was in his office. She had disclosed some but not all of the copies she retained.

45 In the substantive ancillary relief proceedings, Wilson J held that the wife had rightly anticipated her husband's failure to disclose his true financial position. Accordingly, he held that it was "reasonable" for her to take such photocopies as she could obtain without the use of force and to scour the dustbin. But he described as "unacceptable" and "reprehensible" her use of force, interception of mail and retention of original documents: p 1085D–F. He declined to regard that behaviour as relevant to the amount of the award although it would be relevant to costs.

46 In *White v Withers LLP* [2010] 1 FLR 859, para 82, Wilson LJ observed that since the decision in *T v T* [1994] 2 FLR 1083 no judge of the Family Division had, to his knowledge, sought to add to, or subtract from, the so-called "rules" which he had suggested in *T v T* as to the three areas of misconduct in the manner in which documents may be taken or kept, adding that:

> "perhaps partly because they are so easily understandable, the 'rules' now constitute the foundation of advice conventionally given to clients by family lawyers, as well as of the approach of the family judiciary to the treatment of *Hildebrand* documents . . ."

47 It may be noted that Wilson J had referred to the acceptable part of the wife's behaviour as having been "reasonable". In *J v V (Disclosure: Offshore Corporations)* [2004] 1 FLR 1042, para 32, Coleridge J could describe such behaviour as "perfectly permissible".

48 Wilson J did not in *T v T* [1994] 2 FLR 1083, as he later acknowledged in *White v Withers LLP* [2010] 1 FLR 859, para 81, consider the effect of that approach to the law in relation to tortious acts, let alone to the law in relation to the protection of confidential information. But in *White v Withers LLP* this court was confronted with the problem in an action for damages brought by a husband against his wife's solicitors for misuse of his mail intercepted by his wife.

49 There was a sharp divergence of view. Ward LJ said, at paras 57, 58, and 63:

A "57. *Public interest*: Nor is there much scope for public interest serving as a defence to trespass: see *Monsanto v Tilley* [2000] Env LR 313 where it did not avail the environmental group who entered on the land and uprooted genetically modified crops. Here there is no public interest in taking another's documents: the public interest in so far as it prevails, is in the need for a fair trial of the ancillary relief claim with all relevant facts before the court and this could be achieved by B resort either to the court's search and seizure warrants or to a *Hildebrand* plea to admit the documents in evidence no matter how they were procured. 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 C take a risk.

"58. *Legitimate justification*: If, as I hold, the removal, use and retention of documents can amount to the tort of interference with property and as such be a civil wrong, then the justification for the wife's actions, namely, to prevent the husband's wrongfully withholding them, cannot be legitimate. In the words of the old adage: 'Two wrongs don't make a right'. At most the *Hildebrand* rules, and the extent to which they D are observed or broken, may have an impact upon damages and, therefore, upon whether or not the court should allow a civil claim to go to trial. That is essentially an abuse of process argument . . ."

"63. Where does that leave the *Hildebrand* rules? The deviousness of one of the parties and the need for the court to have full and frank disclosure to fulfil the court's statutory duty will justify the admitting the E documents in evidence but, subject to the possibility of de minimis infractions being overlooked for the reasons I have just discussed above, it cannot justify or excuse the commission of the wrongful interference with property. Nothing in this judgment is intended to cast doubt upon the Family Division's practice to admit all relevant evidence in the search for truth or to impose sanctions where there has been improper conduct." F

50 Sedley LJ said, at para 73:

"There may, however, be cases in which a properly conducted *Hildebrand* removal has done appreciable harm and the question has to be answered whether *Hildebrand* affords a substantive defence to the tort. All I would say for the present is that the torts of trespass and conversion G are children of the same common law as has now fathered *Hildebrand*, and that it would be surprising if that experienced parent could not bring the two into a clear relationship less contingent than the power to stay or strike out actions. More bluntly put, if a choice has to be made between the sanctity of property and the value of privacy on the one hand and the doing of justice between spouses on the other, the law is in a position to choose the latter." H

51 Finally, Wilson LJ said, at paras 83 and 84:

"83. . . . The *Hildebrand* 'rules' need to be tested, for compatibility with principles in other areas of law, including in particular the law of tort. As a family lawyer of practical disposition, I have some confidence

that, in the appropriate case, they will withstand that test. If the spouse (say a wife) who, in circumstances of reasonable doubt as to her husband's willingness to comply with his duties of disclosure to the court, borrows such of his documents as he has appeared to be content to leave accessible to her without her need to resort to force, would the notion of a licence negate any conclusion, *if* otherwise apt, that she had thereby committed a trespass or conversion in respect of those documents? Or would the law prefer to recognise a public policy exception to the ordinary laws of trespass to chattels and/or conversion of them? Such an exception would be founded on the words of sections 25(1) and (2) of the Matrimonial Causes Act 1973, which, exceptionally, confer upon the court a *duty* to despatch certain litigation, namely applications for ancillary relief, with regard to certain factors, namely to a 'first consideration' (the welfare of any relevant child while a minor), to the 'matters' specified in subsection (2) and, more widely, to 'all the circumstances of the case'. Unsurprisingly the financial resources of each spouse are the first of the specified 'matters'. Thus, if the family court fails to have regard to the financial resources of each spouse as they truly are, or at least as it can reasonably discern them to be, *it* fails to discharge *its* duty. The family court is therefore required by Parliament to be furnished with true information about the parties' resources, whatever (within the rule of law, appropriately drawn) be the source from which it has been collected . . .

"84. I would be profoundly opposed to a co-existence of the admissibility in the family courts of documents secretly obtained with, nevertheless, a tortious liability on the part of those who had obtained them or who shared responsibility for their having been obtained. Such a co-existence would compromise the ability of family practitioners to advise that action on the part of their clients in accordance with the *Hildebrand* 'rules' was permissible and would thus in my view disable the family courts from discharging their statutory duty in certain cases. It would be as unfortunate as it would be unnecessary for us to suggest, as does Ward LJ, at para 57 above, that to act even in accordance with the *Hildebrand* 'rules' 'is to take a risk'; or to state, as he does, at para 58 above, that 'at most the *Hildebrand* "rules", and the extent to which they are observed or broken, may have an impact upon damages'. Indeed, as already appears, I am far from persuaded of the validity either of his suggestion or of his statement, about which we have not heard argument."

52 The time has come to consider whether there is any legal justification for permitting a wife to retain copies of documents which she has unlawfully obtained on the grounds that to do so will assist in preventing or curing a less than frank disclosure by her husband of his assets. Wilson LJ described himself as a family lawyer of practical disposition, but does that entail permitting a party to obtain an advantage by self-help in breach of the law?

53 Although we shall in due course consider the issues of criminal and tortious liability, the answer to the question we have posed must lie primarily in analysis of the law of confidence and of the remedies designed to protect confidential information and documents.

The nature of a claim in confidence

54 The law of confidence was developed by the Courts of Chancery over the 18th and 19th centuries. Typically, a claim for breach of confidence arose in the commercial context, and in circumstances where there was no question but that the defendant was entitled to have obtained the information concerned initially. Thus, in perhaps the most familiar and frequent category of case, involving trade secrets and the like, the claimant himself will have provided the defendant with the information, as, at the relevant time, the defendant will have been an employee or agent of the claimant. In such cases, the claimant cannot allege that the defendant is not entitled to have the information, let alone complain that he did anything legally wrong or morally culpable to obtain the information in the first place. What the claimant could do was to complain if the defendant made illicit copies of confidential papers or misused the information for his own, rather than his principal's, purposes.

55 The earliest cases on the topic pre-date even the days of Lord Eldon LC. However, the jurisprudence really starts with a number of his decisions and then continues throughout the 19th century. There are many reported cases but it is convenient to start with the celebrated case of *Prince Albert v Strange* (1849) 1 Mac & G 25, the facts of which are too well known to require repetition. It suffices to say that the claim was brought against various defendants who were involved in the copying and proposed publication of etchings of the Royal Family made by Prince Albert which, as Lord Cottenham LC put it, at p 41, had been "surreptitiously and improperly obtained".

56 Lord Cottenham LC stated the general principle as follows, at pp 44–45:

> "a breach of trust, confidence, or contract, would of itself entitle the plaintiff to an injunction. The plaintiff's affidavits state the private character of the work or composition, and negative any licence or authority for publication . . . To this case no answer is made, the defendant saying only that, he did not, at the time, believe that the etchings had been improperly obtained, but not suggesting any mode by which they could have been properly obtained . . . If, then, these compositions were kept private . . . the possession of the defendant, or of his intended partner judge, must have originated in a breach of trust, confidence or contract . . . and . . . in the absence of any explanation on the part of the defendant, I am bound to assume that the possession of the etchings by the defendant or judge has its foundation in a breach of trust, confidence or contract . . . and upon this ground . . . I think the plaintiff's title to the injunction sought to be discharged, fully established."

57 He added, at pp 46–47:

> "The cases referred to . . . have no application to cases in which the court exercises an original and independent jurisdiction, not for the protection of a merely legal right, but to prevent what this court considers and treats as a wrong . . . arising from a . . . breach of . . . confidence, as in the present case and the case of Mr Abernethy's lectures . . . In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether. The interposition

of this court in these cases, does not depend upon any legal right, and to be effectual, it must be immediate." A

58 The relief sought against the defendants included the delivery up of all copies of the plaintiff's etchings. At trial this part of the order was resisted. Knight Bruce V-C made the order sought. He said (1849) 2 De G & Sm 652, 716:

"It is . . . said, that neither the copies of the catalogue, nor the impressions that have been taken, can be delivered, or be directed to be delivered up, in as much as the defendant contends that he is entitled to the property in the materials on which they are printed. With regard to catalogues, no such question, I think, arises. They must be either cancelled or destroyed; and without destruction they can hardly be cancelled. With regard to the impressions, it might possibly be right to attend to the defendant's claim, had the impressions been upon a material of intrinsic value—upon a material not substantially worthless, except for the impressions which, by the wrongful act of the defendants, had been placed there. That case, however, does not arise. The material here is substantially worthless, except for that in which the defendant has no property. There can consequently be no reason why the effectual destruction of subject should not be directed by the court . . ." B C D

59 It is convenient to go next to *Morison v Moat* (1851) 9 Hare 241, a decision of Turner V-C, affirmed on appeal to the Lords Justices, which has been frequently cited with approval. It concerned a servant, Moat, who had sought to use a secret formula of his employer's. The relief sought was an injunction to restrain use of the formula. In a much quoted passage (p 255) which there is no need for us to set out, Turner V-C reiterated the principles, as to which he said there was "no doubt". He added, at pp 263–264: E

"The defendant admits that the secret was communicated to him by Thomas Moat . . . The question then is, whether there was an equity against him; and I am of opinion that there was. It was clearly a breach of faith and of contract on the part of Thomas Moat to communicate the secret. The defendant derives under that breach of faith and of contract, and I think he can gain no title by it . . . the cases of *Tipping v Clarke* and *Prince Albert v Strange* shew, that the equity prevails against parties deriving under the breach of contract or duty. It might indeed be different, if the defendant was a purchaser for value of the secret without notice of any obligation affecting it; and the defendant's case was attempted to be put upon this ground . . . but I do not think that this view of the case can avail him . . . So far as the secret is concerned, he is a mere volunteer deriving under a breach of trust or of contract." F G

60 *Prince Albert v Strange* 1 Mac & G 25 and *Morison v Moat* 9 Hare 241 were cited with approval by Kay LJ in *Lamb v Evans* [1893] 1 Ch 218. Referring, at p 325, to cases where an employee has "surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence", Kay LJ said that the employee "has been restrained from communicating that secret to anybody else, and anybody who has obtained that secret from him has also been restrained from using it". In *Robb v Green* [1895] 2 QB 1 (another employee case) the relief H

granted included an order for delivery up to the plaintiff of all copies or extracts from the plaintiff's papers in the defendant's possession or under his control. The judgment and order were upheld by the Court of Appeal [1895] 2 QB 315, 319–320, per Kay LJ :

> "On whatever ground it is put, it is clear in this case that an injunction ought to be granted . . . The other items of relief granted are the delivery up of the list made and the damages. With regard to the first, it seems to me clear that such a document surreptitiously made in breach of the trust reposed in the servant clearly ought to be given up to be destroyed."

61 Many of the cases on the use of confidential information are confused by the fact that the documents concerned not only contain confidential information but were privileged. That was the position in one of the best known cases on the topic, *Lord Ashburton v Pape* [1913] 2 Ch 469. In that case a third party who had received the confidential and privileged document from the plaintiff's clerk was restrained from using it and required to hand it back to the plaintiff. The court approached the claim on the basis that it was based on confidence, presumably on the somewhat archaic basis that privilege had been lost: see *Calcraft v Guest* [1898] 1 QB 759. Although there appears to have been no claim for return of copies, Swinfen Eady LJ plainly thought, at p 477, that an order could be made for delivery up of both originals and copies, a conclusion entirely consistent with the earlier authorities to which we have referred.

62 In *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, Ungoed-Thomas J granted, at p 317, the plaintiff an injunction to restrain the defendant, her former husband, from publishing

> "secrets of the plaintiff relating to her private life, personal affairs or private conduct, communicated to the first defendant in confidence during the subsistence of his marriage to the plaintiff and not hitherto made public property."

He said, at p 322, that: "the court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right at law." Later, at p 333 he added:

> "an injunction may be granted to restrain the publication of confidential information not only by the person who was a party to the confidence but by other persons into whose possession that information has improperly come."

63 *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431 was a case where a defendant had got possession of his opponent's papers, including certain privileged material, by a trick. Having referred to *Lord Ashburton v Pape* [1913] 2 Ch 469, Warner J said, at p 438:

> "that was not an isolated decision but is illustrative of a general rule that, where A has improperly obtained possession of a document belonging to B, the court will, at the suit of B, order A to return the document to B and to deliver up any copies of it that A has made, and will restrain A from making any use of any such copies or of the information contained in the document."

He added, at p 440, that had the plaintiff applied in time for relief against the defendant on the lines of that granted in *Lord Ashburton v Pape* [1913] 2 Ch 469: "I have little doubt that . . . they would have been held entitled to it."

64 It was only some 20 years ago that the law of confidence was authoritatively extended to apply to cases where the defendant had come by the information without the consent of the claimant. That extension, which had been discussed in academic articles, was established in the speech of Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. He said, at p 281, that confidence could be invoked "where an obviously confidential document is wafted by an electric fan out of a window . . . or . . . is dropped in a public place, and is then picked up by a passer-by".

65 The domestic law of confidence was extended again by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457, effectively to incorporate the right to respect for private life in article 8 of the Convention, although its extension from the commercial sector to the private sector had already been presaged by decisions such as *Argyll v Argyll* [1967] Ch 302 and *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804. In the latter case, Laws J suggested at p 807 that the law recognised "a right of privacy, although the name accorded to the cause of action would be breach of confidence". It goes a little further than nomenclature in that, in *Wainwright v Home Office* [2004] 2 AC 406, the House of Lords held that there was no tort of invasion of privacy, even now that the Human Rights Act 1998 is in force. None the less, following its later decision in *Campbell's* case [2004] 2 AC 457, there is now a tort of misuse of private information: as Lord Phillips of Worth Matravers MR put it in *Douglas v Hello! Ltd (No 3)* [2006] QB 125, para 96, a claim based on misuse of private information has been "shoehorned" into the law of confidence.

66 As Lord Phillips MR's observation suggests, there are dangers in conflating the developing law of privacy under article 8 and the traditional law of confidence. However, the touchstone suggested by Lord Nicholls of Birkenhead and Lord Hope of Craighead in *Campbell's* case [2004] 2 AC 457, paras 21, 85, namely whether the claimant had a "reasonable expectation of privacy" in respect of the information in issue, is, as it seems to us, a good test to apply when considering whether a claim for confidence is well founded. (It chimes well with the test suggested in classic commercial confidence cases by Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47, namely whether the information had the "necessary quality of confidence" and had been "imparted in circumstances importing an obligation of confidence".)

67 As stated in *Stanley on the Law of Confidentiality: A Restatement* (2008), p 6:

> "Cases asserting an 'old fashioned breach of confidence' may well be best addressed by considering established authority [whereas] cases raising issues of personal privacy which might engage article 8 . . . will require specific focus on the case law of the European Court of Human Rights."

However, given that the domestic law on confidentiality had already started to encompass privacy well before the 1998 Act came into force, and that, with the 1998 Act now in force, privacy is still classified as part of the

confidentiality *genus*, 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 20 years.

68 If 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, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence. The notion that looking at documents which one knows to be confidential is itself capable of constituting an actionable wrong (albeit perhaps only in equity) is also consistent with the decision of the Strasbourg court that monitoring private telephone calls can infringe the article 8 rights of the caller: see *Copland v United Kingdom* (2007) 45 EHRR 858.

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. 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. 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. 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.

70 In this connection, we were taken to the observation of Eady J in *White v Withers LLP* [2009] 1 FLR 383, para 8, that

> "the mere receipt of documents by the solicitors from their client, and their continued retention in connection with the matrimonial proceedings, simply cannot give rise to a cause of action."

In our view, that observation (which may in any event have been limited to a cause of action in damages) should be taken as applying only to the receipt of documents by solicitors from their client; further, it should not be taken as suggesting that the claimant could not recover the documents from the solicitors.

71 The fact that the law of confidentiality was extended in *Campbell's* case [2004] 2 AC 457 for the purpose of giving effect to article 8 in English law, cannot, as we see it, mean that the law of confidentiality has somehow

been circumscribed in other respects. The fact that misuse of private information has, as Eady J said in *White v Withers LLP* [2009] 1 FLR 383, para 8 "become recognised over the last few years as a wrong actionable in English law" does not mean that there has to be such misuse before a claim for breach of confidentiality can succeed, unless that was the position before the Human Rights Act 1998 came into force, which it was not. (It is only fair to mention, that in *White v Withers LLP* [2010] 1 FLR 859 the appeal against Eady J's decision was not pursued on the issue of confidentiality: see para 40. Ward LJ's obiter approval (para 23) of what Eady J said related to the suggestion of misuse by the solicitors.)

The relief to be granted where there is a breach of confidence

72 If a defendant looks at a document to which he has no right of access and which contains information which is confidential to the claimant, it would be surprising if the claimant could not obtain an injunction to stop the defendant repeating his action, if he threatened to do so. The fact that the defendant did not intend to reveal the contents to any third party would not meet the claimant's concern: first, given that the information is confidential, the defendant should not be seeing it; secondly, whatever the defendant's intentions, there would be a risk of the information getting out, for the defendant may change his mind or may inadvertently reveal the information.

73 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). Without such an order, the information would still be "out there" in the possession of someone who should not have it. The value of the actual paper on which any copying has been made will be tiny, and, where the copy is electronic, the value of the device on which the material is stored will often also be tiny, or, where it is not, the information (and any associated metadata) can be deleted and the device returned.

74 A claim based on confidentiality is an equitable claim. Accordingly, the normal equitable rules apply. Thus, while one would normally expect a court to grant the types of relief we have been discussing, it would have a discretion whether to refuse some or all such relief on familiar equitable principles. Equally, 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. But, as we have noted, 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.

75 In *Istil Group Inc v Zahoor* [2003] 2 All ER 252, after a full and illuminating survey of the authorities, Lawrence Collins J held, at para 74, that, where a privileged document had been seen by an opposing party through fraud or mistake, the court has power to exercise its equitable

A confidentiality jurisdiction, and "should ordinarily intervene, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy . . .", a view which he discussed in the ensuing paragraphs. On the facts of that case, he concluded, at 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".

B

The claim for confidence in this case

76 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, and are specifically covered by article 8 of the Convention, which confers the

C right to respect for privacy and expressly mentions correspondence.

77 In this case, at far as we can see, there is no question but that Mr Imerman had an expectation of privacy in respect of the majority of his documents stored on the server, so that issue can properly be answered in his favour even at this interlocutory stage. Mr Turner QC, appearing for Mrs Imerman in the Family Division appeal, realistically did not suggest

D otherwise. After all, the very justification offered for the actions of her brothers by Mrs Imerman was the fear that Mr Imerman would seek to maintain the secrecy of the information which she sought by clandestine means. It seems clear that much of the information contained in the documents was, at least in the absence of a good reason to the contrary, confidential to Mr Imerman. Many e-mails sent to and by and on behalf of Mr Imerman, whether connected with his family or private life, his personal

E and family assets, or his business dealings must be of a private and confidential nature.

78 However, at least in the written submissions made on behalf of the defendants in the Queen's Bench Division appeal, it was contended that, until Mr Imerman had specifically identified the documents which contained confidential information, and the grounds for claiming confidentiality, his

F claim in confidence should be rejected. No authority has been cited to support the proposition that, in every case where it is said that breach of confidence has occurred, or is threatened, in relation to a number of documents, the claimant must, as a matter of law, identify each and every document for which he claims confidence, and why. In some cases, that may be an appropriate requirement, for instance where a claimant is seeking to enjoin a former employee from using some, but not all, of the information

G the latter obtained when in the claimant's employment, as in *Lock International plc v Beswick* [1989] 1 WLR 1268, 1274B. However, in the present case, the imposition of such a requirement is unnecessary (as it is obvious that many, probably most, of the documents are confidential or contain confidential information), disproportionate (because of the sheer quantity of documents copied), and unfair on Mr Imerman (in the light of the number of documents copied, and the fact that the copying was done

H without his knowledge, let alone his consent). It is oppressive and verging on the absurd to suggest that, before he can obtain any equitable relief, Mr Imerman must identify which out of 250,000 (let alone which out of 2·5 million) documents is or is not confidential or does or does not contain confidential information.

79 As Mr White QC said on behalf of Mr Imerman, the fact that the documents were stored on the server, which was, as he knew, owned by Robert Tchenguiz, who enjoyed physically unrestricted access to the server, cannot deprive Mr Imerman 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 server. The fact that a defendant has a means of access to get 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. Mr Imerman was a bare licensee of particular rooms in the office, and may have shared rooms with Robert Tchenguiz, but that could not possibly mean that Robert Tchenguiz was entitled to look at Mr Imerman's 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.

Confidence between husband and wife

80 On behalf of the defendants in the Queen's Bench Division appeal, Mr Browne QC contends that Mr Imerman cannot mount a claim in confidence against Mrs Imerman, as they were husband and wife at the time that the information was obtained by the defendants and the seven files were passed to Mrs Imerman. This submission is founded on the simple proposition that there is no confidence as between husband and wife (or, it would follow, as between civil partners). It is quite clear from *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 that each spouse owes the other a duty of trust and confidence, enforceable in equity by the other, in relation to what may be called their shared matrimonial life. It is said, however, as we understand the proposition, that there is no such duty, no such right enforceable against the other, in relation to what may be called their separate lives and personalities. We do not agree.

81 No judicial decision was cited to support this surprising proposition, other than an observation of Lord Nicholls in *McFarlane v McFarlane* [2006] 2 AC 618, paras 16, 20, where he referred to "[the] 'equal sharing' principle [which] derives from the basic concept of equality permeating a marriage as understood today", and deprecated the drawing of "a distinction between 'family' assets and 'business or investment' assets". This observation was said to support the notion that there was, in effect, a community of interest between husband and wife such that neither had rights, or at least rights of confidence, against the other. We do not consider the observation has any bearing on the issue. The case was concerned with the proper approach to the distribution of assets after the breakdown of a marriage, and had nothing to do with the legal and equitable ownership or rights of married couples inter se during the marriage. Mr Browne's submission is also inconsistent with Baroness Hale of Richmond's statement at para 123, that "English law starts from the principle of separate property during marriage. Each spouse is legally in control of his or her own property while the marriage lasts". And although, as she went on to point out, the individual incomes of husband and wife are, typically, used for the benefit of the whole family:

A "There are many different ways of doing this, from pooling their whole incomes, to pooling a proportion for household purposes, to one making an allowance to the other, to one handing over the whole wage packet to the other."

82 The notion that a husband cannot enjoy rights of confidence as against his wife in respect of information which would otherwise be B confidential as against her if they were not married, seems to us to be 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. Thus, more than two centuries ago, in *Barwell v Brooks* (1784) 3 Doug 371, 373, Lord Mansfield CJ said that

C "The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated, and possess separate property, a practice unknown to the old law."

The last relic of the doctrine of the unity of husband and wife was exploded as the fiction it always had been in *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496. And in *R v R* [1992] 1 AC 599 (where the doctrine that a man could not be guilty of the rape of his wife was similarly swept D away) Lord Keith of Kinkel observed, at p 617, that "husband and wife are now for all practical purposes equal partners in marriage". In effect, we are being asked to turn the clock back at a time when society not only has moved, but is continuing to move, in quite the opposite direction.

83 As long ago as 1930, McCardie J had observed in *Gottliffe v Edelston* [1930] 2 KB 378, 384:

E "Husbands and wives have their individual outlooks. They may belong to different political parties, to different schools of thought. A wife may be counsel in the courts against her husband. A husband may be counsel against his wife. Each has a separate intellectual life and activities. Moreover, as Lord Bryce has said, the modern notion is that it is one's right to assert one's own individuality: see Lord Bryce's *Studies* F *in History and Jurisprudence*, vol ii, pp 459, 463. We are probably completing the transition from the family to the personal epoch of woman."

84 So, and not least in relation to financial matters, English law recognises that although marriage may be a partnership of equals there is none the less a sphere in which each spouse has, within and as part of the G marriage, a life separate and distinct from the shared matrimonial life. This, after all, is what one would expect. It is, moreover, implicit in the protection which article 8 affords each spouse in relation to his or her personal and individual private life, in contrast to their shared family life.

85 This being so, why, we ask, should one spouse have no right of confidentiality enforceable against the other in relation to their separate lives and personalities? More specifically, why should one spouse in H relation to his or her separate financial affairs and private documents not be able to have recourse as against the other to the kind of equitable relief which we are here considering? We can think of no satisfactory reason for any such rule and every reason why such relief should in principle be available as between spouses. Is it to be said, for example, that a husband is

to be free to borrow and read what he knows his wife would consider her private diary? Is a wife to be free to borrow and read what she knows her husband would consider his confidential papers (whether relating to his work or to the affairs of his parents or siblings)? Surely not. Subject of course 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.

86 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 the 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 the financial terms on which the parties are to be divorced.

87 However, 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. We would go along with Mr Browne's submission to the extent of accepting that the fact that the claimant and defendant in confidence proceedings were married at the time of the alleged breach of confidence 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.

88 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. But, as we have already said, confidentiality is not dependent upon locks and keys. Thus the 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.

89 But it is important to emphasise that the relationship between the parties and the circumstances in which the information or document is obtained is relevant only to the question as to whether the information or document is to be cloaked with confidentiality. Once it is determined that the document is properly to be regarded as confidential to one spouse but not

A to the other, the relationship has no further relevance in relation to the remedy for breach of that confidentiality.

Alleged breaches of the criminal law

90 So far as concerns the criminal law, the surreptitious removal of papers may, depending of course upon the circumstances, involve offences B such as theft or burglary, though nothing of that sort is alleged here. But where, as in this case, information is surreptitiously downloaded from a computer, there may also be criminal offences under the Computer Misuse Act 1990 and the Data Protection Act 1998.

91 On behalf of Mr Imerman, it is contended that, in addition to infringing his rights of confidence, the defendants, or some of them, in accessing his computer records without his consent, were in breach of C statutory duty under the 1998 Act, and committed crimes under the provisions of the 1990 Act and 1998 Act.

Alleged criminality under the 1990 Act

92 Section 1(1) of the 1990 Act provides that it is an offence for a person to cause "a computer to perform any function with intent to secure access D to any program or data held in any computer", where "the access . . . is unauthorised" and "he knows at the time . . . that that is the case". By virtue of section 17(2), securing access includes taking copies of any data, or moving any data "to any storage medium", or using such data. Section 17(8), as amended by section 52 of and paragraph 29 of Schedule 14 to the Police and Justice Act 2006 provides that an act is

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> "unauthorised, if the person doing [it] . . . is not [and does not have the authority of] a person who has responsibility for the computer and is entitled to determine whether the act may be done".

93 On the basis of the arguments that have been, relatively briefly, presented to us on the issue, there does seem to be a real possibility that those defendants responsible for accessing Mr Imerman's computer records stored F on the server 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 Mr Imerman's documents stored on server, within the meaning of the Act, because they had, to his knowledge, physically unrestricted access to the server.

G **94** It is, in principle, undesirable and, in practice, difficult to make an unambiguous finding, at an interlocutory stage in civil proceedings, as to whether or not a crime was committed. In addition, even if it was established that a crime has been committed, it by no means necessarily gives rise to a civil cause of action. Accordingly, at this stage, while we properly can, and do, conclude that there is a real possibility that an offence under the 1990 Act was committed when Robert Tchenguiz H obtained copies of Mr Imerman's documents downloaded from the server in early 2009, it is not possible and not necessary to reach a final conclusion on that issue. It is not necessary because for the purposes of considering the impact of Mrs Imerman's and her brothers' submissions it is only necessary to bear in mind that, if she is correct, she can obtain the

advantage of the retention of copies of the seven files notwithstanding their criminal activities.

Alleged breach of statutory duty under the 1998 Act

95 We turn to the somewhat more complex 1998 Act. The alleged breach of statutory duty arises out of section 4(4), which imposes a duty on a "data controller" to comply with "the data protection principles", set out in Schedule 1, in relation to "all personal data [of] which he is the data controller". Section 1 of the 1998 Act contains definitions; "data controller" is defined as meaning "a person who . . . determines the purposes for which and the manner in which any personal data are . . . processed"; "personal data" is defined as meaning "data which relate to a living individual who can be identified . . . from those data . . ."

96 In relation to Mr Imerman's data stored on the server, it is strongly arguable that Robert, and possibly Vincent, Tchenguiz appear to have been, data controllers, given their ownership of, and ability to access and control, the server and the IT systems in the office. It seems, at least on the face of it, highly probable that some of the material copied from Mr Imerman's documents accessed from the server included "personal data", although there is authority which supports the notion that that expression should be given a narrow meaning.

97 Paragraph 1 of Part I of Schedule 1 to the 1998 Act states that data "shall be processed fairly and lawfully", and only if "one of the conditions in Schedule 2 is met". There is force in the argument that, far from being lawful, fair and in accordance with Schedule 2, the accessing in early 2009 failed all three requirements. It was arguably not lawful because of the alleged breach of the 1990 Act; it was arguably not fair because of the secret and indiscriminate way the access was effected; it was arguably not in accordance with Schedule 2, because, contrary to the defendants' arguments, it was not "necessary . . . for the administration of justice" or "necessary for the purposes of legitimate interests pursued by the data controller", the two primary grounds floated by the defendants (and found respectively in paragraphs 5 and 6 of Schedule 2).

98 The defendants also rely on 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 purposes of establishing, exercising or defending legal rights".

99 The issue of necessity lies at the heart of the argument that there is or should be a special dispensation in the Family Division which permits Mrs Imerman to retain copies of documents, prior to the time at which the rules dictate she was entitled to them and without court order. We have resolved that more general but crucial issue against Mrs Imerman (see below). Accordingly, and quite apart from anything else, in so far as it is said to have been "necessary" to protect Mrs Imerman's interests, there is compelling attraction in the argument that it was not necessary, because Mrs Imerman 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.

100 The defendants largely took their stand on the argument that the material accessed did not include personal data, given the narrow meaning of that expression, although they did not concede any other points. On the

A basis of the arguments we have heard, it is clear that Mr Imerman has a powerful case to the effect that, in accessing and copying his computer records, Robert Tchenguiz was in breach of his statutory duty under section 4(4) of the 1998 Act, and that Vincent Tchenguiz may also have been liable.

101 But there is no need to resolve the issue. Resolution of the issues of confidentiality and its breach in the context of ancillary relief proceedings B make it unnecessary to resolve the specific question of breach of statutory duty. It is, however, relevant to observe, just as in relation to alleged criminality, that the question whether there is a basis for condoning unlawful activity in ancillary relief proceedings must embrace the real possibility of condoning a breach of statutory duty.

C *Alleged criminality under the 1998 Act*

102 Section 55(1)(a) of the 1998 Act states that "a person must not knowingly or recklessly" and "without the consent of the data controller obtain or disclose personal data". Section 55(2) exempts from the ambit of section 55(1) cases where (a) the obtaining or disclosing was "necessary for the purpose of preventing or detecting a crime" or "required . . . by any rule D of law", (c) the person reasonably believed that he had the consent of the data controller, or (d) the action was "justified as being in the public interest". Section 55(3) provides that a person who breaches section 55(1) "is guilty of an offence".

103 We have already referred to the definitions in section 1 of the Act, and discussed, briefly, the argument based on necessity, which would arise under section 55(2)(b). The defendants' argument under section 55(2)(a) is E largely limited to the Leconfield House issue, which is, at least on the face of it, a little optimistic, given that it only apparently covers some 17 documents, and was not really the basis upon which the accessing was sought to be justified. Nor does section 55(2)(d) look a particularly promising avenue for the defendants: the fact that accessing the documents can be said to have been to protect Mrs Imerman's rights can scarcely be said F to render it "in the public interest", even if it was done with a view to exposing, or preventing, Mr Imerman's anticipated wrongful concealment of assets.

104 However, for the reasons already given when discussing the alleged criminality under the 1990 Act, it would be inappropriate to say any more than that we consider that there is a realistic prospect of Mr Imerman establishing that at least some of the defendants (but not Mr Zaiwalla) were G guilty of breaching section 55(1) of the 1998 Act.

Possible tortious liability

105 So far as concerns a claim in tort, and leaving aside all questions of copyright, it would seem that where confidential *papers* are surreptitiously copied, even in situ, without the knowledge of the owner, the inevitable if H minimal asportavit may give rise to an action in trespass to goods: see the discussion in *Salmond & Heuston on the Law of Torts*, 21st ed (1996), p 95 and in particular *Thurston v Charles* (1905) 21 TLR 659, per Walton J and the discussion by Ward LJ in *White v Withers LLP* [2010] 1 FLR 859, paras 44–50. (Dillon LJ's disapproval of *Thurston* in *Lonrho plc v Fayed*

(No 5) [1993] 1 WLR 1489, 1495, was not directed to Walton J's holding that there was a trespass but only to the award of £400 damages to the plaintiff for injury to her character, which, as he pointed out, was inconsistent with the rule that damages for injury to reputation cannot be awarded in an action for trespass to goods.) 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 LLP* [2010] 1 FLR 859, paras 51–61. There is, however, no need for us to explore these questions any further, save to express our agreement with Ward LJ's analysis. We have been invited to proceed, and agree that we can proceed, on a much narrower front, by reference to the equitable principles exemplified by such cases as *Lord Ashburton v Pape* [1913] 2 Ch 469.

The relevance of the Hildebrand rules

106 It is at this point, and having got to this stage in the analysis, that the previous acceptance of a spouse's unlawful conduct by virtue of the assumed jurisprudential acceptability of the *Hildebrand* rules in the Family Division requires particular scrutiny. The assumption has hitherto been that, provided no force is used, a spouse may 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. That, after all was the ruling of Moylan J, even though he regarded Mrs Imerman's behaviour as being at the extreme end of the range of behaviour he had seen in 30 years.

107 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.

108 The problem has been exacerbated by the fact that the family courts have been faced with the fait accompli that the wife has retained copies of unlawfully obtained information or documents and have had to consider the extent to which she might *use* them to demonstrate her husband's lack of candour. Thus the question of remedy for breach of confidence or the unlawful conduct was considered (if at all) in the context of the dishonesty on the part of the other spouse which that information had revealed. The family court was *by that stage* understandably more concerned with ensuring that the spouse guilty of attempting to conceal his assets was not to be allowed to get away with it.

109 But this case concerns the logically prior question of the appropriate remedy for unlawful activity and breach of confidence *before* any question arises as to the use to which the information or documents might be put. So it is to that issue that we now turn. We shall deal later with the question of the *use* (if any) to which such unlawfully obtained information and documents can be put in evidence.

110 There is no doubt, and we are very alive to the fact, that the lack of candour on the part of spouses determined to conceal the true value of their assets from the court is a very real problem, though in the nature of things it is difficult to quantify the extent of the problem. After all, the very existence of the so-called *Hildebrand* rules is a recognition of the seriousness of the problem and of the need to do something about it.

A **111** In *Araghchinchi v Araghchinchi* [1997] 2 FLR 142, 146, Ward LJ referred to:

> "a category of cases which makes its way regularly through the divorce courts, where the court grapples with the dishonest and devious husband determined to conceal his assets and determined to frustrate both the court and the applicant seeking ancillary relief."

B **112** Very recently, in *FZ v SZ (Ancillary Relief: Conduct: Valuations)* [2011] 1 FLR 64, Mostyn J, who speaks, as the junior puisne judge in the Family Division, with the advantage of the most up to date experience of such problems at the Bar, said, at para 80, referring to the present appeals:

C > "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."

D **113** Indeed, at para 82, he advocated an extension of the *Hildebrand* rules, saying that in his view they should be extended to a family computer used by both parties which is not password protected, adding that documents on such a machine can be "legitimately copied" in the same way as documents lying around the home. Taking copies from such sources should not, he said, be regarded as a matter of criticism but as "part of the E warp and weft of ancillary relief litigation". He went on to comment that a wife who breaks locks or breaches a password on her husband's computer "takes a calculated risk that . . . she will be prevented from using the documents in the proceedings", though observing that "no process could ever remove her knowledge of what she has found out".

114 It appears clear that there is real concern among judges and F practitioners in this field that many rich husbands are dishonestly hiding their assets with a view to avoiding their responsibilities.

115 The problem faced by lawyers and judges in many ancillary relief cases (the great majority of which no doubt do not proceed to trial), and the difficulties presented by the *Hildebrand* rules, were admirably summarised by Tugendhat J in *L v L* [2007] 2 FLR 171, paras 1–2:

G > "1. It is frequent in matrimonial disputes for one party (in this case the wife) to suspect that the other party is about to destroy documents, or conceal information which is, or may be, relevant to the proceedings, and to do so with a view to preventing her from obtaining from the court the financial provision to which she claims to be entitled. While the law provides for court orders to be made for the preservation and obtaining of evidence for the purpose of future legal proceedings, claimants, or H potential claimants, sometimes resort to measures of self-help, by copying, seizing, or attempting to access digital copies of documents. The other party in such a case, in this case the husband has rights, including privacy, confidentiality and legal professional privilege, in relation to relevant documents. The rights of privacy and confidentiality

(but not any right to privilege) may be overridden by the competing public interest that any trial should be conducted on full evidence where the documents are relevant. But unless a document or information is relevant to the actual or intended proceedings in question, the rights of privacy and confidentiality will not be overridden at the instance of the potential or actual claimant, here the wife. These measures of self-help therefore give rise to legal difficulties.

"2. The difficulties that measures of self-help give rise to in this context include the danger that the husband's rights will be overridden, when they would not be overridden if the matter had been the subject of an application for a preservation or search order made to the court. Rights of confidentiality, and legal professional privilege, have long been protected by the common law. Measures of self-help could in the past involve the commission of civil wrongs, such as trespass, breach of confidence and breach of copyright. In the last 20 years or so the legal protection of information has been greatly increased. This has in large measure been in response to the development of computers and their use for word processing and sending of electronic messages. The amount of information that can be stored on a laptop is vast, and techniques for copying are quick and simple for experts. So the potential fruits of self help are of a different order from those of former days. These developments have given rise to the question of the extent to which measures of self-help are also in breach of the criminal provisions of the law designed to protect the databases contained in digital form in computers."

116 We have characterised the conduct involved in such cases as unlawful. But what of the arguments, which seem to have appealed in *White v Withers LLP* [2010] 1 FLR 859 to Sedley and Wilson LJJ, though not to Ward LJ, that such conduct is in fact lawful, either on the basis of some, albeit previously unrecognised, "substantive defence", as Sedley LJ put it, or, as Wilson LJ suggested, because of some public policy exception founded on the words of section 25 of the Matrimonial Causes Act 1973?

117 With great respect to both of them we cannot agree with either Sedley or Wilson LJJ. On the contrary, we find Ward LJ's analysis (paras 54–63) compelling. We agree with Ward LJ that the so-called *Hildebrand* rules cannot in law be justified on any of the bases suggested, whether on the basis of lawful excuse, self-help or public interest, or, indeed, we would add, on any other basis. 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. Self-help has a narrow and jealously policed role to play, for example, in the form of the right in certain circumstances to abate a nuisance, but it is far too late to suggest that self-help should be extended into the territory we are here concerned with. After all, legislative prohibition of self-help, enforced with criminal penalties, dates back to the Statute of Marlborough of 1267 (52 Hen 3). Section 1, which is still on the statute book, after providing that "all persons, as well of high as of low estate, shall receive justice in the King's court", prohibits anyone taking "revenge or distress of his own authority, without award of the King's court" and provides for the punishment of offenders by fine. We do not suggest that this provision is directly applicable in a case

A such as this; rather we point to it as illustrative of the law's long-standing aversion to unregulated self-help.

118 So far as concerns the special role of the court in ancillary relief cases, we accept that the jurisdiction is inquisitorial and not purely adversarial, so that the well-known observations of Lawton LJ in *Hytrac Conveyors Ltd v Conveyors International Ltd* [1983] 1 WLR 44, 47, must be read in the Family Division with this important caveat in mind. But B 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 in paras 127–136 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* C 12 EHRR 1.

119 Nor, in our judgment, and with great respect to Wilson LJ, do we think that section 25 of the 1973 Act will bear the weight of the argument sought to be founded on it. It is true that section 25(2)(a) provides that, when making financial provision, the court must "have regard to . . . the [actual and prospective] income, earning capacity, property and other financial resources [available to] each of the parties". However, that cannot D automatically require the court to admit any evidence and every document which relates to such issues irrespective of the circumstances in which they were obtained. In the first place, the reference in the section must be to the financial circumstances as assessed by the court on the basis of the evidence which it has received and weighed, so if certain evidence has been excluded, it is not relevant to the exercise the court has to carry out. Secondly, E section 25(2)(g) also requires the court to "have regard to . . . the conduct of each of the parties . . . if that conduct is such that it would . . . be inequitable to disregard it". Accordingly, in an ancillary relief case where the court concludes that a wife is seeking to rely on evidence which the court considers that she ought not be entitled to rely on, because it would be "inequitable" to disregard the way in which she obtained the evidence, it appears that there F are specific statutory grounds for excluding such evidence (or admitting all or some of it on terms).

120 We conclude, therefore, that there is no legal basis for the so-called *Hildebrand* rules. The rule in *Hildebrand* as we have stated it in para 42 above was and remains good law. But that is all. The wider *Hildebrand* rules (which, we repeat, have no basis in anything decided by Waite J in *Hildebrand v Hildebrand* [1992] 1 FLR 244) are not good law.

G **121** 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 (whether as a tort or in equity) nor as providing any reason why the relief (whether at law or in equity) which would otherwise be available should not be granted. More particularly it follows that neither the wives who purloin their husband's H confidential documents nor the professional advisers who receive them (or copies of them) can plead the so-called *Hildebrand* rules in answer to a claim for relief of the kind we have referred to in paras 73–74 above. We repeat the point we have already made about the availability of such relief against a third party, however innocent, who cannot establish that he is a bona fide purchaser of the information without notice—a defence which is

unlikely to be available, for example, to the solicitors acting for the wife in the ancillary relief proceedings. And we add that where the information has been passed on, whether by the wife or by those acting in her interest, 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 her from continuing to instruct those solicitors in the proceedings: see *In re Z (Restraining Solicitors From Acting)* [2010] 2 FLR 132.

122 Thus far we have approached the question as a matter of principle. But we should add, though this cannot affect the outcome, that we do not, in any event, think that the prospects for wives will be quite as dire as some suggest if, as we have held, the *Hildebrand* rules do not exist.

123 In the first place, there is, as Ward LJ pointed out in *Araghchinchi v Araghchinchi* [1997] 2 FLR 142, 146, the readiness of the family court in drawing appropriately severe adverse inferences where a husband has failed to give full and frank disclosure. Referring to *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359 and *Baker v Baker* [1995] 2 FLR 829, he said, at p 146, that:

> "where the court finds that a spouse has lied about his means, has withheld documents and failed to give full and frank disclosure, it is open to the court to find that beneath the false presentations are undisclosed assets and to make an order on that basis."

Recent examples can be found at first instance in *Al-Khatib v Masry* [2002] 1 FLR 1053 and in *Ben Hashem v Al Shayif* [2009] 1 FLR 115, and, in this court, in *Mahon v Mahon* [2008] EWCA Civ 901.

124 Secondly, there is the wider point made by Wilson LJ in *Mahon v Mahon* [2008] EWCA Civ 901 at [6]:

> "My experience of hearing applications for ancillary relief regularly over 12 years in the Family Division, and then of considering appeals to them in this court during the last three years, leads me to the conclusion that spouses, particularly husbands, who face claims for ancillary relief made through the courts of England and Wales have come to recognise that our legal system has become sophisticated in detecting and dealing with dishonest disclosure and that a refusal to make clear, candid, early disclosure very seldom benefits the party who adopts that strategy . . . But assets are now daily uncovered in the family courts despite the most ingenious efforts of their owners to cover them up; and, even when not uncovered, the attempt to cover them up is often so obvious as to justify an inference that they exist. So the party who adopts that strategy very seldom engineers an award more favourable to himself; on the contrary, in that by his conduct he has increased the other party's costs of the case, often very substantially, and in that, as in the present case, he is almost invariably ordered to pay the other's costs on the indemnity basis, the strategy, designed dishonestly to reduce his financial exposure to the other party, usually instead leads to an enlargement of it."

125 Coleridge J, another judge with great experience of such cases, made much the same point in *J v V (Disclosure: Offshore Corporations)* [2004] 1 FLR 1042, paras 16–17, a case involving what the judge described as a network of offshore, largely Liberian, corporations. He continued:

A "16. . . . Nothing is more calculated to set the bells ringing in a specialist lawyer's mind than to be faced by such wealth contained within such a structure. It is designed and intended to be impenetrable and when it supports a lavish standard of living it is invariably like a red rag to a bull.

"17. In order to prevent the instigation of an exhaustively searching inquiry, respondents to such applications are required to be from the B outset perhaps even fuller and franker in the exposure and explanation of their assets than in conventional onshore cases. Otherwise skulduggery is instantly presumed. Applicants justifiably believe that advantage is being taken to hide assets from view amongst complex corporate undergrowth. To begin the process of disclosure, as here, by, without more, denying legal and beneficial ownership of all-important assets in the case by virtue C of such arrangements is, quite simply, foolish and unhelpful. And once applications of this kind get off on the wrong foot they never regain equilibrium."

126 Now views may differ as to how significant a role is played in this context by *Hildebrand* documents (and they were, as we recognise, an important feature in both *Mahon v Mahon* [2008] EWCA Civ 901 and *J v V* D [2004] 1 FLR 1042). We also have very much in mind what Wilson LJ, with his vast experience of such matters, said in *Charman v Charman* [2006] 1 WLR 1053, para 47:

> "In my experience . . . the wife will very seldom have the knowledge with which to prove the existence of a document which, if it does exist, may have a crucial bearing on the outcome of her financial application."

E But the cases in which such adverse inferences can be, and are in fact, drawn are certainly not confined to those where the wife has been able to rely upon *Hildebrand* documents. That said, we recognise that the assessment of whether, and, if so, to what extent, a husband is concealing his assets must be an inexact and unsatisfactory exercise in at least many such cases and that many would say that it is a poor substitute for F determining the level of relief by reference to knowledge of the full extent of the husband's assets.

127 Thirdly, there is the availability in the Family Division, just as in the other divisions of the High Court, of *Mareva* (freezing) and more particularly *Anton Piller* (search) orders. What is surprising, not least given what, as we have seen, is the justification for the so-called *Hildebrand* rules, G is the extreme rarity in the Family Division of any application for an *Anton Piller* order, something which is all the more puzzling given the relative frequency with which *Mareva* (freezing) orders are both sought and granted in the division. Although involved in many cases where he or other judges in the division had granted a freezing order, whether under section 37 of the Matrimonial Causes Act 1973 or section 37 of the Senior Courts Act 1981, Munby LJ cannot recall a single occasion during some nine years in the H division when he was asked to make an *Anton Piller* order. And Mr Turner and Mr Howard, each with very considerable experience of ancillary relief practice, told us much the same. Neither had been involved in more than a couple of cases where *Anton Piller* orders had been either sought or granted.

128 After all, if she is correct and there exists evidence of an intention to salt away assets so as to deceive the court, Mrs Imerman is surely not without remedy. An important and relevant remedy for a wife, even though it seems to have fallen into desuetude in this area, is the court's power to grant search and seize, freezing, preservation, and other similar orders, to ensure that assets are not wrongly concealed or dissipated, and that evidence is not wrongly destroyed or concealed. Such orders are not infrequently sought, normally without notice, in the Queen's Bench Division and Chancery Division, where a claimant alleges, or has reason to believe, that, for instance, a defendant is seeking to make himself judgment-proof, has misappropriated money or other assets and is intending to conceal or dissipate the proceeds, has obtained confidential information from the claimant which he is intending to use, has articles which infringe the claimant's intellectual property rights, or (particularly germane here) has documents which are relevant to a dispute with the claimant which documents he intends to conceal or destroy. There is no reason why such orders should not be sought or granted in the same way 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.

129 It has been suggested that the court would be more reluctant to grant such orders in the family context, bearing in mind the more emotionally charged nature of the relationship between the parties than in the commercial context. We are unconvinced by that argument, given that the alternatives to a court order are either a strong belief on the part of the wife that she is being defrauded by her husband, or a husband's private records being unlawfully, even criminally, and normally underhandedly, accessed by the wife. 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.

130 We were taken to three reported cases on the point, *Emanuel v Emanuel* [1982] 1 WLR 669, *Burgess v Burgess* [1996] 2 FLR 34 and *Araghchinchi v Araghchinchi* [1997] 2 FLR 142, which it was suggested illustrated the reluctance of the judges to grant such orders in ancillary relief cases. We do not agree.

131 In *Emanuel v Emanuel* [1982] 1 WLR 669 an *Anton Piller* order was made by Wood J on the grounds (pp 676–677) that it was an "exceptional case" in which the husband was "clearly ready to flout the authority of this court and to mislead it if he thinks that it is to his advantage so to do"; the normal process of law was liable to be rendered nugatory because "there is a grave danger that evidence will be removed or destroyed". Wood J added that

> "I cannot think that real harm will be caused to the husband from making the order, as the only documents sought are those which he ought properly to produce and, indeed, to have produced in the past."

132 It was suggested that the decision of this court in *Araghchinchi v Araghchinchi* [1997] 2 FLR 142 demonstrated that, even where there was a

A strong prima facie case for a search and seize order, it would be refused. We do not agree with this analysis of that decision. The reason that peremptory relief was refused in that case was (p 146E–G) that it was "not necessary" for the documents in question to be seized, as there was another way of getting them. It is fair to say that the judgment of Ward LJ in that passage, with its reference to the "draconian innovation" nature of the order sought, may have operated to discourage such applications.

B **133** It is also true that, in *Burgess v Burgess* [1996] 2 FLR 34, 41 Waite LJ suggested that a search and seize order was "a rare weapon for use only in extreme or exceptional cases". If (as we believe) Waite LJ thereby meant that such an order would rarely be sought in ancillary relief proceedings and should only be sought when it was proportionate, just as in proceedings in the Queen's Bench and Chancery Divisions, then we would C agree. However, if (which we doubt) he meant that such orders should be more difficult to obtain in ancillary relief proceedings than in ordinary civil proceedings, we would disagree.

134 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. In such a case, subject of course to any other factors D which are relevant, such as whether an order, and if so what order, is proportionate, a peremptory order to protect the wife's rights would often be justified.

135 Of course, such orders, particularly search and seize orders, can be expensive to obtain and execute, and we accept that, particularly in cases where the amount at stake is not substantial, the cost-effectiveness, or E proportionality, of seeking such an order may be questionable. But 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. It is the course almost routinely taken when a claimant, in a case involving commercial breach of confidence, passing off or breach of intellectual property rights, believes that the defendant is concealing or destroying infringing items, F incriminating material or relevant documents. We are confident that the judges of the Family Division can be relied upon to exercise these powers appropriately, indeed robustly.

136 Had that course been taken in this case, there would have been no question of any breach of confidence, tort, or statutory crime having been committed through accessing and copying Mr Imerman's electronic G documents. So, too, there would have been no question of his rights of confidence being invaded by the defendants, the forensic accountants, the barrister who checked the seven files for privilege, Mrs Imerman or Withers, who were provided with information confidential to Mr Imerman, and extracted from those documents. The determination of whether any of Mr Imerman's documents, and if so what documents, were to be seized, inspected, checked, preserved, sent to Withers, or used by Mrs Imerman, or H were to be subject to some other order, 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: see *Chappell v United Kingdom* 12 EHRR 1. As pointed out by Tugendhat J in *L v L* [2007] 2 FLR 171,

para 93, this would be far more satisfactory than an unauthorised, inequitable, tortious, and quite possibly criminal, accessing, copying, dissemination and proposed use, of the documents, as happened in this case from 6 January 2009. A

137 The objection of those practising in the Family Division relies on the licence to cheat which the *Hildebrand* rules seek to prevent. But there is no basis for any special rules. Many litigants in all jurisdictions are driven by their greed or other unworthy motives to lie and cheat. The rules, and the judges' application of the rules, must be robust to prevent such conduct. But what surely cannot be allowed is a system of self-help outwith the law so as to circumvent the rules, and this, after all, is the hypothesis upon which the *Hildebrand* rules have to be justified, for otherwise the remedy would be to invoke the assistance of the court. How can the law—how can the judges—countenance recourse to self-help in circumstances where the court itself declines to act, and when to do so would be not merely unprincipled but an unjustifiable invasion of someone's rights? In the instant appeal Mrs Imerman 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. B C D

138 The forensic reality is that these problems are not unique to the Family Division, a proposition well illustrated by *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 WLR 1964. In that case, confidential documents had been obtained by private investigator agents making so-called "pretext calls" to banks in circumstances where there was, as the judge held, a strong prima facie case of criminal or fraudulent conduct in the obtaining of the information involving either breaches in England of the Data Protection Act 1984 or in Switzerland of its banking secrecy laws. Rix J commented, at p 1969: E

> "It seems to me that if investigative agents employed by solicitors for the purpose of litigation were permitted to breach the provisions of such statutes or to indulge in fraud or impersonation without any consequence at all for the conduct of the litigation, then the courts would be going far to sanction such conduct. Of course, there is always the sanction of prosecutions or civil suits, and those must always remain the primary sanction for any breach of the criminal or civil law. But it seems to me that criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege. It is not as though there are not legitimate avenues which can be sought with the aid of the court to investigate (for instance) banking documents. That apparently is true in Switzerland as well. In any event, the material being investigated is usually material which falls within the other party's possession or control, and which in all probability he will in due course be obliged to disclose himself. In such circumstances, it does not seem to me to be too great an intrusion on legal professional privilege to require that documentation F G H

such as is in question in this case should be disclosed. Otherwise the position would be that the party employing the criminal or fraudulent agent would have it entirely within his own power to decide which of the criminally or fraudulently acquired information he was willing to rely on and disclose and which he was not. Where such a party will be asking the court to make inferences from such material, it is only fair that such material should be seen as a whole."

His approach has been endorsed by this court in *Memory Corpn plc v Sidhu (No 2)* [2000] 1 WLR 1443 and in *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734.

139 What was done here cannot be justified under the so-called *Hildebrand* rules. There are no such rules. There are no rules which dispense with the requirement that a spouse obeys the law.

140 We add a final, additional, point. As we have sought to emphasise, at the time the information was taken unlawfully, Mr Imerman was under no obligation whatever to disclose his assets, still less to disclose private documents relating to those assets. The rules required him only to give full disclosure under form E. Only thereafter might he be ordered to disclose further documents should the court think it necessary. Accordingly, since the rules specifically exclude any such obligation, it is not possible, it is simply unacceptable, to countenance Mrs Imerman taking the law into her own hands so as to obtain a premature advantage.

Conclusion on the breach of confidence claim

141 In the present case, there is no real doubt but that the defendants have substantially breached Mr Imerman's rights of confidence in relation to much, and probably the great majority, of the information obtained through accessing it through the server on some nine occasions in early 2009. Furthermore, there seems to be a substantial possibility that the information was all obtained as a result of some of the defendants committing a breach of statutory duty or even a crime. In the absence of good reason to the contrary, Mr Imerman could reasonably expect the court to order that all the documents so accessed, and any copies thereof, whether in electronic or paper form, be delivered up to him or destroyed, and that the defendants be enjoined from using any information obtained from those documents. Again, in the absence of good reason to the contrary, and as Mrs Imerman did not receive the seven files as a bona fide purchaser without notice, Mr Imerman could reasonably expect similar orders against her (and her servants and agents, to use the traditional language, thereby including Withers) in respect of the documents and information in the seven files.

142 Of course a claim for breach of confidentiality may be defeated by showing that the documents or information revealed unlawful conduct or intended unlawful conduct by the claimant: see *Istil's* case [2003] 2 All ER 252. But in the instant appeal it is not suggested that the documents themselves disclose measures taken to defeat the wife's claim. Rather it is the external evidence of Mr Imerman's intentions as revealed to the brothers on which reliance is placed. If that was sufficient to establish such an intention then Mrs Imerman should have sought a freezing injunction and/or a search order. It would not have been open to her to take the law into her own hands, and it was not open to her brother to do

so for her benefit. If she had sufficient evidence to obtain a search order from the court, it cannot be right for a judge effectively to sanction her committing a legal wrong by by-passing the court's procedures and hacking into her husband's computer records stored on the server. If she did not have sufficient evidence to obtain a search order, it would be even more offensive if a judge effectively sanctioned her (or her brother) hacking into her husband's computer records.

143 We also emphasise that it was not open to her to pre-empt consideration of the husband's disclosure in form E. We have already concluded that there are no rules which dispense with the requirement that a spouse obeys the law. The only remedy which can vindicate Mr Imerman's right to preserve the confidentiality of his documents and information until such time as the law requires him to make full and frank disclosure is to require Mrs Imerman to deliver up the copies containing the information she obtained prematurely and unlawfully.

144 It is also right to bear in mind that this was an extreme case of wrongful access to confidential material. Not only does it seem quite possible that the accessing of Mr Imerman's documents involved breach of statutory duty and statutory crimes under the 1990 and 1998 Acts, but it took place on nine occasions outside the family home, at his place of business, and it involved a vast number of documents (the majority of which will have had no bearing on the ancillary relief proceedings, let alone the Leconfield House issue), which were then electronically copied, and, in many cases, copied onto paper. Moylan J described the case in his judgment of 13 January 2010 [2010] 2 FLR 802, para 43 as being "at the extreme end of the range of behaviour which I have seen during the course of the last 30 years". What happened in this case was an invasion of privacy in an underhand way and on an indiscriminate scale.

145 We emphasise that, at this stage, it is not possible to say that Mr Imerman has failed in his form E to reveal all his assets, or that he has sought to divest himself of any assets for the purpose of his ancillary relief liabilities. In saying this, we have taken into account the forensic accountant's report, prepared on Mr Zaiwalla's instructions, to which we were taken by Mr Browne on behalf of the defendants in the Queen's Bench proceedings, in the absence of Mrs Imerman and her representatives (and with their agreement).

146 Mrs Imerman should not be entitled to benefit in any way from the wholesale, wrongful, and possibly criminal, accessing and copying of Mr Imerman's confidential documents, particularly as she could have been expected to apply for a peremptory order (given that the expense of applying for and enforcing such an order would appear to be proportionate in this case, at least on the information we have seen). It would be unrealistic to make too much of this latter point in this case, as the notion that a wife should seek peremptory relief in this sort of case appears, for some reason, to have been thought to be inappropriate as a matter of general practice. Having said that, we should emphasise that, in future, this should not be seen as a good reason for not having sought peremptory relief.

Form of relief

147 We have concluded that the right order to make in relation to the seven files is that they (together with any copies, whether electronic or paper)

should be handed over to Mr Imerman's solicitors, Hughes Fowler Carruthers, on terms that, unless Mrs Imerman's solicitors agree in writing, they are not to part with any of those documents without the permission of the court. So long as Hughes Fowler Carruthers continue to act for Mr Imerman, they will be obliged to take reasonable steps to consider and advise on any documentation which is provided to them, with a view to ensuring that their client complies with his disclosure obligations, whether under the Rules or pursuant to orders of the court, and whether in relation to assets or documents. In case Mr Imerman ceases to instruct Hughes Fowler Carruthers (whether for normal or sinister reasons), Mrs Imerman should be entitled to know that they will be obliged to retain the papers, unless the court otherwise orders or she otherwise agrees.

148 We cannot agree with Moylan J that Mrs Imerman, or her solicitors, should be entitled to retain any copies of any part of the seven files. It would give her access to material which was confidential to Mr Imerman, and had been unlawfully taken from him by her brother and supplied to her, in circumstances where it is not the court or Mr Imerman, but her brothers, who selected the documents, where there was no compelling evidence that he was avoiding his responsibilities to her, and where she will be protected by an order which ensures that all the documents will be preserved and will remain in the possession of Mr Imerman's solicitors. In due course, it may be appropriate for Mrs Imerman to apply for an order that some of the documents be produced to her or to the court, but there is no justification for any such order now.

149 The order we propose seeks to achieve a fair balance, or at least as fair a balance as can be achieved in the circumstances, between two competing concerns. On the one hand, there is obvious justice in seeking to eliminate, or at least to minimise, the benefit to Mrs Imerman, and the disadvantage to Mr Imerman, of her being able to use his confidential documents, which she should not have seen, and which were accessed and copied unlawfully. On the other hand, there is also obvious justice in seeking to ensure that Mr Imerman cannot dispose of or hide documents which he is or may become obliged to produce to the court or to Mrs Imerman under the Rules or pursuant to a court order, and that he will at least find it more difficult to hide his assets (if that is what he has done or intends to do).

150 For the same reason, it seems to us that Mr Imerman is entitled to an order restraining Mrs Imerman, at least for the time being, whether by herself or through Withers, from using any of the information they have obtained through reading the seven files. Again, events may develop in such a way that it becomes appropriate for that order to be modified or even discharged. However, at the moment, given that the seven files will be in the custody of Hughes Fowler Carruthers, who, as Mr Imerman's solicitors in the ancillary relief proceedings, have duties to the court as well as to their client, it would not be right to permit Mrs Imerman to benefit from the information that she or her solicitors have obtained from the files.

151 The only real argument raised against this order on behalf of Mrs Imerman is that she may know more about some aspects of Mr Imerman's affairs than Hughes Fowler Carruthers, so that there may be documents whose contents would mean nothing to Hughes Fowler

Carruthers, but which would put her on notice of other assets. It would be wrong to reject that argument as having no conceivable force, but it strikes us as very weak. No specific examples or grounds were given to support such a possibility in this case, and it seems to us that it is far too weak and speculative to justify departing from the order we would otherwise think it right to make.

152 As for the very substantial body of material which was obtained by, and is held by, or to the order of, any of the defendants in the Queen's Bench proceedings, we think it right to make similar orders, both in relation to the documents (and any copies) and in relation to the use of any information obtained therefrom (albeit that Eady J was right to accept an undertaking from Mr Zaiwalla, in lieu of imposing an injunction). There is a much stronger case for saying that this material should simply be handed over to Mr Imerman, as the documents which were thought to be relevant in the ancillary relief proceedings, namely the seven files, were provided to Withers, and there is no other conceivable basis for any of the rest of the material not being simply returned to Mr Imerman. However, one of our concerns about the seven files is that the contents were selected, at least in part, by the Tchenguiz brothers, who are not lawyers or accountants, and they may therefore have included documents which had no bearing on the ancillary relief proceedings; by the same token, there is a real risk (albeit, we acknowledge, a lesser one) that the material retained by the defendants, and not passed on to Withers, include documents relevant to those proceedings. We therefore consider that, in order to protect Mrs Imerman (but not, we emphasise, the defendants), similar orders are appropriate in relation to the documents held by, or to the order of, any of the defendants, as we are disposed to make in relation to the seven files. However, we would, at least as at present minded and in principle, be sympathetic to an application by Mr Imerman, supported by appropriate evidence, that all the documents other than the seven files be handed back to him; indeed, we would expect Mrs Imerman to take a realistic attitude to any such proposal, thereby hopefully avoiding the need to involve the court.

Conclusion on the main issues

153 Accordingly, we would uphold the order made by Eady J in the Queen's Bench Division and vary the order made by Moylan J in the Family Division.

154 In explaining our reasoning, we have concentrated on domestic law, although we have mentioned the Convention, and in particular the fact that articles 6, 8, and 10 are engaged. It has been authoritatively said that, once the court has to carry out a balancing exercise between competing Convention rights, "an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary" and that "the justifications for interfering with or restricting each right must be taken into account": per Lord Steyn in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17. While we may not have expressly discussed the impact of those articles in the course of this judgment, we have had them well in mind (not least because they reflect domestic rights to a fair trial, to confidence, and to rely on evidence), and we believe that we have subjected the parties' respective rights to an appropriately intense focus, and have made an appropriate assessment of any justification for encroaching on

A those rights. We add that neither in the present case, nor in the general run of such cases, does the need to carry out such a balancing exercise require that the case has to go to a full trial. It does not: *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57.

155 We agree with Eady J that, subject to one set, the defendants should return all copies of the material extracted from Mr Imerman's documents stored on the server (or any copies thereof), and that they should be enjoined
B from communicating any of the information they have gleaned therefrom. However, as is provided in the order drawn up following Eady J's decision of 27 July 2009, we consider that one complete copy of the material should remain for the time being with Hughes Fowler Carruthers, rather than with Mr Imerman, in case it includes documents which are disclosable in the ancillary relief proceedings. There is no reason why the order should not be
C a final order, provided that both Mrs Imerman and Mr Imerman have permission to apply. Mrs Imerman (or the Tchenguiz brothers on her behalf) should have such permission in case she wishes to vary the injunction to enable the Tchenguiz brothers to communicate to her some of the information they have retained, in the light of what she tells them is happening in the ancillary relief proceedings. Mr Imerman should have such permission in case he wants to obtain the material from Hughes Fowler
D Carruthers, and Mrs Imerman does not agree.

156 We take a different view from Moylan J in the Family Division proceedings. We understand why he thought it was fair that, once Mr Imerman had had the opportunity to remove any privileged documents, the seven files should be available to Mrs Imerman. However, in this case, the evidence that the husband may be concealing assets is, at least at the
E moment, by no means overwhelming (although there is some evidence to that effect) and the documents were obtained from him in unlawful, and quite possibly criminal, circumstances, and at a time when Mrs Imerman had no right under the Rules to see any of the documents. There is a far more appropriate way in which her interests can be protected. Hughes Fowler Carruthers will, no doubt, consider whether the seven files disclose any information which ought to be passed on to Withers, and, as they will be
F retaining the seven files, the judge hearing the ancillary relief application will be able, if he or she decides that it would be fair and proportionate to do so, to see all or any of the documents.

Four smaller issues

157 There are four other issues which we must deal with.

G **158** The first issue is the contention in the Queen's Bench proceedings that no relief could properly have been granted against any of the defendants except Robert Tchenguiz. It is true that he was apparently the instigator of, and main participant in, the exercise of accessing Mr Imerman's documents stored on the server, and then making and disseminating copies. However, it is clear that Nouri Obayda and Vincent Tchenguiz also played a part. All
H the defendants resisted the application for an injunction and for delivery up. In the light of this, we see nothing wrong in Eady J concluding that, if such orders were justified against Robert Tchenguiz, the first to fourth defendants should all be required (i) to hand back any copies in their possession of the documents which had been copied, and (ii) not to disseminate any information they had gathered from the documents. If they had no such

documents or information, then the order would not affect them, but, as there was a risk that they might, the judge was entitled to take the view that Mr Imerman should be granted protective relief against them—not least as they gave him no assurance to that effect when he sought it. A

159 As for Mr Zaiwalla, it must depend on the precise facts of a particular case whether a solicitor, who has been provided by his client with documents which are confidential to a claimant, is a proper defendant, in addition to his client, in confidence proceedings brought by the claimant. A solicitor who receives, reads, and passes on such documents, particularly knowing that they have been taken from the claimant unlawfully, may well be an appropriate defendant. Without intending thereby to suggest that Mr Zaiwalla necessarily read all or any of the documents, or acted wrongly in any way, we consider that, on the unusual facts of this case, it was a proper exercise of professional judgment for counsel to have joined Mr Zaiwalla in the proceedings, and a proper exercise of Eady J's case management powers, with which this court should not interfere, to have made an order which extended to him, albeit that it is right to repeat that Mr Zaiwalla offered an undertaking, which Eady J accepted in lieu of an injunction. B C

160 The second issue arises from Mr Imerman's telephone conversation with Vincent Tchenguiz. It was argued that, in the light of what Mr Imerman said in that conversation, his pursuit of the appeal against the Family Division order, and his claim against Mr Zaiwalla in the Queen's Bench proceedings, are each an abuse of process. D

161 There is nothing in this point. The somewhat jocular, and at times tasteless, even offensive, contents of the telephone conversation are said to show that Mr Imerman does not really care whether the seven files are retained by Mrs Imerman, or that he would be prepared to let her keep the files if other documents in her possession were provided to him. We accept that, if one takes the odd statement, in the course of a longish telephone conversation, out of context, it could be said to show that Mr Imerman appeared to be fairly relaxed about the fact that his wife had received the seven files, but that is of no relevance: he could have been putting a brave face on things, bluffing, or seeking to improve his negotiating position, to identify only some possibilities. One thing he was not doing was giving up his right to pursue these applications or appeals. Similarly irrelevant is the fact that he might have been prepared to trade any right he had to object to Mrs Imerman using the seven files in return for his being given certain documents and information: the fact that he might have been prepared to settle his claim does not mean that he should not be allowed to pursue it. E F G

162 The offensive remarks in the telephone conversation related to Mr Zaiwalla, and do not need to be repeated in this judgment. While distasteful and reprehensible, they take matters no further either, as they do not get near establishing that the sole purpose, or even one of the purposes, for joining Mr Zaiwalla as a defendant was not bona fide. H

163 The third issue concerns what, at least on the face of it, is an entirely separate matter from those raised by these appeals. It involves an allegation by Robert Tchenguiz that, fraudulently and in breach of fiduciary duty, Mr Imerman arranged for a company called Whyte & Mckay to pay substantial sums, for "services and office accommodation" which it enjoyed

A and occupied to a company which he wholly owned. This is said to have been dishonest because the accommodation in question was in the office, which had been provided to Mr Imerman by Robert Tchenguiz for nothing, and Robert Tchenguiz was kept in ignorance of the charge made to Whyte & Mckay.

164 This so-called Leconfield House issue is now only live in relation to
B costs, and it is therefore inappropriate to deal with it at this stage, although we were, somewhat unenthusiastically, invited to do so. It was faintly suggested that Mr Imerman's alleged wrong-doing in charging Whyte & Mckay somehow provided additional justification for accessing his documents on the server. There is nothing in that argument. Concern that he had acted wrongly in charging a company for space which he was permitted by Robert Tchenguiz to occupy for nothing, without telling
C Robert Tchenguiz, cannot begin to justify accessing Mr Imerman's computer records. In any event, the evidence suggests that it was, at best, an ancillary reason for accessing Mr Imerman's records. The basic evidence on the Leconfield House issue was already available to Robert Tchenguiz, and if (which appears very unlikely indeed) that evidence justified a peremptory search of Mr Imerman's records, an application for a search order could
D have been made.

165 In our view, the only relevance of the Leconfield House issue for present purposes is that it provides another reason why, rightly or wrongly, the Tchenguiz family had, by February 2009, formed a very jaundiced opinion of Mr Imerman's honesty. In so far as it may be necessary to consider this issue further for the purpose of an order for costs, it can be dealt with by written submissions following receipt of this judgment, in the
E normal way.

166 The fourth issue concerns the disposal of Mrs Imerman's cross-appeal against Moylan J's order. For the reasons already given, we have concluded that the seven files, and any copies of any of their contents, should be handed over to Mr Imerman's solicitors and not returned to Mrs Imerman or her solicitors (at least until any subsequent order).
F Accordingly, the cross-appeal effectively falls away. However, it is right to record that we would have been unsympathetic to the notion that anyone other than Mr Imerman and his solicitors (and, if they thought it appropriate, his counsel) should be involved in looking at the seven files and considering which of the documents were properly the subject of legal professional privilege or litigation privilege.

G *The orders*

167 Counsel should agree forms of order which reflect these conclusions.

168 We have left until this stage consideration of the future use in the ancillary relief proceedings of the information and documents obtained by Mrs Imerman. We distinguish between the documents (which, because of
H the order we have made, she will no longer have access to unless at some stage her husband produces them, either voluntarily or pursuant to an order made in the ancillary relief proceedings) and any relevant information she may have, including but not limited to whatever she may be able to recall of the contents of the documents.

169 At this stage there is no question of any use at all. It is premature to consider utilisation of the information which Mrs Imerman obtained until the time for which the Rules provide. That is after her husband's form E has been delivered and if and when she is inviting the court to conclude that his disclosure has been inadequate or dishonest. At that stage Mrs Imerman might be in a position to challenge the adequacy of his disclosure on the basis of the information she had previously seen in documents she has been compelled to return. Of course, compelled as she should be to return copies, her recollection will be inadequate. But if there is information, which will include the records of conversations with her brothers, to suggest inadequate disclosure by her husband, that is the time she can deploy it. There is, as Mostyn J pointed out in *FZ v SZ (Ancillary Relief: Conduct: Valuations)* [2011] 1 FLR 64 (in the passage we have cited at para 113), no process by which her recollection of what she has learnt from the documents can be removed. And it is unlikely that the husband will be able to resist reliance by the wife on such evidence merely by saying that part of the information she relies upon had been culled from documents unlawfully obtained.

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: see *R v Sang* [1980] AC 402, relying on *Kuruma v The Queen* [1955] AC 197. 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. However, just because it is admissible, it does not follow that the court is obliged to admit it.

171 Thus, it appears that, as a matter of common law, a judge often has the power to exclude admissible evidence if satisfied that it is in the interests of justice to do so: *Marcel v Comr of Police of the Metropolis* [1992] Ch 225, p 265, per Sir Christopher Slade. Where the Civil Procedure Rules apply, the position is even clearer: see *Jones v University of Warwick* [2003] 1 WLR 954. In that case, relying on CPR r 32.1(2), which provides in terms that the court can exclude evidence, as well as the overriding objective in rule 1.1, the Court of Appeal held that the trial judge had a discretion as to whether or not to admit highly relevant evidence obtained in an underhand manner. Although they upheld his decision to admit the evidence, it is quite clear from the reasoning that the court had power to exclude it in the light of the way in which it had been obtained.

172 It was suggested by Mr Turner for Mrs Imerman that a judge in ancillary relief proceedings has no such power. We do not agree. First, the equivalent of the overriding objective in rule 1.1 applies to ancillary relief proceedings: see rule 2.51D of the Family Proceedings Rules 1991. Secondly, and even more significantly, unlike in proceedings governed by the CPR, where the parties have a general disclosure obligation, and can normally choose what documentary evidence to tender, it is, as we have said,

A the court which controls what documents are to be disclosed and tendered by way of evidence in ancillary relief proceedings.

173 As these provisions indicate, judges hearing ancillary relief applications, unlike judges in normal civil proceedings, have a far greater control than they have under the CPR in normal civil proceedings, over which documents should or should not be produced in evidence.

B 174 It seems to us that, where the court is satisfied that a husband has documents which may be relevant to the issue before it, but that his wife has, in some way retained copies of those documents she has wrongly obtained, it would be open to the court in an appropriate case to refuse to order the husband to produce the documents on the ground that to do otherwise would render the way it dealt with the application unfair, even taking into account the fact that the documents contain, or may contain, C information which is relevant to the proceedings. Equally, it would be open to the court in an appropriate case to permit the wife to give evidence of their contents as a prelude to ordering the husband to produce them, However, on our analysis of the law, it is unlikely that questions as to use of unlawfully obtained documents will arise in the future. Hitherto the family courts have, as we have pointed out at para 108, considered the D question of the use of unlawfully obtained documents at a time when no prior application has been made for their delivery up, along with any copies. Now, if we are right, by the time the court comes to consider the adequacy of the husband's disclosure any wrongfully obtained documents will have been returned. The question for the court will be, in the future, the extent to which the wife's recollection of information derived from unlawfully obtained documents may be deployed to establish the E inadequacy of her husband's disclosure.

175 It was also suggested that the court would have no power to exclude documents which might affect the ancillary relief awarded, in the light of the provisions of section 25 of the 1973 Act. It is true that section 25(2)(a) provides that, when making financial provision, the court must "have regard to . . . the [actual and prospective] income, earning F capacity, property and other financial resources [available to] each of the parties". However, and as we have already explained, that cannot automatically require the court to admit any evidence and every document which relates to such issues, however unfair the court thinks that it would be to do so.

176 It would be surprising if the court in ancillary relief proceedings G had no power to exclude evidence which was confidential to the husband and had been wrongly obtained from his records, however outrageous the circumstances of the obtaining of the evidence and however unfair on the husband it would be to admit the evidence. It would be all the more surprising in the light of the Human Rights Act 1998. As was explained by Ward LJ in *Lifely v Lifely* [2008] EWCA Civ 904; The Times, 27 August 2008, in a case of this type, the decision whether to admit or exclude H evidence involves weighing one party's (in this case, the wife's) article 6 right to a fair trial with all the available evidence, against the other party's (the husband's) article 8 right to respect for privacy. (It may also involve the wife's right under article 10 to say what she wants to say, and the husband's article 6 right, on the basis that he might say the trial was unfair

if it extended to evidence which had been wrongly, even illegally, obtained from him). A

177 Accordingly, we consider that, in ancillary relief proceedings, while the court can admit such evidence, it has power to exclude it if unlawfully obtained, including power to exclude documents whose existence has only been established by unlawful means. In exercising that power, the court will be guided by what is "necessary for disposing fairly of the application for ancillary relief or for saving costs", and will take into account the importance of the evidence, "the conduct of the parties", and any other relevant factors, including the normal case management aspects. Ultimately, this requires the court to carry out a balancing exercise, something which, we are well aware, is easy to say in general terms but is often very difficult to effect in individual cases in practice. B

C

Appeal against order of Eady J dismissed with costs against first and second defendants only.
Injunctions continued against first to fourth defendants.
Undertaking accepted from fifth defendant. D
Appeal against order of Moylan J allowed in part with costs against wife on standard basis.
Cross-appeal against order of Moylan J dismissed.
Permission to appeal refused in both cases. E

SUSAN DENNY, Barrister

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