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## *ARTICLE 8 - THE USE OF PRIVATE CORRESPONDENCE IN CLAIMS FOR ANCILLARY RELIEF*

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### *The relevance of Article 8 ECHR in claims for ancillary relief*

This paper tries to deal with the problems familiar to matrimonial practitioners since *Hildebrand -v- Hildebrand* [1992] 1 FLR 244, where one spouse seeks to use in evidence documents surreptitiously or illicitly obtained from the other. In the light of Tugendhat J's decision in the Queen's Bench Division in *L -v- L* [2007] 2 FLR 171, it poses the question whether since the Human Rights Act 1998 there is a discretionary jurisdiction to exclude such evidence on grounds of fairness.

### *Copying the husband's documents: the view of Mr Justice Wilson (as he then was) in 1993*

In December 1993 Wilson J (who three years before had been counsel for the wife in *Hildebrand*) addressed a dinner of the Northern Region of the FLBA on *Conduct of the Big Money Case* (1994) Fam Law 504. In the course of his address he posed this question:

*"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 ?".*

Not surprisingly Sir Nicholas displayed some hesitation about advising on a course which was essentially underhand, but he answered the question as follows:

*"..... in many cases one may be gravely prejudicing the client's case if one does not give one's blessing to that precaution. 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."*

He then considered the question of the stage at which the photocopied documents should be disclosed to the other side:

*"My own view is that the copies are discoverable documents which should logically be disclosed at, but only at, the discovery stage, or earlier, if the husband's solicitors so request. In other words, they can, absent such a request, be withheld until after the husband has sworn his affidavit of means and until the wife's questionnaire is served."*

### *The Hildebrand case: December 1990*

In December 1990 Nicholas Wilson QC had appeared for the wife in *Hildebrand*, where the husband had surreptitiously obtained photocopies of the wife's personal box file kept in the former matrimonial home. Later, just before a hearing of cross-summonses by both parties, the wife (who was worth £5m more than her husband) caught him *in flagrante delicto* in her flat. It then emerged that he had made as many as five illicit visits to the flat and photocopied a substantial number of documents. Waite J refused to make an order that the wife answer the husband's questionnaire on the ground that it would be an abuse of the process of court and condone conduct which the

husband's counsel had conceded was improper. Mr Wilson's successful submission was (in part) that (253d):

*"The court should regard the use of all methods of discovery by a party who has taken discovery into his own hands as an abuse of its process and restrain it."*

The Judge ruled that it would be oppressive to allow the husband to ask questions to which he already knew the answers, merely in order to have the opportunity of seeing if he could trap the wife. He accepted the assurance offered by Mr Wilson on behalf of the wife that the duty of candid disclosure would be honoured to the letter.

From the judgment of Waite J in *Hildebrand*, it seems that one can extract the following basic propositions:

(1) The surreptitious seizure of documents is improper.

(2) Taking discovery into one's own hands is conduct which should not be condoned by the court.

(3) In such circumstances a questionnaire is an abuse of the court's process; *a fortiori* where the questionnaire seeks to take advantage of the information in the documents improperly seized: 253-4.

(4) Ordinarily the court should trust both sides to make full disclosure of all relevant documents voluntarily, and accept the assurance of a party's lawyers that the duty of candid disclosure will be honoured to the letter: 254.

However, it is notable that in *Hildebrand* there was no application by the wife for delivery up of the documents taken by the husband. Nor was there any consideration of any possible civil remedy, such as in trespass, wrongful interference with goods or breach of copyright or confidence. Consequently (as Tugendhat J was to point out in *L -v- L*, [52]) there was no discussion of whether, or in what circumstances, a party who obtains the other side's documents by tortious means is entitled to read them.

### *T -v- T: July 1994*

In July 1994 in *T -v- T (Interception of Documents)* [1994] 2 FLR 1083 Wilson J was confronted with a wife, whom (he held) had reasonably anticipated that her husband would attempt to conceal his true financial position. She had then opened and taken letters addressed to him, as well as breaking into his office and removing his diary. The question arose whether her conduct should be brought into the reckoning in making the substantive award. The Judge concluded that it was reasonable for the wife to take photocopies of such of the husband's documents as she could locate without the use of force, and even to scour the dustbin. But she had gone far beyond that and acted reprehensibly in (1) using force to obtain documents, (2) intercepting the husband's mail, and (3) keeping original documents. She had then suppressed her possession of the documents for many months, finally producing many of them, like a rabbit out of the hat, just before the hearing.

Wilson J's conclusion was that though reprehensible, her conduct should not be brought into the reckoning of the substantive award, whether as conduct or as a circumstance. However, he thought that it should *prima facie* have some relevance in relation to costs. In these circumstances it may be thought that the wife escaped relatively lightly: her conduct in breaking doors and a window and in misappropriating letters appeared to be criminal, and it also seems that she had obtained information protected by legal professional privilege (see *L -v- L*, [60]). Once again, as in *Hildebrand*, the Court did not consider the husband's civil law rights and remedies.

### *Copying the husband's laptop: the view of Tugendhat J in February 2007*

In *L -v- L*, Tugendhat J sitting in the Queen's Bench Division pointed out that *"1994 is a long time ago in this field of law"* and crisply commented that he did not understand counsel for the wife to be submitting that Sir Nicholas' FLBA address was *"the best source law on this*

*subject"* [55]. This was a fair point, given that the offence under the Data Protection Act of obtaining unauthorised access to personal data was first introduced by s.161 Criminal Justice & Public Order Act 1994, and there has subsequently been a rash of English and Strasbourg cases, as well as new legislation on searches, covert surveillance and evidence gathering. Another reason for 1994 seeming to be ancient history are the technological advances in the meantime: given the vast amount of information which can now be stored on a laptop and the speed and simplicity of expert techniques of copying, *"the potential fruits of self help are of a different order from those of former days":* [2].

In *L -v- L* proceedings were issued in the Family Division on 20 December 2006 for leave to issue an application for substantive financial relief, some two weeks after the Swedish court had pronounced a decree absolute [11, 13]. The husband disputed jurisdiction, but prior to all that, on 2 November 2006 a computer expert engaged by the wife had removed the husband's laptop from his office at the family home. Two copies of the hard drive were made and the laptop was then returned the following day*:* [18, 21].

It appears that the wife's solicitors had advised Mrs L that *"it would be a sensible precaution to obtain a copy of the hard drive in the family laptop as this was virtually the only repository for documentary information left in the home"* [37]. In correspondence they said they had given the advice when told that the husband had shredded some documents and changed his password. It also seems that the advice was endorsed by leading counsel [39].

Mr L contended that the laptop was his own personal property, configured to be used (and in practice only used) by him. He said that it was password protected, and that he did not disclose that password to his wife or children, who had computers of their own [16]. The wife responded that the laptop was the joint property of her husband and herself, and that she was permitted by the husband to access or copy the contents [18]. In answer to the point that no divorce, ancillary relief or Children Act proceedings were in existence in this jurisdiction at the time, Mrs L responded that they were contemplated [29].

In summary the relief (successfully) sought by Mr L from Tugendhat J was:

(1) delivery up of all copies of the hard drive of the husband's computer, and

(2) an injunction to restrain the wife and her solicitors (the second defendants) from communicating, using or disclosing any contents of the hard drive or any copy of it containing private or confidential information relating to:

- the husband, his personal or private life,

- his financial or business affairs (including any legally professionally privileged material, and

- those of any of his business associates.

Since the wife had copied the whole hard drive and did not select for copying just what she thought might be useful documents or extracts, the range of material in issue was wide-ranging. It consisted of:

(1) communications between the husband and his lawyers in England and Sweden covered by legal professional privilege,

(2) confidential information, not protected by legal professional privilege and potentially relevant to the English proceedings,

(3) information about the personal and business affairs of friends, colleagues, associates and companies and said to include information not relevant to the English proceedings,

(4) information relating to the husband not relevant to the English proceedings: [72].

*Legal professional privilege*

It was accepted, not surprisingly, by counsel for the defendants that in so far as there were documents protected by legal professional privilege, in principle the husband was entitled to delivery up: [76]. This is in accordance with a line of authorities from ***Lord Ashburton -v- Pape*** [1913] 2 Ch 469 to ***Goddard -v- Nationwide Building Society*** [1987] 1 QB 670 (see particularly May LJ at 679-680, 683).
In ***Derby & Co. Ltd. -v- Weldon (No.8)*** [1991] 1 WLR 73, 99c-d, Dillon LJ stated:

*"The court does not, so far as privileged documents are concerned, weigh the privilege and consider whether the privilege should outweigh the importance that the document should be before the court at the trial, or the importance that possession of the document and the ability to use it might have for the advocate."*

In ***ITC Film Distributors Ltd. -v- Video Exchange Ltd*** [1982] Ch 431 the second defendant, Mr Chappell, was found to have obtained documents (some privileged and some not) by tricking a courier who had come to collect the other side's documents following an earlier court hearing. Warner J held that balancing the public interest that the truth should be ascertained against the public interest that litigants should be able to bring their documents into court without the fear that they might be filched by their opponents and used in evidence, the interests of the proper administration of justice required that such of the plaintiffs' documents or copies thereof as had not yet been referred to in court should be excluded from scrutiny. Applying ***Ashburton -v- Pape***, Warner J held (438e) 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."*

Another example of the principle is ***English & American Insurance Ltd. -v- Herbert Smith*** [1988] FSR 232, where counsel's clerk in a Commercial Court action returned his papers to the other side's solicitors. The solicitors were instructed by their clients to read the papers, and they did so, informing their clients of what they had discovered. They then returned them. Sir Nicolas Browne-Wilkinson V-C held that if privileged information had not yet been tendered in evidence, the person entitled to legal professional privilege could restrain any use by the other side, including use in pending proceedings.

*"The spirit of self-help is the root of all genuine growth in the individual": Samuel Smiles (1859):*

In ***L -v- L*** Tugendhat J did not approach self-help remedies in quite the robust fashion of Samuel Smiles. He pointed out that [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."*

The husband's rights included (1) privacy, (2) confidentiality and (3) legal professional privilege in relation to relevant documents. Where the documents were relevant (but not otherwise), the rights of privacy and confidentiality might be overridden by the competing public interest that any trial should be conducted on full evidence: [1]. The same did not apply to legally privileged documents.

*Confidential or private information: the discretion to order delivery up*

Mrs L and her solicitors relied on a decision of Lloyd J in ***A -v- B*** [2000] EMLR 1007. The case had started in the Family Division, and was transferred to the Chancery Division because an issue as to copyright arose. The facts were very different from the copying of Mr L's hard disk. Mr B had read and then photocopied just two pages of his wife's personal diary. In those circumstances and because the information in question was relevant to the proceedings, Lloyd

J declined to exercise his discretion in favour of the wife applicant and order delivery up.

Tugendhat J clearly shared the view of Lloyd J in *A -v- B* that the Court did have a discretion to order *"the delivery up of documents containing confidential information which is or may be relevant to the proceedings, even though they are not the subject of legal professional privilege"*: [77]. In *L -v- L* the Judge ordered delivery up because he concluded that as the law stood:

(1) *"there is a real possibility that the judge who tries this action might find that the wife has acted unlawfully, and might choose to exercise his discretion to order the delivery up of the copies of the hard drive..... in circumstances where that would make it impossible for the wife to adduce in the matrimonial proceedings any evidence there might be on the copy hard disks":* [117]

(2) *"a judge, who tries this case (in whatever Division) may have powers to order delivery up of the copies and prevent evidence being adduced which is otherwise admissible, and so prevent evidence being admitted, in the event he should find that the wife has acted unlawfully and that such an order would be just and equitable in all the circumstances":* [125].

### *"All's fair in love and war": does the court have a discretion to exclude relevant evidence?*

My impression is that it is quite widely believed in the Family Division that there is no exclusionary rule of relevant evidence in matrimonial proceedings. Tugendhat J thought that the point was not clear [125], though he did think that the Judge trying the action before him might have powers to order delivery up and prevent evidence being adduced which was otherwise admissible. In any event, whatever may have been the rule prior to October 2000, any supposed non-exclusionary rule would have to be re-considered in the light of the passage of the Human Rights Act 1998. s.6(3)(a) Human Rights Act makes the Court a public authority, and by s.6(1) *"it is unlawful for a public authority to act in a way which is incompatible with a Convention right".*

As the Judge pointed out in *L -v- L* [78], with the coming into force of the Human Rights Act, there was a *"consequent need for the court to have regard to Article 8*".

- *Article 8(1)* confers *"the right to respect"* for not just *"private and family life*", but also for *"home and correspondence"*. As a public authority, the Court is therefore bound to afford respect to that right.

- Under Article 8(2) there shall be no interference with the exercise of that right, except such as is in accordance with the law and necessary in a democratic society for *(inter alia*) *"the protection of the rights and freedoms of others"*. Such rights would include the right to a fair and public hearing in the determination of civil rights and obligations under Article 6(1).

Tugendhat J commented that whether there was a discretion in civil proceedings to exclude evidence unlawfully obtained was *"a matter on which the law is developing"* [115]. That is best shown by the decision of the Court of Appeal in *Jones -v- Warwick University* [2003] 1 WLR 954, which indicates that since the coming into force of the Civil Procedure Rules and the Human Rights Act 1998, it is no longer the case (in the words of Lord Woolf CJ at [21]) that *"if evidence was available, the court did not concern itself with how it was obtained".* Lord Woolf went on:

*"While this approach will help to achieve justice in a particular case, it will do nothing to promote the observance of the law by those engaged or about to be engaged in legal proceedings. This is also a matter of real public concern"* [22].

*"Fortunately, in both criminal and civil proceedings courts can now adopt a less rigid approach to that adopted hitherto which gives recognition to the fact that there are conflicting public interests which have to be reconciled as far as this is possible"* [24].

It is consistent with the Strasbourg jurisprudence cited by Lord Woolf [27] that the domestic court should have a discretion to exclude evidence obtained in breach of Article 8. In the *Jones*

case the insurers' inquiry agent had trespassed in the claimant's home by posing as a market researcher and used a hidden camera to film her without her knowledge. The resulting film was then shown to a medical expert who concluded she had no injury. It is absolutely clear that the Court considered that one weapon in the court's discretionary armoury was the exclusion of the evidence [30]; but it was not the only weapon and they declined to use it. Instead, the defendant was ordered to pay the costs before the district judge, the judge and the Court of Appeal, even though the latter dismissed the claimant's appeal.

### *Articles 6 and 8 are making their effect felt in all areas of the law*

The recent decision of Lord Phillips CJ and Silber J in ***R (Hafner & Another) -v- Westminster Magistrates Court*** [2008] EWHC 524 (Admin) underlines that courts in every area of the law must consider carefully the impact of Article 8 rights, when deciding whether to order the disclosure of documents, and that they must be especially careful to see that there is no invasion of legal professional privilege. They must also have regard to the rights of third parties not before the Court. What is more, the respect for a person's home, private life and correspondence can extend to professional or business activities and premises: ***Niemietz -v- Germany*** (1992) 16 EHRR 97 [29-31], in which a lawyer's office had been searched by the German police looking for the whereabouts of a third party suspected of crime.

Consistently with the Strasbourg case-law, Lord Phillips underlined that an order infringing privacy rights under Article 8(1) should only be made where it was necessary for a purpose stipulated in Article 8(2), and even then should not go beyond *"that which is necessary for this purpose"*: [26]. The District Judge was criticised for ruling that Article 8 was not engaged where a request for assistance had been received from the Australian Securities and Investments Commission in relation to an investigation of suspected share fraud, and documents were sought including a commercially sensitive document.

It also needs to be remembered that the right to a fair trial under Article 6 involves the right to a fair hearing for the owner of the seized documents. In December 2000 in ***Regina -v- P*** [2002] 1 AC 146, 158f-g, Lord Hobhouse pointed out that this right *"involves the same criterion as is applied in section 78 of the 1984 [Police and Criminal Evidence] Act"*. s.78(1) PACE, headed *"Exclusion of unfair evidence"*, reads as follows:

*"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances,* ***including the circumstances in which the evidence was obtained****, the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."* [emphasis added].

### *The Strasbourg case-law on the right to a fair trial*

The House's decision in ***Regina -v- P*** followed the judgment of the European Court of Human Rights in ***Khan -v- UK*** (2001) 31 EHRR 1016 six months before. Prior to the enactment of the Regulation of Investigatory Powers Act 2000, the Applicant had been convicted of a serious drugs offence on the basis of evidence secured by the police by means of a secret listening device. A breach of Article 8 was found because of the lack of any statutory framework at that time for the regulation of the use of covert listening devices. In relation to Article 6, the Court stated [34]:

*"While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible, or, indeed whether the applicant was guilty or not."*

In both ***Khan*** and the earlier case of ***Teixera de***

*Castro -v- Portugal* (1998) 28 EHRR 101, the Court emphasised that the critical question was the fairness of the trial as a whole. In the latter case, the Court said [34]:

*"The court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair."*

### *Giving effect to Article 8 in English law: the Naomi Campbell case*

In giving effect to Article 8 rights, the English courts use the tort formerly known as breach of confidence, and since re-named by Lord Nicholls in *Campbell -v- MGN Ltd* [2004] 2 AC 457 as the misuse of private information [14]. The newly re-fashioned tort, in the words of Lord Hoffmann (dissenting only on the facts) [51]:

*"... takes a different view of the underlying value which the law protects... it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people."*

As Lord Nicholls said [21]*: "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy"* . This will come about *"whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected":* see [85] *per* Lord Hope. Private correspondence (such as e-mails) are a pre-eminent example of such material – indeed it is expressly protected by Article 8(1).

The *Campbell* case is only one example of the general task confronting the court when Article 8 rights are engaged, namely carrying out *"a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure"*: [85]. In cases like *L -v- L* where there has been indiscriminate copying of all the documents on a hard disk, it is difficult to see any countervailing public interest in disclosure in the absence of substantial evidence to suppose that without such disclosure, the husband will not provide the disclosure to which the wife is properly entitled in order to secure a just share of his assets. If there is such evidence, it does not follow that it will be conclusive. The Court still has to perform what Lord Steyn in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 [17]*,* called *"the ultimate balancing test*":

*"First, neither Article has* ***as such*** [Lord Steyn's emphasis] *precedence over the other.*

*Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.*

*Thirdly, the justification for interfering with or restricting each right must be taken into account.*

*Finally, the proportionality test must be applied to each."*

### *The criminal law: the Computer Misuse Act 1990*

In *L -v- L* the Judge did not have to resolve the dispute as to whether the wife had rights of access to what the husband said was his passport-protected laptop. Under s.1(1) Computer Misuse Act 1990*:*

*"A person is guilty of an offence if –*

*(a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer;*

*(b) the access he intends is unauthorised; and*

*(c) he knows at the time when he causes the computer to perform the function that that is the case."*

By reason of s.1(2) the intent necessary to commit the offence need not be directed at any particular program or data. The penalty on summary conviction is a maximum of six months' imprisonment or a fine not exceeding £5,000 or both.

In *L -v- L* [113] Tugendhat J concluded that if the case were to go to trial, there was a real prospect that it might be found that the wife had acted unlawfully, or had attempted to do so. It was in the context of the possible criminal offences (including under the Data Protection Act) that he went on to consider [114] what effect a finding of illegality would have on the ability of the wife to put the evidence so obtained before the Judge hearing the Family Division proceedings. As Lord Woolf CJ indicated in a media injunction case, although the fact that the information was obtained unlawfully does not necessarily mean that it will be restrained, *"the fact that unlawful means have been used to obtain the information could well be a compelling factor when it comes to exercising discretion": A -v- B Plc* [2003] QB 195 [11(x)].

### *The criminal law: the Data Protection Act 1998*

The material copied in *L -v- L* was pretty plainly "*personal data"* for the purposes of the Data Protection Act 1998. s.55(1) & (3) creates a criminal offence as follows:

*"A person must not knowingly or recklessly, without the consent of the data controller, --*

*(a) obtain or disclose personal data or the information contained in personal data, or*

*(b) procure the disclosure to another person of the information contained in personal data."*

By virtue of s.55(2) the offence is not committed by a person who shows --

*"(a) that the obtaining, disclosing or procuring –*

*(i) was necessary for the purpose of preventing or detecting crime, or*

*(ii) was required or authorised by or under any enactment, by any rule of law or by the order of the court,*

*(b) that he acted in the reasonable belief that he had in law the right to obtain or disclose the information or, as the case may be to procure the disclosure of the information to the other person,*

*(c) that he acted in the reasonable belief that he would have had the consent of the data controller if the data controller had known of the obtaining, disclosing or procuring and the circumstances of it, or*

*(d) that in the particular circumstances the obtaining, disclosing or procuring was justified in the public interest."*

Tugendhat J commented on the significance of the reference in s.55(2)(a)(ii) to an order of the Court [105]:

*"Those who claim that it is right that they should be able to obtain and disclose other people's personal data have the opportunity to apply to the Court for an order to that effect."*

### *Seizure orders*

In the course of submissions in *L -v- L*, the Judge asked counsel for the wife why no order was sought from the Court, pointing out that it did not have to be a search order (the old-style *Anton Piller* order), it could have been an order for the preservation of the laptop: [92]. Counsel's response that *"such applications would unnecessarily burden the Family Division"* was described as unconvincing by the Judge, who pointed out that a much lower threshold of evidence was needed to obtain a preservation order.

A search order has been described as one of the law's nuclear weapons, and it is notable that in *L -v- L* counsel for the wife did not suggest that *"there was sufficient evidence to cross the very high threshold necessary"* [93]. Not surprisingly, Tugendhat J said [94]:

*"I find it a matter of considerable concern that parties to litigation should conduct searches which lack any of the safeguards built into a search order issued by the court, and all the more so if they do that in circumstances where they could not reasonably expect to obtain any such order from the court."*

The safeguards where the court makes an order are more than a mere formality. They normally include [88, 96]:

● Provision for the party to whom the order is directed to seek legal advice, and to ask the court to vary or discharge the order before it is executed.

● The appointment of a supervising solicitor, an independent third party.

● Provision for the party whose documents are searched to gather together those he believes may be incriminating or privileged.

● An undertaking by the applicant's solicitors to retain in their own safekeeping all items obtained as a result of the order until the court directs otherwise.

In *Anton Piller KG -v- Manufacturing Processes Ltd.* [1976] 1 Ch 55, 61h, it was a Family Lord Justice, Ormrod LJ who described the search order as at the extremity of the court's powers:

*"Such orders, therefore, will rarely be made, and only when there is no alternative way of ensuring that justice is done to the applicant."*

The most recent summary of the conditions for the grant of a search order in a commercial context is that by Warren J in *Indicii Salus Ltd. -v- Chandrasekaram* [2006] EWHC 521 (Ch)*:*

(1) There must be an extremely strong *prima facie* case.

(2) The damage, actual or potential, must be very serious for the applicant.

(3) There must be clear evidence that the defendants had in their possession incriminating documents or things.

(4) There is a real possibility that the defendants may destroy such material before an application on notice is made.

(5) The harm likely to be caused to the respondent in his (business) affairs by the execution of the order must not be out of proportion to the legitimate object of the order.

*Search orders are exceptional in the Family Division*

The first application for *Anton Piller* relief in the Family Division appears to have been that successfully made to Wood J in *Emanuel -v- Emanuel* [1982] 3 FLR 319. The husband failed to comply with orders for discovery, disposed of property in breach of freezing orders and had lied about where he was living. The Judge held that this entitled him to make an order permitting the wife's solicitors to enter the premises of the husband and his sister for the purpose of inspecting and taking into custody all documents relating to the husband's financial position, income and assets.

In *Emanuel* the Court held that essential documents were at risk (327). Wood J concluded:

*"The respondent is clearly ready to flaunt the authority of this court and to mislead it if he thinks it is to his advantage so to do. The normal process of law is liable to be rendered nugatory. I have no doubt that justice in the present matter cannot be achieved without making the present order, and that there is a grave danger that evidence will be removed or destroyed. I cannot think that real harm will be caused to the respondent 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."*

In *Kepa -v- Kepa* [1983] 4 FLR 515 Booth J made an order permitting entry to premises to inspect documents and to value jewels in a case which she described as very different from *Emanuel* where there had been a very long history of non-disclosure. The husband had deposed that he was a street trader with an income of £1,800 a year, whereas the wife contended that he was a jeweller by trade with a stall on the Portobello Road, where her solicitors had photographed him. The Judge approached the matter by balancing the harm to the wife if the order was not made against the harm to the husband if she did (520):

*"It seems to me that the potential harm to the husband in the circumstances is very minor indeed. It is, of course, a serious matter that the court should make an order which in effect requires him to give permission to strangers to enter and inspect his home. But, as I see it, it is an emotional harm that he will suffer, as opposed to the very real and long-term potential harm which the wife could suffer if I did not make the order and her fears were realised and the husband succeeded in spiriting away his assets from the court."*

***Kepa*** seems to be the high-water mark for the grant of relief. More recently, in ***Burgess -v- Burgess*** [1996] 2 FLR 34 the Court of Appeal dismissed a (solicitor) husband's appeal from an order by Hale J to pay the indemnity costs of an ***Anton Piller*** order obtained from Douglas Brown J. Nothing of any real significance was found on the search, and Hale J's criticism was severe (41):

*".... the order brought to light no evidence which has been useful in resolving any of the issues; nor did it come anywhere near demonstrating that the wife was the kind of dishonest person who would flout the orders of the court that the husband had represented her to be. I therefore have no doubt that this order should never have been sought or granted. It was oppressive and unnecessary."*

Waite LJ considered that Hale J had every reason for ordering the husband to pay costs on the indemnity basis (41):

*"If she intended to sound a note of warning to others as to the consequences of making an ill-judged resort to* ***Anton Piller*** *relief in family proceedings – where it remains a rare weapon for use only in extreme or exceptional circumstances – she had good reason, in my view, for doing so."*

The subsequent Court of Appeal decision in ***Araghchinchi -v- Araghchinchi*** [1997] 2 FLR 142 provided further discouragement to any resort to the weapon. Hobhouse and Ward LJJ dismissed an appeal from Sumner J, who had refused relief to a wife, whose husband had valued a property at £10,000, and subsequently disposed of it for £150,000. (The latter fact was said to have been extracted in cross-examination *"with all the pain of extracting a tooth"*). Ward LJ approached the case on the basis that the husband was devious and dishonest, with no respect for his family or the orders of the Court. But he went on (146a):

*"Nonetheless, the orders sought are Draconian and are to be granted in exceptional circumstances only. Assuming, as I have, that there is a very strong prima facie case leading to eventual success for the wife's application to reopen the ancillary relief proceedings, the court must nonetheless have regard to whether or not there is very serious actual or potential damage to the petitioner which must be protected by the* ***Anton Piller*** *order and whether there is evidence that the husband is in possession of vital material which he might destroy or dispose of so as to defeat the ends of justice."*

The ***Aragchinchi*** case shows that dishonesty is not enough. To secure an order there must be sufficient evidence that the respondent has destroyed, or will dispose of, incriminating documents. This and the other cases serve to justify Tugendhat J's scepticism that Mrs L could ever have secured from the Court what she seized for herself. But it raises the question why, if the court insists on such strict safeguards before making any search order itself, does it not act to discourage those who take the law into their own hands with an illicit search ?

### *"They do things differently there": is the Family Division "a foreign country"?*

It is only natural for Family Division judges to treat the illicit obtaining of confidential documents with world-weary resignation. In ***K -v- K (Financial Capital Relief; and Management of Difficult Cases)*** [2005] 2 FLR 1137, the wife had rummaged through dustbins and taken documents from her husband's pockets. She had changed the locks on his study in the former matrimonial home where she was no longer living, and then obtained more documents. Baron J commented [20]:

*"This case is an object lesson for all. If a husband does not give proper disclosure, makes threats and causes problems/delays, then the result will be a wife who feels that she has no alternative but to litigate with "all guns blazing" – taking documents, taping telephone calls, employing private detectives and the like. The strategy will make a husband feel beleaguered so that he becomes more defensive and difficult. It is a vicious circle."*

As Tugendhat J pointed out in *L -v- L* [62], Baron J *"did not approve or in terms condemn the conduct of the wife"*. Yet the wife had almost certainly secured for herself documents she could not have obtained by a search and inspection order. It is, of course, important to bear in mind that it is a feature of financial proceedings in the Family Division that one party (usually the wife) is in a different position to ordinary civil litigants. That is why on disclosure applications "fishing" is permitted (though not against third parties: see Wilson LJ in *Charman -v- Charman* [2006] 1 WLR 1053, 1067) to a degree which would be impermissible in litigation in other divisions. As it was put by Dunn J in a well known passage from *B -v- B (Matrimonial Proceedings: Discovery)* [1978] 3 WLR 624, 633e-f:

*"In general terms, [the wife] may know more than anyone else about the husband's financial position..... She may also know, from conversations with the husband in the privacy of the matrimonial home, the general sources of his wealth and how he is able to maintain the standard of living that he does. But she is unlikely to know the details of such sources or precise figures, and it is for this reason that discovery now plays such an important part in financial proceedings in the Family Division."*

Non-family practitioners must also not lose sight of the inquisitorial nature of the Court's function in ancillary relief proceedings under the Matrimonial Proceedings Act 1973. The nature of the Court's role was described by Coleridge J in *Kimber -v- Brookman Solicitors* [2004] 2 FLR 221 [15]:

*".... the court has a statutory duty to inquire into the parties' means. It is not just a question as between two clients. It is a question between the court and the parties. The court has an inquisitorial function, not merely an arbitration function as between the two parties. That puts the court.... in a different position to that more conventionally found in civil litigation generally."*

These considerations, in particular that *"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"*, are what enables the Court to order the disclosure of what in *Charman -v- Charman* [45], the wife's counsel called "conjectural documents", that is to say, documents which he could not at the time of the order prove to exist. Wilson LJ commented [46] that no doubt the requirement of proof of existence made perfect sense in ordinary civil litigation (in particular, commercial litigation), but it could not be regarded as mandatory in a special type of proceeding in which it would largely deprive the jurisdiction to secure the production of documents of its efficacy.

Thorpe LJ in *Clibbery -v- Allan* [2002] 1 FLR 565 [99] described the duty of the parties in relation to disclosure in ancillary relief proceedings as one of *"full and frank disclosure":*

*".... [this was] clearly recognised well before the advent of the statutory powers for equitable redistribution of assets on divorce. The duty was succinctly stated by Sachs J in the case of* J-PC -v- J-AF *[1955] P 228 when he said: 'For a husband in maintenance proceedings simply to wait and hope that certain questions may not be asked in cross-examination is wholly wrong'."*

### *So does the inquisitorial nature of ancillary relief proceedings justify the court in turning a blind eye to how evidence was secured?*

The story of *L -v- L* is a tale without an ending. We can only guess what would have happened had there been a full-scale trial of either the issues before Tugendhat J or (if jurisdiction in this country had been confirmed) of the ancillary relief proceedings themselves. My own view takes account of the rashness of a non-family practitioner expressing any opinion, but it is as follows:

(1) The Human Rights Act embraces the Family Division just as it does as any other court, but in applying Articles 6 and 8 to ancillary relief proceedings, regard must be had to the special nature of those proceedings and to the issues which they raise.

(2) The court cannot simply turn a blind eye in all

circumstances to unlawful seizure of evidence, where the evidence could not have been obtained by lawful means or by the use of the court's procedures (including *Anton Piller* search and seizure relief, if necessary).

(3) The party who is the victim of unlawful self-help has rights under both Articles 6 and 8:

(a) Under Article 8(1) he has the right to respect for both his private life, and his home and correspondence, and

(b) Under Article 6(1) he has the right to a fair trial, in which oppressive use is not made of unlawfully obtained evidence.

(4) The Article 8 right is subject to what is necessary in a democratic society for the protection of the rights and freedoms of others. This leads to consideration of what is necessary and proportionate to ensure a fair trial for both parties under Article 6. In this connection what seems relevant is not so much the inquisitorial nature of ancillary relief proceedings, as the reality that wives (and sometimes husbands) are too often at the mercy of spouses determined to withhold documents which if brought to light may turn out to be crucial evidence. But that consideration should not willy-nilly provide sanction after the event to speculative and unlawful raids for documents.

(5) An absolute rule permitting a party to adduce evidence, no matter how it was obtained would render Article 8 rights nugatory and imperil the right under Article 6 to a fair trial. In considering the requirements of a fair trial, the Court should make due allowance for all the exigencies of ancillary relief litigation, but ultimately pose the question (familiar from s.78 PACE 1984) whether admitting the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to permit it.