Neutral Citation Number: [2009] EWCA Civ 1122

Case No: A2/2008/2991

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE EADY
HQ07X04302

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2009

Before:

LORD JUSTICE WARD
LORD JUSTICE SEDLEY
and
LORD JUSTICE WILSON

- -

Between:

Marco Pierre White	**Appellant**
- and -	
(1) Withers LLP & anor	
(2) Marcus Dearle	**Respondents**

- -
- -

Mr Michael Crystal QC, Mr Jonathan Crystal and Mr Adam Al-Attar (instructed by Hill Dickinson LLP) for the applicant/appellant
Mr David Sherborne (instructed by Barlow Lyde and Gilbert LLP) for the respondent

Hearing date: 23rd June 2009

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Judgment

Lord Justice Ward:

1. It is the well known duty of parties in proceedings for ancillary relief after divorce to give full and frank disclosure of their means. Sometimes, however, one party (I shall assume for the purpose of this judgment that it is the wife, although, as will be seen, it may be the husband) will fear that the other will conceal the extent of his (or her) wealth from the court. The response is a pre-emptive strike: the wife plunders his documents and appropriates them to use in the ancillary relief proceedings. In the Family Division the purloined documents are known as "*Hildebrand* documents", so named after *Hildebrand v Hildebrand* [1992] 1 FLR 244. The novel question which arises in this appeal is whether, and if so in what circumstances, the wife's solicitors may be liable in damages to the husband "for breach of confidence, misuse of personal information, invasion of privacy and wrongful interference with property by possessing, taking or intercepting the claimant's correspondence and documents including personal family letters, private and confidential letters concerning business opportunities and documents containing financial information."

2. That was the claim brought by Mr Marco Pierre White against Withers LLP, one of the leading firms of divorce lawyers, Mr Marcus Dearle, one of its partners, and Mrs Matilde White, the claimant's wife. On 19th November 2008 Eady J. struck the action out. On the direction of my Lord, Wilson L.J., Mr White's application for permission to appeal was adjourned to this Court with the appeal to follow if permission be granted. For reasons which will become apparent, I would grant permission to appeal.

The facts in a little more detail

3. Marco Pierre White is a very well-known chef and restaurateur. He had been previously married and has a daughter Letitia, known as Letty, by that earlier marriage. He and Matilde began to live together in 1993 and married on 7th April 2000. They have three children. The marriage appears to have become unhappy and they separated in the summer of 2006 but were reconciled and entered into a deed of reconciliation in September 2006. Sadly the reconciliation broke down and they parted finally in January 2007. On 8th March 2007 Mrs White issued a petition for divorce and in due time began her claim for ancillary relief.

4. In their Defence, Withers and Mr Marcus Dearle whom I shall henceforth call "the defendants", the claim against Mrs White having been discontinued on 2nd May 2008, plead that the claimant had made a series of threats that in the event of Mrs White's divorcing him, he would fail to provide full and proper financial disclosure and/or he would dissipate his assets or frustrate the petitioner's ability to obtain the financial provision to which she was lawfully entitled. It is alleged that he informed her that:

> "(a) she would not receive a penny from him were they ever to separate;
>
> (b) he would leave the country and that she would never find him;

> (c) he would pull the plug on everything and that she would get nothing from him because when his affairs were unravelled she would discover that he owned nothing, because it was all being dealt with now;
>
> (d) he owned nothing and had sold it all for £1."

These allegations are denied in the Reply.

5. The Defence goes on to plead that since the commencement of divorce proceedings, the claimant had conducted himself in a way which was calculated to frustrate Mrs White's entitlement and to conceal his true financial position by means of a series of false, incorrect or misleading statements and failing to give proper disclosure of his assets. Again I should record that these allegations are denied.

6. The scene is now set. Mrs White's response was predictable. To thwart him she began to remove his documents.

7. The claimant says in his witness statement that he was first alerted to the fact that Mrs White might have been intercepting his mail in November 2007. On 23rd November 2007 P&O had contacted him to ask why he had not signed a contract they had sent to him on 1st November 2007. He explained he had not received it: he had been out of the country when it had been sent. They confirmed it had been sent to his home address in an envelope marked "Private and Confidential". P&O were concerned that he had not signed because they had already printed all their brochures and publicity material in connection with his association with their restaurants on their cruise ships. Mr White looked for the contract at his home address but could not find it. He had to go to P&O's offices in Southampton to sign a duplicate.

8. He consulted his matrimonial solicitors, Bindman & Partners, and on 23rd November 2007 they wrote to Withers referring to the conversation with P&O and stating:

> "He [Mr White] believes your client must have the original [contract]. Please could you return this contract together with any other Hildebrand documents that you or your client have?"

9. In the days that followed Mr White confronted his wife and according to him she told him that Mr Dearle had told her to intercept his mail and take his documents. Both Mrs White and Mr Dearle deny this. Mrs White says in her witness statement:

> "I recall that at the commencement of the divorce proceedings I discussed with Marcus [Dearle] what I could and could not remove in terms of documents that were relevant/potentially relevant to any matrimonial proceedings. I recall that Marcus advised me that I was entitled to copy documents that I found lying round the home as long as I did not use force or break and enter into any room and/or briefcase in order to obtain those documents."

Mr Dearle confirms in his witness statement that he did not tell or advise Mrs White to take and/or intercept any of the documents. He says:

> "I advised Mrs White that she was only entitled to take copies of documents that she found in the matrimonial home which were relevant to the matrimonial proceedings, provided she did not break into any of the claimant's property in order to obtain access."

He attached an attendance note dated 3rd May 2007 which records:

> "You referred to the fact you have found some documents of Marco's and you gave copies of them to us. MDD confirmed that you are entitled to take copies of documents provided you do not break into anything in order to gain access to them …"

10. According to Mr White there was a conversation between him and his wife on 2nd December in which she prevaricated about the whereabouts of the P&O contract saying at first that it was in Marcus Dearle's office, then retracting that and saying it was in their daughter's bedroom and then saying she had looked for it but could not find it. As a result Mr White consulted Hill Dickinson who represent him in these proceedings and they wrote on that day to Withers demanding a list of the documents which were or had been in the possession of Withers and delivery up of all documents and all copies in the firm's possession.

11. In their response sent later that day, Withers wrote, perhaps some would say a little condescendingly:

> "It appears that you are not familiar with the rules regarding disclosure of documents in a family law context. The rules are set out in the leading case of *Hildebrand v Hildebrand* [1992] 1 FLR 244, which we suggest you read carefully. When you do, you will see that our client's obligation to disclose any documents or copy documents belonging to your client is upon service of a questionnaire, or upon request if earlier. It is a shame that you clearly did not see fit to consult your family department to check the law before writing to us."

They went on to say that they had earlier that day sent to Bindmans "*all of the original* documents that are in our possession" (I add the emphasis) but "for the avoidance of doubt, we have kept copies of all documents as we are entitled to." They denied advising their client to intercept Mr White's post but retorted that Mrs White was "perfectly *entitled to* copy and *retain any documents which she finds lying around* and which belong to your client, subject to complying with the *Hildebrand* rules – which she has done to the letter", (again with my emphasis added). They explained that they had seen the P&O contract for the first time "when it arrived by fax from our client this afternoon".

12. Withers had compiled a schedule of the *Hildebrand* documents which were returned to Bindmans. There were 42 of them. The earliest seems to be dated 4th October 2004 and the last was the letter from P&O Cruises dated 1st November 2007. Most of the 42 documents are financial documents of one sort or another. Mr White points out that they were addressed to him but sent to a number of addresses, presumably business premises occupied by him. It is regrettable that no attempt has been made to

identify how many of these documents are original and how many are copies of the documents that were taken. There was some dispute about this at the hearing before us which will have to be resolved if this matter goes to trial. In any event, the exchanges between Counsel in the course of argument suggest that at least a significant number are original documents. By "original documents" I mean the actual documents, the very pieces of paper, that were removed, as distinct from copies made after removal.

13. One of the documents which has caused some confusion was a draft letter addressed to, but apparently never sent to Withers. Mr White commented that:

> "On the original … there is nothing written at the top of the first page however on the copy that was provided to my solicitors in these proceedings it states that it was found by Matilde White in my car. This was not written by me or by anyone on my behalf and I infer that it was written by the defendant."

That observation was taken to be an assertion that the whole document was a fake so that at times it has been called "the fake letter" but I think Mr David Sherborne who appears for the respondent now accepts that the words properly understood mean no more than that only the added words, "Letter found by Matilde White in car …", were the words not written by him. It is a dispute which now has little importance.

14. Also among the documents are a letter from Letty and a letter from one of the children of this family and Mr White said he had never seen them until the originals were produced by Withers. The letter from Letty needs some elaboration but I shall keep it brief. It was a touching, almost heartbreaking, letter to her father expressing her love for him and her wish to see much more of him. It was a letter which desperately called for a speedy reply. It is alleged that this letter was not only intercepted but it was also withheld, thus denying Mr White the opportunity to respond to his daughter's cry for help. Mr Dearle, an experienced family lawyer, may be open to criticism for withholding it.

15. In response to a request for further information of the Defence asking when the defendants came into possession of each of the 42 documents the not very helpful response was that the defendants came into possession of the *Hildebrand* documents on various dates between August and December 2007. Those facts were stated to be true by Mr Dearle. At the hearing before Eady J. it was pointed out that the attendance note to which I have referred in para [9] above acknowledged receipt of a document on 3rd May 2007. A corrective witness statement was filed by the defendants' solicitors in which they acknowledged that they had been in error in drafting the response saying:

> "In fact the defendants had instructed my firm in January 2008 that the range of dates when they received the Hildebrand documents was from July 2006 to December 2007."

There must, therefore, have been a number of occasions when documents were taken by Mrs White and handed to Withers, but so far only one attendance note is disclosed recording those events. A significant matter for this court is that we are completely in

the dark as to the length of time each document was retained by Withers and this aspect, which may have important repercussions, will also need clarification if this goes to trial.

The Claim and Defence

16. On 14th December 2007 Mr White launched his claim as I have already set out at [2] above. He valued the claim as one not exceeding £50,000. The particulars of claim listed the documents in a schedule as documents taken or intercepted from the claimant's home, his office, his car and his clothing. Special mention was made of the draft letter to Withers found in the car (the so-called "fake"), Letty's letter and the P&O contract. The particulars of claim plead:

> "3. The third defendant has taken or intercepted the claimant's documents including private family letters or correspondence containing private or confidential information relating to the claimant and his financial or business affairs ("the documents").
>
> **PARTICULARS**
>
> Prior to disclosure the claimant is aware that forty-two documents were taken or intercepted. Such are itemised in the schedule served here marked "A" and were taken or intercepted from the claimant's home, his office, his car and his clothing. …
>
> 5. On or about 24 November 2007 the third defendant whilst at home told the claimant that she had been told by the second defendant to take his mail. …
>
> 7. … It is evident from this letter [of 7h December 2007 from Withers to Bindmans] that the defendants were and had been in possession of both original and copy documents and that such were delivered up after receipt of the letter [of 7th December 2007from Hill Dickinson].
>
> 8. Possession of the documents infringes the claimant's rights in confidence and privacy, misuses his private information and wrongfully interferes with his property.
>
> 9. Further the first and second defendants are jointly and severally liable with the third defendant for her taking or intercepting the documents …
>
> 10. By reason of the above matters, the claimant has suffered injury, loss and damage.
>
> **PARTICULARS**
>
> The claimant was deprived of correspondence from his children.

> The claimant was deprived of correspondence and information relating to his financial or business affairs. In particular, the claimant was denied the opportunity to sign and return the draft agreement from P&O in a timely manner.
>
> The claimant's privacy has been invaded in a way he finds upsetting and humiliating.
>
> **AND THE CLAIMANT CLAIMS:**
>
> (1) damages for breach of confidence and privacy, misuse of private information and wrongful interference with property."

17. In their Defence Withers and Mr Dearle contend that the claim is wholly misconceived both in fact and in law, that the particulars of claim fail to disclose any reasonable cause of action and that they are an abuse of the process of the court, the claim being a collateral attempt to place improper pressure upon or intimidate Mrs White in her divorce proceedings with the claimant and/or impede her proper representation in those proceedings and the claim is therefore liable to be struck out on any one of those grounds. In fact no claim to strike out was immediately made.

18. The defendants admit that they "acquired the 42 documents …in the course of the divorce proceedings". By way of defence to the claim for breach of confidence and privacy and/or misuse of private information, they aver that even if the documents were private or obtained in circumstances of confidence, there could be no actionable tort since there was no misuse of the private information nor any breach of confidence. In paragraph 14 it is contended that the documents were "lawfully acquired by the Third Defendant and/or taken (or 'intercepted') by her with the implied authority or consent of the claimant". The allegation of consent is founded upon the claimant's alleged dyslexia which led to the Third Defendant reading his correspondence and having implied authority always to do so. It was further alleged that "the taking (or 'interception') and/or any use of [the documents] for the purposes or in the course of or in relation to divorce proceedings was legitimate, justified and/or a matter of public interest". The defence of lawful excuse/legitimate justification or public interest arose from the claimant's alleged failure to give full and frank disclosure and the documents being taken for use in existing or contemplated proceedings between husband and wife. The alleged collateral or improper purpose relied on the claimant's attempt to remove Withers from acting as Mrs White's solicitors in the divorce proceedings, an attempt which was unsuccessful. The defendants plead that:

> "17. … in further support of that contention that the proceedings are an abuse of the process [they will refer] to the fact that these proceedings not only lack any merit … but will also achieve no or no real purpose or gain for the claimant in view of the fact that (a) the original documents were safely returned to him prior to the commencement of the proceedings; (b) even if actionable, the temporary deprivation of them will result in only a nominal award, far outweighed by the costs of the proceedings and (c) the documents are to be used in the ancillary relief proceedings in any event."

19. As I have said, no immediate steps were taken to strike out the claim. Instead directions were given for trial including the standard order for disclosure and directions for the exchange of witness statements. Mr Michael Crystal Q.C., who now appears with Mr Jonathan Crystal and Mr Adam Al-Attar for the appellant, points out that in the disclosure statement signed by Mr Dearle he says he did not search for any documents pre-dating 2007. This response is criticised by Mr Crystal as it is now known that Mr Dearle had been receiving documents over time from July 2006. Even though we do not know when each of the 42 documents was in received by him this may be a very minor point of criticism given his solicitors' apparent misunderstanding of Mr Dearle's instructions to them.

20. On the date that witness statements were to have been exchanged the defendants applied to strike out the claim pursuant to CPR Parts 1 and 3.4 alternatively that judgment be entered for the defendants pursuant to CPR Part 24.2

> "because (a) the Claimant's Statements of Case disclose no reasonable grounds for bringing a claim against them; and/or (b) the Claimant's action is an abuse of the court's process; and/or (c) the Claimant has no real prospect of succeeding in his action and there is no other compelling reason why the case should be disposed of at a trial."

The hearing before Eady J.

21. Mr Jonathan Crystal represented the claimant, Mr Sherborne appearing for the defendant. We have been taken through a transcript of the proceedings before the judge. By way of very short summary, it is apparent that Mr Sherborne focused primarily on the claim for damages for breach of confidence or misuse of private information. The cause of action based on trespass to the documents seems almost to have come as a surprise to the judge when Mr Crystal mentioned it. Very little, if indeed any, argument, seems to have been addressed to the judge about the common law claim for interference with property.

22. The salient points of Eady J.'s judgment are these:

> "10. Where one spouse takes documents belonging to the other, intending to use them in matrimonial proceedings or to seek advice on them in that connection, and that involves intercepting post or breaking into (say) a desk, study or vehicle, the impermissible act cannot be excused merely because of the motive. The cases cited before me, in which judges have addressed the taking of documents in that context, have not had to consider the question of civil remedies that might be available to the other partner. Here that is a matter which needs to be considered.
>
> 11. The law regarding interference with personal property may have application notwithstanding a marital relationship. It is recognised in the *Hildebrand* line of cases that a document "left lying around" can be copied and used in the proceedings, but it would not seem to be right to take and keep an original,

especially perhaps when that involves concealing the document's existence altogether from the intended recipient. …

13. For there to be a civil remedy in respect of personal property, what is required is for the proposed defendant to have asserted some contrary property right to it as against that of the owner. If a demand for its return is made and refused, then there may be a cause of action. On the present facts, there is no evidence that the solicitors ever had the original [P&O] contract in their possession, still less that they asserted any claim over it or refused a demand to return it. The evidence is that the first they knew of it was when they were informed about it by telephone on 7 December 2007. Mr Dearle asked for a copy of it, as being potentially relevant to the financial dispute, but indicated that Mrs White should leave the original for her husband's collection when he next visited the house. It is impossible to see how any conventional domestic law wrong has been committed by the Defendants. …

15. ... There must be facts, capable of being pleaded, which would (if true) establish the tort in question or provide a sufficient basis for an inference that it must have been committed. There is no such evidence. The mere fact that Mrs White intercepted his mail, if she did, would not give rise to the inference that she must have done so at the instigation of her advisers. … I must assess his prospects of establishing the tort of wrongful interference in the light of the evidence. Yet the evidence of what happened is all one way. Both the solicitor and his client deny that any such advice or encouragement took place.

16. A variation on this theme is that interference with correspondence is contrary to the right of privacy protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms. … The cases in which these new principles have so far been applied [*Wainwright v Home Office* [2004] 2 A.C. 406, *Campbell v MGN Ltd* [2004] A.C. 457 and *McKennitt v Ash* [2008] Q.B. 73] have been primarily concerned with the wrongful communication of information, in respect of which the claimant had a reasonable expectation of privacy, to a third party or to the world at large. That is not the situation now before the court. There has been no "misuse" of any information, or breach of confidence, on the part of the solicitors. Such information as they have been given has been received, noted and retained purely for use in connection with court proceedings and the protection of their client's interest in that context. That is in accordance with the common practice recognised in the *Hildebrand* cases. It does not involve "misuse".

> 17. It emerges from the evidence that a few documents contained in the "*Hildebrand*" list disclosed to Mr White's solicitors consisted of originals rather than copies. It might have been better to ensure that only copies were retained, but it cannot be said that their possession of those documents was in itself wrongful. They were not withheld in the teeth of a demand for their return; nor was any adverse right or title asserted.
>
> …
>
> 20. As I have said, there was an alternative ground raised for striking out; namely, that the claim was an abuse of process. The suggestion is that the proceedings have not been brought in order to obtain a remedy but merely to cause hassle for Mrs White and her solicitors – and perhaps to give rise to a conflict of interest such that they would have to withdraw. Since there is no claim for an injunction, there being no basis for seeking such relief, the only remedy that the Claimant could obtain if he were able to establish a wrong on the part of these Defendants would be that of nominal damages. It is thus said by Mr Sherborne that the claim could be characterised, in the phrase adopted by the Court of Appeal in *Jameel (Yousef) v Dow Jones Inc* [2005] QB 946, as being "not worth the candle". There is clearly much force in that submission, but the jurisdiction is one that needs to be exercised with considerable caution. If there were some genuine basis for thinking that a professional person had committed a wrong in connection with legal proceedings, it might be thought that a litigant should be allowed to pursue the matter even though there was no prospect of a significant remedy. Similar considerations weighed with the Court of Appeal in the case of *Ashley v Chief Constable of Sussex Police* [2007] 1 WLR 398, where the claimant was permitted to proceed with his claim for assault notwithstanding admissions made on the Chief Constable's behalf as to liability for negligence.
>
> 21. I need not, however, come to a final conclusion on the matter of abuse, since I have already decided that the claim should be struck out as disclosing no cause of action. Moreover, even if the particulars of claim were amended to make, directly, the claim that the solicitors had advised Mrs White to intercept her husband's mail, or to take any impermissible step to obtain documents, they would be entitled to summary judgment on that issue since there would be no realistic prospect of establishing that this was so."

The arguments advanced on the appeal

23. If Mr Michael Crystal Q.C. did not concede that the claim for damages for breach of confidence and privacy could never succeed, he was quite clear that he "need not

trouble" us with that element of the claim. In my judgment he was clearly right to take that course: Mrs White's communication of that confidential/private information to her solicitors for their use in the litigation could never be characterised as misuse of it.

24. Mr Crystal instead concentrated his fire on trespass to goods submitting that there was a direct and immediate interference with the claimant's possession of the documents which were handled by the solicitors without his permission. Mr Sherborne's answer was to deny that the interference was either direct or immediate and to assert that it was essential that the appellant have actual possession of the goods at the time of the interference and that could not established.

25. Mr Crystal's fall back position was to rely on conversion of the documents and Mr Sherborne submitted that claim failed because the appellant could not establish any overt act of withholding nor any exercise of dominion over the documents by the solicitors.

26. Mr Sherborne submitted that the *Hildebrand* practice in the Family Division had been properly followed and that constituted a good defence in the public interest.

27. Mr Crystal sought to enhance the solicitors' liability by submitting that they were jointly responsible for the tort committed by Mrs White because they aided its commission by the retention of the documents. He submitted that the judge was wrong to hold "a mini-trial" and so find that Mr Dearle never gave advice to intercept the mail.

28. In anticipation of Mr Sherborne's submission that any nominal damages could be recovered, Mr Crystal sought to contend that the court could award Mr White aggravated damages and furthermore that the court's duty to give effect to Article 8 of the ECHR required the court to give more than nominal damages where greater compensation was justified by a wrongful interference with another's personal private property.

Discussion

29. Before turning to the issues raised in the appeal which, I emphasise, arise in the law of tort, I need first to explain the *Hildebrand* practice in the Family Division whilst noting at the same time that this practice is not the subject of the appeal but the background against which it is made. *Hildebrand v Hildebrand* [1992] 1 FLR 244 was decided by Waite J. Counsel for the victorious wife was Mr Nicholas Wilson Q.C. In that case it was the husband who had surreptitiously obtained photocopies of the contents of his much richer wife's personal box file kept in the matrimonial home. The wife issued a questionnaire seeking disclosure of those copy documents but the husband refused to produce them. The husband made another series of raids on the wife's home and took photocopies of so many documents obtained by him in the course of those visits that they would "fill a crate". The wife conceded she had to disclose these latter documents but the husband persisted in his objection to disclosing the copies he had taken of the box office file because he asserted that he needed to maintain an element of surprise in circumstances where it was being alleged there was a real risk that disclosure might prompt a fraudulent concealment of evidence by the wife. Waite J. ruled against the husband because in view of the fact the wife still had

her box file and knew the documents that were in it, it was fanciful, even absurd, to argue that there was still some remaining element of surprise of which the husband could take advantage. The cat was already out of the bag.

30. There was another issue before the court. The husband had served a questionnaire and demanded answers to it which, it was submitted on the wife's behalf, were already known to him from an inspection of the documents he had removed. That questionnaire was a standard practice of the Family Division and had the character both of a request for discovery and of an interrogatory. The wife objected to answering it on the grounds that because the husband had taken matters into his own hands by blatantly and, as was conceded, improperly, entering the wife's home without permission to secure his crate full of documents, the court should not condone such conduct for it was an abuse of the court's process. Waite J. agreed. He held at p. 254 that the husband had chosen to take matters into his own hands as regards discovery and in such circumstances "to come to the court and seek to make use of a questionnaire designed to achieve the ends of justice by supplying gaps in the knowledge of a genuinely ignorant party is to make a mockery of the court's discovery procedures".

31. There are two further points to be noted. The first is this, as Waite J. held at page 247:

> "There is another important feature in the context of discovery which it is relevant to mention as applying in family cases. The jurisdiction is a paternal one, and, where financial proceedings are involved, the court is exercising not merely a paternal but also, in appropriate circumstances, an inquisitorial jurisdiction. Underlying the whole basis of the exercise of the court's discretion under the amended s. 25 of the 1973 Act is the duty of both sides to provide the court with information about all the circumstances of the case, including, among other things, the particular matters specified in s. 25. That was very clearly stated by the House of Lords in *Livsey (formerly Jenkins) v Jenkins* [1985] AC 424 … (see the speech of Lord Brandon at p. 436. …)."

32. The second important point is to note the limited ambit of the judgment. The judge said at p. 248:

> "Submissions were made to me as to the propriety of that conduct [obtaining the contents of the box file and photocopying them] and I learnt, with interest, of the problems that practitioners experience when they are asked to advise spouses on the brink of a marriage break down as to whether it is proper to photograph secretly documents belonging to the other spouse. These involve deep questions. Again, I think they are better left to be resolved by those who have the task of framing the rules of professional etiquette or, if necessary, by a court with appropriate authority in a case in which the matter arises directly for consideration or for an authoritative obiter statement."

This appeal may be the occasion for that consideration.

33. The next authority is the decision in *T v T (Interception of Documents)* [1994] 2 F.L.R. 1083 decided by none other than Wilson J. as he then was. There the wife feared that the husband would seek to understate the true extent of his resources to the court and so she engaged in a number of activities, including opening and taking letters addressed to him and breaking into his office, with the intention of gathering documentation to enable her to ascertain the husband's true financial position. He retaliated. My Lord noted that at times the wife used force in order to obtain the documents, for example by breaking the door or window of the husband's office. She also opened letters addressed to him and misappropriated a letter which was not produced by her solicitors until six months later. She removed another letter and that was returned to him via the solicitors five months later. The husband in turn broke down the door of the room in which the wife kept her papers and removed a mass of them. Less than a fortnight before the substantive hearing the wife's solicitors produced two hundred and twelve pages of further documents or copies of documents belonging to the husband. She had had a substantial number of them in her possession for many months. She entered his office while he was there and snatched his diary and ran off with it, read it and then returned it. My Lord held at p. 1085:

> "The first question, which is not straightforward, is to what extent the wife's activities in relation to documents were reprehensible. The fact is that the husband had not made a full and frank presentation to the court of his financial resources and that a few of the documents taken by the wife (or, like the diaries, scrutinised by her and then called for) have enabled this to be made clear. The wife anticipated – and I find that she reasonably anticipated – at the outset of the litigation that the husband would seek to reduce the level of her award by understating his resources in breach of his duty to the court. On balance, I consider that in those circumstances 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, for that matter, to scour the dustbins. But the wife went far beyond that. She:
>
> (a) used force to obtain documents;
>
> (b) intercepted the husband's mail; and
>
> (c) kept original documents."

34. My Lord went on to consider the next question, namely:

> "… whether the reprehensible activities of the wife in relation to documents amount to relevant 'conduct' or to a relevant 'circumstance' within the subsection. I appreciate that it has been held that a spouse's behaviour in the ancillary litigation, specifically a dishonest failure to make full disclosure, amounts to such conduct … … a dishonest disclosure will more appropriately be reflected in the inference that the resources are

> larger than have been disclosed (in which case it will fall within s. 25(2)(a)) and/or in the order for costs; indeed that is how I intend to approach the husband's disclosure in this case. I am also firmly of the view that the wife's activity in relation to documents should not be brought into my reckoning of the substantive award, whether as conduct or a circumstance, but should prima facie have some relevance in respect of costs. The extent of their relevance will depend on the potency of other factors. Although the wife's activities may not have caused significant increase in the costs, the court's discretion is wife enough to permit their inclusion in its survey of the litigation."

I agree that it is appropriate to consider that such "reprehensible activities" are capable of constituting "conduct" within the meaning of s. 25(2)(g) of the Matrimonial Proceedings Act 1973 or of being a reason for ordering costs against the miscreant party and, as I understand it, that is the way the Family Division marks its displeasure with such an improper resort to self-help. It should, however, be noted, as Eady J. has correctly observed, that neither *T v T* nor *Hildebrand* itself dealt with the question of whether or not the conduct of the wife, still less of her solicitors, was tortious or in breach of the duty of confidence/privacy. That question falls to us to decide.

35. The next case in the trilogy is *L v L* [2007] EWHC 140 (QB), [2007] 2 FLR 171 where a claim brought in the Queen's Bench Division by a husband against his wife and her solicitors, also well-known family lawyers, Hughes Fowler Carruthers, for delivery up of two copies of the hard drive from the husband's laptop. In that case the solicitors, who it seems were acting on the advice of leading counsel (see [37] and [39]), had advised the wife that it would be a sensible precaution to remove his laptop from his study and take copies of the hard drive which was virtually the only repository of the husband's documentary information. The husband alleged that the hard drive contained numerous documents, many of which were covered by legal professional privilege, others were of a confidential nature and related to his personal life, others related to his personal, financial and business affairs and yet others related to personal and business affairs of friends and colleagues. Tugendhat J. introduced his judgment saying:

> "[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 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 of 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 of the criminal provisions of the law designed to protect the databases contained in digital form in computers."

36. He decided 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, that case concerning not only a claim to misuse of private and confidential information but also breaches of the Data Protection Act 1998 and the Computer Misuse Act 1990. So he ordered the delivery up of the hard drives to the husband's solicitors. He did not find the conduct of the wife's case at all attractive. He said:

> "[93] I find it a matter for 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.
> …
>
> [107] It is a matter for Parliament and the courts to strike the balance between the public interest in protecting privacy and the public interest in ensuring fair trials and the protection of the rights of spouses, in particular by ensuring that evidence is

> not destroyed and concealed. But whatever the right balance, it is not in the public interest that the law be flouted.
>
> …
>
> "[123] … It is said that this [the *Hildebrand* procedure] is a concept unknown in the Queens Bench Division. I do not consider the concept is unknown in this Division, even if the name of the case is not cited. As I understand the principle, it is the application to Family Proceedings of the principle referred to above, namely that in civil proceedings it has hitherto generally been considered that admissible evidence must be admitted however it has been obtained and if it has been obtained by reprehensible means, then that should be visited upon the wrongdoer, if at all, in orders for costs, or in some other way."

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. So much for the Family Division; and later in this judgment I will return to the *Hildebrand* procedure to examine its effect, if any, in the civil proceedings before us.

38. I must turn now to examine whether the judge erred in dismissing the claim principally as disclosing no cause of action but also in part because there was no realistic prospect of establishing that the solicitors had advised Mrs White to intercept her husband's mail.

The proper approach to this application to strike out

39. When considering whether or not the claim discloses a cause of action, the facts asserted in the claim are assumed to be true. So the question is whether or not on those facts a good claim would lie. When considering the claim to strike out pursuant to CPR 24.2 the defendants must show that the claimant has no real prospect of succeeding on the claim and that there is no other compelling reason why the case should be disposed of at a trial. Lord Hope of Craighead spelt out the proper approach to that question in *Three Rivers DC v Bank of England (No. 3)* [2003] 2 A.C. 1, 260:

> "[95] … it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible

> to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

The claim for infringement of the claimant's rights in confidence and privacy and for misuse of his private information

40. Mr Michael Crystal, correctly in my view, does not pursue this claim any longer and I say no more about it.

The claim for wrongful interference with property: joint and several tortfeasors

41. "Wrongful interference with goods" is the generic name now given to a series of torts including conversion of goods and trespass to goods: see the definition in section 1 of the Torts (Interference with Goods) Act 1977. These torts are different. Thus, as we shall see, A may commit trespass to goods by removing them from the claimant's possession and if he then passes the documents to B who takes possession with the intention of asserting some right or dominion over them or dealing with them in a manner inconsistent with the right of the true owner, then B may be guilty of conversion. Assuming for the moment that B is not himself guilty of trespass, he may be liable for A's acts if he is a joint and several tortfeasor. Thus, to quote *Clerk and Lindsell on Torts* 19th edition at **4-04**:

> "Where one person instigates another to commit a tort they are joint tortfeasors; so are persons whose respective shares in the commission of a tort are done in furtherance of a common design. "All persons in trespass who aid or counsel, direct or join, are joint trespassers.' [per Tindal C.J. in *Petrie v Lamont* (1842) CAR. Marsh. 93 at 96]."

42. So the first question is whether or not the claim sufficiently pleads a case of joint and several responsibility and if so whether there is no real prospect of it succeeding. Paragraph 5 of the claim (set out in paragraph [16] above) directly alleges that Mr Dearle told Mrs White to take the claimant's mail. Paragraph 9 of the claim expressly pleads joint and several liability. In response to a request for clarification and further information, the claimant made clear that he was still pursuing the allegation that the first and second defendants told the third defendant to take the claimant's mail. The claim cannot be struck out for any failure to plead the cause of action.

43. The judge, however, summarily dismissed that part of the claim. He concluded in paragraph 15 of his judgment set out at [22] above that the evidence was all one way and that both solicitor and his client denied giving advice or encouragement to the

interception of the claimant's mail. That ignores, however, what the claimant said his wife had told him. The claimant may well have an uphill battle in proving his case. But is it a fanciful assertion? Sadly Mr Dearle is shown on the papers before us not to be entirely reliable in the way he has presented his evidence (which is a long way short of saying he is not to be believed). He has made mistakes. In responding to the claimant's request for further information the defendants pleaded that they came into possession of the *Hildebrand* documents on various dates between August and December 2007 and those facts were stated by Mr Dearle to be true. In his witness statement of 11th November 2008 he had to correct that. He acknowledged that documents were received between July 2006 and December 2007. In his witness statement of 1st October 2008 Mr Dearle set out the advice he gave to the effect that Mrs White was only entitled to take copies of documents that she found in the matrimonial home provided she did not break into any of the claimant's property in order to obtain access. He attached his attendance note of 3rd May 2007 "which records the advice that I gave her". Subject to claims of professional privilege, Mr Dearle may legitimately be asked what advice, if any, he gave prior to or at least on receipt of documents which may have come in on different occasions between July 2006 and December 2007. On those facts there is, it seems to me, a case for the defendants to answer and the claimant's sworn assertion that his wife informed him that she had been told to take his documents cannot be summarily dismissed. I repeat that the claimant may well not succeed in establishing that case on the balance of probabilities but that is a far cry from shutting him out from his right to a fair trial of the issue.

Trespass to goods

44. Trespass to goods is an ancient tort. *Clerk & Lindsell* at **17-123** describes the nature of trespass to goods in these terms:

> "The action of trespass to goods, *de bonis asportatis*, has always been concerned with the direct, immediate interference with the claimant's possession of a chattel. Though the reference to asportation suggests perhaps what is the most common feature of this form of trespass that is, the taking away or removal out of the claimant's possession, the wrong of trespass includes any unpermitted contact with or impact on another's chattel. The interference must, it seems, be of a direct nature and involve some kind of physical contact or affectation. "Thus, to lock the room in which the claimant has his goods is not a trespass to them". [*Hartley v Moxham* (1842) 3 Q.B. 701]. But a mere touching is enough for liability, at least if damage is caused."

Counsel's researches have produced little modern authority. Mr Crystal relies on the dictum of Lord Diplock in *Inland Revenue Commissioners v Rossminster Ltd* [1980] A.C. 952, 1011 that "the act of handling a man's goods without his permission is prima facie tortious." In *Bentley v Gaisford* [1997] Q.B. 627, 635 Sir Richard Scott V-C observed in a passage in his judgment which may be obiter but nonetheless persuasive:

> "The clandestine removal or some other unauthorised handling of the documents would, however, constitute a tortious interference with the solicitor's possession of the documents and, accordingly, would constitute a trespass to goods for which damages could be claimed."

45. Mr Sherborne draws attention to this passage in the judgment of Atkin L.J. in *Sanderson v Marsden and Jones* (1922) 10 Lloyds Rep. 467, 472:

> "… an act of conversion differs from a mere trespass in as much as the former must amount to a deprivation of possession to such an extent as to be inconsistent with the right of an owner and evidence and intention to deprive him of that right, whereas the latter includes every direct forcible injury or act disturbing the position of the owner, however slight the act may be."

46. It is not in dispute that the original documents are chattels. And it is not in dispute that Mrs White removed them and that (perhaps with the exception of the P&O contract where the solicitors seem to have received a facsimile copy, not the original document) she passed all that she had taken into the possession of her solicitors. The claim sufficiently pleads the taking or interception by Mrs White and the receipt by the solicitors. So is that enough? In my judgment a good cause of action is sufficiently pleaded at least in respect of the claim against Mrs White. Hers was a direct and immediate interference with the claimant's possession of the documents. It does not seem to me to matter whether she "took" documents which the husband had left "lying around" or whether he "intercepted" them before the husband had had the chance to receive them into his actual possession. It is a classic case of asportation. If the case of joint and several responsibility is established, the solicitors will also be liable for her tortious conduct.

47. The position of the defendants standing alone is more complicated. Mr Sherborne relies on *Clerk & Lindsell* **17-128**to the effect that

> "Though the right to possession, without actual possession, may enable a claimant in conversion to maintain a claim, in trespass the claimant must be in possession at the time of the interference."

He submits accordingly that because possession had passed from Mr White to Mrs White when she removed the documents, the documents were no longer in his possession at the vital moment when she passed them to the defendants and they began to handle them.

48. There seems little readily available learning on this question which I confess I have found to be difficult. The authority cited by *Clerk & Lindsell* is *Ward v Macauley* (1791) 4 T.R. 489 at 490 where Lord Kenyon C.J. said:

> "The distinction between actions of trespass and trover is well settled: the former is founded on possession: the latter on property. Here the plaintiff had no possession; his remedy was

> by an action of trover founded on his property in the goods taken."

Although not in our bundle of authorities, I have looked at that case. The plaintiff was the landlord of a house let furnished to Lord Montford. An execution was issued against Lord Montford under which the defendant, the Sheriff of Middlesex, seized part of the furniture, notwithstanding that the officer had noticed that it was the property of the plaintiff. He brought an action of trespass to goods. It is, in my judgment, important to observe that he had let Lord Montford into possession as his tenant with exclusive right to the use of the furniture and thus he no longer had any immediate right to possession himself, nor any actual possession. Similarly the bailor may have no right of action in trespass. That case provides no answer to the case where possession is not surrendered voluntarily but wrongfully usurped as when the possessor of goods is deprived of his possession without his consent and by a trespass for which there is no justification.

49. No authority was cited to us on this point. I note in *Halsbury's Laws of England* 4th Edition Reissue vol. 35, para 1216 that:

> "The right to have legal and de facto possession is a normal but not necessary incident of ownership. Such a right may exist with, or apart from, de facto or legal possession, and in different persons at the same time in virtue of different proprietary rights. Thus, when an owner has been wrongfully dispossessed of his goods by theft, or has lost them, he retains the right to possess them; but, where he has bailed them for a term or by way of pledge, this right is temporarily suspended. Similarly, an executor immediately on the testator's death and before probate has constructive possession of the testator's goods.
>
> Where de facto possession is undermined, as, for example, where it is equally consistent with the facts that possession may be in one person or another, legal possession attaches to the right to possess."

It seems to me to be arguable that when Mrs White removed Mr White's documents she may have assumed actual possession of them but the right to legal possession remained in Mr White. The great treatise on the subject is *Wright and Pollock's Possession in the Common Law* which I have not researched and insufficient argument has been addressed to us for me to be able confidently to express a view on the nature of the possession required to found the claim, "possession" being a word of notoriously ambiguous meaning. If it is established that the defendants took possession from Mrs White knowing that she was a trespasser, then their taking possession and handling the documents may be as trespassory as hers. For present purposes it may not in any event be necessary to determine this question finally. Too much depends upon the facts as they emerge at the trial and the precise findings of the judge and, because the answers are not clear cut, summary judgment is an inappropriate vehicle for determining the issue. I would certainly not be prepared to strike the claim out at this stage.

50. In conclusion on this aspect, I am clear that there is a good cause of action maintained against Mrs White and that the cause of action against the defendants cannot be struck out as having no real prospect of success. Even if the claim against Withers and Mr Dearle cannot be directly established, it may be that they are liable as joint and several tortfeasors with Mrs White.

The claim in conversion

51. Here there is good modern authority. In *Kuwait Airways Corp v Iraqi Airways Co. (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 A.C. 883, Lord Nicholls established these propositions.

> "39. … I need not repeat the journey through the textbooks and authorities on which your Lordships were taken. Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion.
>
> 40. The judicially approved description of the tort in *Clerk & Lindsell* encapsulates, in different language, these basic ingredients. The flaw in IAC's argument lies in its failure to appreciate what is meant in this context by 'depriving' the owner of possession. This is not to be understood as meaning that the wrongdoer must himself actually take the goods from the possession of the owner. This will often be the case, but not always. It is not so in a case of successive conversions. For the purposes of this tort an owner is equally deprived of possession when he is excluded from possession, or possession is withheld from him by the wrongdoer.
>
> 41. Whether the owner is excluded from possession may sometimes depend upon whether the wrongdoer exercised dominion over the goods. Then the intention with which acts were done may be material. The ferryman who turned the plaintiff's horses off the Birkenhead to Liverpool ferry was guilty of conversion if he intended to exercise dominion over them, but not otherwise: see *Fouldes v Willoughby* (1841) 8 M & W 540.
>
> 42. Similarly, mere unauthorised retention of another's goods is not conversion of them. Mere possession of another's goods without title is not necessarily inconsistent with the rights of the

> owner. To constitute conversion detention must be adverse to the owner, excluding him from the goods. It must be accompanied by an intention to keep the goods. Whether the existence of this intention can properly be inferred depends on the circumstances of the case. A demand and refusal to deliver up the goods are the usual way of proving an intention to keep goods adverse to the owner, but this is not the only way."

52. In the context of this case it is important to note that it is a tort of strict liability. In a classic statement, Diplock L.J. said in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 W.L.R. 956, 970/1:

> "At common law, one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. The duty is absolute; he acts at his peril."

See, to similar effect, Lord Hoffmann in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1, paragraph [95]. Here it is beyond dispute that each of the defendants knew full well that they were dealing with the claimant's documents.

53. The claim includes allegations of the defendants' using the documents and the response to the request for further information refers to the "receipt and custody of each document inevitably involving copying" and "reading and noting the contents of the documents". Mr Sherborne submits that that is insufficient to establish the exercise of dominion over the documents. I do not agree. What is required is some conduct inconsistent with the rights of the owner. The owner can control who reads his documents or who copies them and keeps them. Here the case against the defendants is that they have done that without the claimant's knowledge or consent, they have acted inconsistently with the rights of the owner. In my judgment the claim does disclose a good cause of action.

Are the Hildebrand rules a good defence as giving a lawful excuse or legitimate justification or as being in the public interest?

54. On the facts which seem to be beyond dispute, some of the claimant's documents were intercepted and many, if not all were retained by Withers for months. To that extent at least the *Hildebrand* rules as I summarised them at [37] above were not complied with and *Hildebrand* can afford the defendants no defence. Although, therefore, it may not strictly be necessary to determine these issues, it may assist the court to express some tentative views in the event that it is found that some documents were taken, copied but returned forthwith in a manner compliant with *Hildebrand.*

55. *Lawful excuse*: *self-help*: The *Hildebrand* rules stem from acts of self-help. Self-help cannot of itself be a good defence. There are alternative means of obtaining

protection which would not necessitate the wrongful interference with another's goods. The court can grant orders for the detention, custody or preservation or for the inspection of relevant property. Within limits – see *T v T* set out at [33] above – the Family Division tolerates self-help as a way of ensuring that evidence can be placed before the court of the true financial position so that the court can discharge its duty under section 25 of the Matrimonial Proceedings Act 1973. At its heart the question is one of the admissibility of evidence if it is wrongfully obtained. A similar dilemma faces other divisions of the High Court: see for example *Jones v University of Warwick* [2003] EWCA Civ 151 where the issue was whether, and if so when, a defendant to a personal injury claim is entitled to use as evidence a video of the claimant which was obtained by filming the claimant in her home without her knowledge after the person taking the film had obtained access to her home by deception. This called for a balance between conflicting public interests, the right to a fair trial and the invasion of privacy after the trespass to the claimant's home. Admitting the evidence, Lord Phillips of Worth Matravers added, "…it is appropriate to make clear that the conduct of the insurers was improper and not justified." It is, therefore, one thing to balance wrong-doing against the interests of justice in order to ensure a proper fair trial but quite another to admit self-help as a defence to the tortious activity in so garnering that evidence.

56. In that regard the bounds of self-help are narrow indeed. In *Southwark LBC v Williams* [1971] 1 Ch. 734, Lord Denning M.R. said at p. 744:

> "If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine they were in need or would invent a need, so as to gain entry. The plea would be an excuse for all sorts of wrongdoing. So the courts must refuse to admit the plea of necessity to the hungry and the homeless: and trust that their distress will be relieved by the charitable and good."

Edmund Davies L.J. said at p. 745:

> "But when and how far is the plea of necessity available to one who is prima facie guilty of tort? Well, one thing emerges with clarity from the decisions and that is that the law regards with the deepest suspicion any remedies of self-help and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear – necessity can very easily become simply a mask for anarchy."

57. *Public interest:* Nor is there much scope for public interest serving as a defence to trespass: see *Monsanto v Tilley & ors* [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 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 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 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 with which I will deal shortly. But first I must deal with a tricky point.

59. *The de minimis non curat lex argument*: This gives rise to a question that does trouble me, but which was not addressed in argument in any detail (if at all), namely whether an action will lie when minimal, trivial or insignificant harm has been done to the right of the claimant in all the circumstances of the case, e.g. where a wife removes a document, copies it on a machine in the home, then immediately replaces it, or where she takes it to her solicitors who copy it and it is then returned forthwith. What is the legal position where the interference is *de minimis*? *Clerk & Lindsell* say this at **17-123**:

> "This does not mean, however, that all intentional touching of another's goods should amount to trespass. On the contrary, the theatre-goer who moves someone else's coat in the cloakroom in order to retrieve his own should not be liable in trespass, nor should the pedestrian who brushes past a car parked in a crowded street, perhaps breaking off an ornamental mascot in the process. It is submitted that an analogy should be drawn here with trespass to the person where Goff L.J. has said that there is not trespass where the actor has not in the circumstances "gone beyond generally acceptable standards of conduct". The theatre-goer and the pedestrian have not; and that is the ground on which they ought to be excused."

That dictum of Robert Goff L.J. appears in *Collins v Wilcock* [1984] 1 W.L.R. 1172, 1178, a case in the Divisional Court where the defendant woman police officer had had taken hold of a suspect's arm to restrain her. His Lordship held:

> "Although such cases [jostling which is inevitable from one's presence in a busy street] are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life."

That was referred to in *Wilson v Pringle* [1987] Q.B. 237 where Croom-Johnson L.J., giving the judgment of the Court of Appeal, said at p. 252/3:

> "Robert Goff L.J.'s judgment is illustrative of the considerations which underlie such an action, but it is not practicable to define battery in terms of "physical contact which is not generally acceptable in the ordinary conduct of daily life."
>
> In our view, the authorities lead one to the conclusion that in battery there must be an intentional touching or contact in one form or another of the plaintiff by the defendant. That touching must be proved to be a hostile touching. That still leaves unanswered the question "when is a touching to be called hostile?" Hostility cannot be equated with ill-will or malevolence. It cannot be governed by the obvious intention shown in acts like punching, stabbing or shooting. It cannot be solely governed by an expressed intention, although that may be strong evidence. But the element of hostility, in the sense in which it is now to be considered, must be a question of fact for the tribunal of fact. "

Quite how that translates to trespass to goods is uncertain.

60. Nor is the position with regard to conversion any clearer. Paragraph **17-11** in *Clerk & Lindsell* states that:

> "A mere transitory exercise of dominion, such as unlawfully "borrowing" or using goods, may still amount to conversion. If a man takes my horse and rides it and then redelivers it to me nevertheless I may have an action against him, for this is a conversion, and the redelivery is no bar to the action but shall be merely a mitigation of damages."

On the other hand *Fleming's Law of Torts*, 8th edition, refers to *Fouldes v Willoughby* (1841) M&W 540 where the plaintiff, after embarking his horses on the ferry, got involved in a dispute with the boatman. The latter requested him to get off and remove his horses but when the passenger refused to comply he put them ashore himself. They were conveyed to an hotel kept by the defendant's brother. The plaintiff again declined to leave the boat and was then carried across the river. It was held that the defendant by merely turning out the horses had not committed a conversion. The commentary suggests that:

> "The wrong was not so serious as to make it proper to require him to pay the full value. His possession was for a short time only, no damage was done to the horses and, far from disputing the owner's title, his conduct throughout emphasised that he did not want any part of them. On the other hand, had the horses been destroyed, lost or injured, he would surely have been treated as a converter. "The controlling factor therefore seems to be not necessarily the defendant's act viewed in isolation, but whether it has resulted in a substantial interference with the owner's rights so serious as to warrant a false sale. Hence, a particular type of intermeddling is probably not, under any and

> all circumstances, necessarily a conversion. What may be decisive are such additional factors as the extent and duration of the interference, the harm done to the chattel and, not least, the defendant's intent", citing Prosser, *Nature of Conversion,* 42 Corn L.R. 168 (1957)."

There is a great deal of common sense in those observations and I can well understand why they could be applied in the circumstances I am postulating. However, others read *Fouldes* differently and see it as a case turning simply on whether or not there was an interference with dominion. I am inclined to agree with that view since it more accurately reflects the judgment of Lord Abinger C.B.:

> "The judge was wrong to direct the jury that the simple fact of putting the horses on shore amounted to conversion. He should have added that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself and the defendant, in furtherance of that object did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them."

61. What conclusions am I to draw from that? It seems to me to still be moot whether or not a slight interference will amount to either trespass or conversion. Common sense suggests that minor infractions especially in this fraught field of divorce should not lead to claims in tort being brought where the action would not be censured by the Family Division judge if it were considered to be, adapting the approach of Robert Goff L.J. in *Collins v Wilcock*, "acceptable in the ordinary conduct of everyday life [in the Divorce Courts]." Minor misconduct may be best regulated by the Family Division and should not become the source of satellite litigation in the Queen's Bench Division. The final determination of the question of liability in tort for a minor trespass or conversion must depend upon the facts and circumstances of the particular case and it is, I am rather relieved to say, not a matter which it is appropriate for us to decide on an application to strike out a claim. It must await a decision at a trial when the facts are clear.

62. If such a trivial claim is brought, it is difficult to see anything more than nominal damages being suffered and I would encourage and expect such a claim to be struck out for being an abuse of the process.

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 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.

Abuse of process in this case

64. Mr Sherborne submits that this is a case where damages will be limited to a nominal or derisory figure. He points out that Brandon L.J. held in *Brandes Goldschmidt & Co Ltd v Western Transport Ltd* [1981] 1 Q.B. 864, 870 that: "Damages in tort are awarded by way of monetary compensation for the loss or losses a plaintiff has actually sustained" and he points out that no loss is alleged nor can it easily be seen to have been suffered from the mere taking, copying and retention, even for months, of original documents. It may be that the claimant could show that he suffered financial loss in the expenditure of travel to Southampton to sign the P&O contract which would not have arisen if he had been able to return it by post in the ordinary course of business. At the moment no such loss is pleaded.

65. Mr Sherborne submits accordingly that even if the claimant is ultimately successful, the damages will be so limited as not to justify the taking up of valuable court time in pursuit of that remedy when in truth the purpose of the litigation is wholly collateral, namely, because Withers dared act in the divorce proceedings against him, to launch an unpleasant attack upon them to remove them from the record, something which McFarlane J. refused to do, or at least cause them aggravation. He relies upon *Jameel (Youssef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946 where Lord Phillips of Worth Matravers M.R. made clear that:

> "An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice."

This case, submits Mr Sherborne, is "not worth the candle" and so should be stopped in its tracks here and now.

66. Mr Crystal on the other hand submits that aggravated damages are recoverable. He acknowledged the need to plead it and indicates that application will be made for such amendment to enable that claim to be advanced. It may have significance perhaps in respect of the P&O contract but it may have more relevance to the retention of Letty's letter. He also advances an argument, again not pleaded, that even if he cannot bring a separate claim for misuse of confidential information, he can somehow persuade the court to give horizontal effect to Article 8 so as to justify the quantum of damages reflecting the wrongful interference with another person's private property. Whilst I see the force of the argument in respect of aggravated damages, I do not propose at the moment to entertain his radical argument under Article 8: the court will deal with that if and when it is properly pleaded and properly before the Court.

67. Furthermore, it must always be remembered that solicitors are officers of the court and if they are shown to have done wrong they should face the judgment of the court. It is not conducive to the administration of justice that such claims are simply swept under the carpet. It is in the public interest that the bounds of proper conduct be clarified. The interception and retention of Letty's letter, more than the P&O contract, leaves me with such an uncomfortable feeling that for my part I would be reluctant to shut out the claimant and deny him his day in court. Thus I am not persuaded that this claim has been shown to be an abuse of the process.

Conclusions

68. Eady J. was quite right to dismiss the claim relating to the misuse of confidential or private information. The case argued before us on the interference with property is so wholly different from the case argued before him that he cannot be criticised at all for dealing with that summarily. However Mr Michael Crystal Q.C. has convinced me that those claims cannot be struck out. Since there is no abuse of process, the matter must proceed to trial. I would allow the appeal accordingly.

Lord Justice Sedley :

69. I agree that as much of this claim as concerns trespass to goods and conversion cannot be struck out either as an abuse of the court's process or as a claim too trivial to merit court time and resources.

70. There will be many cases in which what has been surreptitiously taken by one spouse in the course of a matrimonial property dispute turns out to be either inconsequential or uncontentious; but that cannot always be known at the time. So it will generally – though certainly not always - be legitimate to copy such documents in case they turn out to be material. But the pragmatic inroad which the *Hildebrand* doctrine makes on the general law does not extend to keeping originals. If they are kept, it will ordinarily be at the detaining party's risk.

71. Mr White's claim, as now presented, illustrates two versions of this risk. First, if a contractual document is not simply copied but is retained without good cause, there may be a real and predictable consequential loss (though in the event there was none here). Secondly, if a letter such as Letty's distressed plea to her father is taken and improperly kept from him, there is no reason why the absence of the kind of harm which is generally compensable in damages should set the limit of the claim. The nominal damages which would otherwise be the limit may be aggravated if, for example, the court finds the interference to have been callous, hurtful and unnecessary.

72. While, as Lord Justice Ward says, we are not called upon to decide finally what the legal relationship is between a *Hildebrand* abstraction and the law of trespass and conversion, it seems to me at the moment that in the great majority of cases it will not matter whether or not removal for the purposes of litigation constitutes a defence to either tort. What will matter is that, provided the document is not obviously off limits (as in my present view Letty's letter was) and provided that, whether or not copied, it is promptly returned (as the material documents were not), there will be no appreciable damage. Today, in contrast to when most of the leading cases were decided, that is enough to allow the courts to call an early halt to any lawsuit in tort. The claim for a shilling in damages in order to prove a point and obtain an award of costs is history.

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 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.

74. I recognise that the desire for vengeance on the lawyers acting for an estranged spouse is as common as it is irrational. The courts are right to be wary about letting such expeditions through their doors. But if, among these, one turns out to be legally viable, the claimant's motive cannot shut the court's door; and this, I agree, is such a case.

Lord Justice Wilson:

75. I would also allow the appeal. But, profound as is my respect for the views of Ward LJ, I wish to stress the narrow ambit of the appeal and to disassociate myself from some of his *obiter* remarks.

76. As drawn, there are three grounds of appeal. Two relate to the defendants' receipt and in particular their retention of *original* documents; and the third relates to their alleged responsibility, jointly with the claimant's wife, for the taking, i.e. for the *interception*, of the claimant's mail. In effect there are two grounds of appeal: they relate to *originals* and *interception*.

77. The oral argument of Mr Crystal QC precisely followed the above lines. On ten separate occasions in the course of his submissions to us he stressed that the appeal was primarily founded upon the defendants' retention of *original* documents; and he made clear that his only subsidiary contention, which (he said) at any rate deserved to be placed before a court of trial, was that, if and insofar as the claimant's wife had tortiously *intercepted* the claimant's mail, the defendants were also liable in that (so the claimant alleges) they had instructed or advised her to intercept it.

78. It would be helpful at the outset for me to define terms; and in this respect I agree with – but would wish to elaborate upon – the last sentence of [12] in the judgment of Ward LJ above. The context is that, in connection with proceedings for ancillary relief between them, B either secretly takes documents which belong to A and are in his possession or intercepts documents which were intended to pass into his possession. All the actual pieces of paper thus taken or intercepted by B are for this purpose the "original" documents. In this context, therefore, the word "original" has a wider meaning than in other contexts in that it can extend to a document which might otherwise be described as a copy. The photocopies of the original documents then made by or on behalf of B are for this purpose the "copy" documents. At some stage B is likely to create a second set of the copy documents. For there will come a time when B will have to disclose the copy documents to A; and B will usually do so by serving one set of the copy documents upon A. If so, B will wish to keep a second set for her or his own subsequent use in the proceedings. The copy documents thus disclosed to A are the *Hildebrand* documents. If B has retained all or any of the original documents, they must also and at the same time be disclosed to A, indeed returned to A, and, in that event, they will also constitute *Hildebrand* documents. But, as I will explain, this practice of self-help is accepted in the family courts as necessary and thus legitimate only within narrow limits; and one limit is that the original documents should be restored to the places whence they were taken as soon as practicable after they have been photocopied. So, at the later, disclosure stage, B

ought not still to be in possession of any of the original documents; and thus the *Hildebrand* documents then disclosed ought to be confined to copy documents.

79. Ward LJ has pointed out that I appeared as an advocate in *Hildebrand v. Hildebrand*, cited above, decided by Waite J in 1990 and also, by coincidence, that in 1994 I presided, as a judge, over *T v. T (Interception of Documents)*, cited above. I remember explaining to Waite J the difficulties which confronted me and other practitioners in the field of ancillary relief in advising clients of the circumstances in which it was permissible for them secretly to borrow their spouse's documents for photocopying with a view to their subsequent use in the proceedings; and I urged Waite J to give guidance *obiter* in that respect. In the event, unsurprisingly, he declined to do so. In the passage quote by Ward LJ at [32] above, Waite J said only that the issue raised "deep questions … better … resolved … in a case in which the matter arises directly for consideration or for an authoritative obiter statement". In the light of the facts that the present appeal is brought only against the striking out of the claim and that it is founded only upon such actions on the part of the defendants as exceeded what would be sanctioned in the Family Division under the *Hildebrand* "rules" as subsequently developed, I have reservations about the suggestion of Ward LJ that this appeal may be the decision for the consideration which Waite J referred. 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 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).

80. In December 1993, only months after I became a judge of the Division, I gave an address to family lawyers in Harrogate entitled "Conduct of the Big Money Case". It was published in [1994] Family Law at 504. Most of it is now laughably out of date and it is no longer worth reading. But I said, at 505:

> "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? One is naturally hesitant to advise on a course which is essentially underhand, but 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."

Then, in accordance with the decision in *Hildebrand*, I stated that copy documents thus obtained were discoverable documents which should be disclosed at the normal disclosure stage or (I added by way of modest qualification) earlier if, having come to

learn or suspect that such documents were held, the other spouse's solicitors were, prior to the normal disclosure stage, to request their disclosure.

81. The decision in *T* came seven months later. Ward LJ has explained, at [33] and [34] above, the circumstances in which I acceded in part to the husband's request that I should weigh in the balance against the wife her activities in relation to his documents. I built upon what I had suggested in Harrogate. I found that the wife reasonably anticipated that the husband would understate his resources in the proceedings in breach of his duty to the court and thus held that it was reasonable for her to photocopy such of the husband's documents as she could locate without the use of force. But I found (at 1085D) that her actions were improper in three respects, namely in that she:

> "(a) used force to obtain documents;
>
> (b) intercepted the husband's mail; and
>
> (c) kept original documents."

I also found that the timing of her disclosure of the documents had not been in accordance with the decision in *Hildebrand* (to which I added the same modest qualification). I ruled that her misconduct in these respects would more aptly be reflected in my order for costs than in my substantive award to her. These, therefore, were features to which I decided to give weight in the exercise of a discretion. I cited no authority because there was none. I readily acknowledge, as Ward LJ has suggested, that I did not approach the matter through the prism of whether the wife (or her solicitors) had committed tortious acts in respect of any of the documents.

82. Since the decision in *T* in 1994 no judge of the Family Division has, to my knowledge, sought to add to, or subtract from, the so-called "rules" either as to the timing of disclosure of *Hildebrand* documents identified by Waite J (as modestly qualified by myself in *T*) or as to the three areas of misconduct in the manner in which documents may be taken or kept which I suggested in *T*. Albeit 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, whether in terms of admissibility or of penalty, in particular in relation to costs against those who have infringed them. Ward LJ may be right to suggest, at [37] above, that even documents taken in breach of the *Hildebrand* "rules" will at any rate be admitted in evidence; but I, for my part, would not express myself so categorically. There appear to be some concerns that the *Hildebrand* "rules" fail to make clear the time-frame within which original documents should be returned. Inasmuch as they tolerate the borrowing of original documents only for photocopying, the "rules" tolerate the retention of original documents only for a very short period of time; and, since they must not discriminate between borrowers who have the good fortune to have photocopying facilities within their home and those who need to take them elsewhere (such as to their solicitors) for photocopying, the "rules" must afford a reasonable time (as a yardstick, helpful to the profession, what about a maximum of two clear working days?) for their retention of original documents for the purpose of photocopying. Moreover in an appropriate case there must be an authoritative adaptation of the

"rules" to documents in electronic form; and it will no doubt be informed in part by the decision of Tugendhat J in *L v. L*, cited above.

83. But, with respect to Waite J, who later became a distinguished member of this court, the two authorities which have given rise to the *Hildebrand* "rules" can hardly be accounted robust. 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 s.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. In *J v. V: (Disclosure: Offshore Corporations)*, [2003] EWHC 3110, [2004] 1 FLR 1042, Coleridge J well summarised what, at present, I believe to be the proper, as well as the usual, approach, at [32], as follows:

> "The use of *Hildebrand* documents in English ancillary relief proceedings is perfectly permissible subject to certain conditions as to early revelation to the party who owns the documents. When that general point is added to the fact that, absent these documents, the picture of the husband's finances would be even more incomplete in a number of crucial respects than it is anyway, I find [the wife's] conduct entirely understandable, justified and above criticism. I should not have hesitated to criticise her and her lawyers if I had felt they had over-stepped the mark."

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 [57] above, that to act even in accordance with the *Hildebrand* "rules" "is to take a risk";

or to state, as he does, at [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.

85. The present proceedings, whether at this preliminary stage or at substantive trial, are not those in which actions within the *Hildebrand* "rules" fall to be tested, whether against the law of tort or otherwise. Other such proceedings may arrive in this court; in my view, if now only in the interests of legal clarity, they should do so. But, although (to be fair to Eady J) the claimant's defence to the strike-out application was not presented to him with such specificity, his appeal to us is squarely presented on the basis that his claim does not challenge actions in accordance with the *Hildebrand* "rules". As I have made clear, the basis of Mr Crystal's appeal against the judge's determination that the claimant discloses no reasonable grounds for bringing his claim (and against any alternative conclusion that the claim is an abuse of the process of the court) reflects his grounds of appeal, namely (in the format of single words) *originals* and *interception*.

86. Eady J had been given to understand that, of the 42 *Hildebrand* documents which, by service of a bundle of them, the defendants disclosed on 7 December 2007, only "a few" had been originals. It thus came as a considerable surprise to me when, at the outset of the hearing before us, Mr Crystal told us that no less than 24 of them had been originals. I eagerly awaited Mr Sherborne's response. In the event he acknowledged that "a number" of them had been originals. But he was unable to identify the number: this seemed to me to be odd not only because the defendants had of course compiled that bundle but also because, with the claimant's lawyers, their lawyers had conducted a joint inspection of it soon after the hearing before the judge. At all events, there seems every reason for us at this stage to accept Mr Crystal's figure.

87. The defendants may wish to explain at trial what is not presently obvious to me, namely why they considered that their retention of originals beyond the time necessary for their photocopying served the interests of their client or was likely to enable the family court better to discharge its statutory duty, as well as, more broadly, why their doing so was legally permissible. They may also wish to explain why they elected to keep what the claimant, as yet uncontradicted, contends to have been the originals of the two letters addressed to him from the elder son of the marriage and, in particular, from his daughter by his earlier marriage. The claimant's averment that he first saw his daughter's letter only following disclosure on 7 December 2007 seems inconsistent with the fact that the defendants attached a copy of it to their letter to his solicitors dated 30 August 2007 in relation to issues surrounding the children of the marriage. So, at least from then onwards, the claimant would appear to have been able both to respond to the daughter's letter and to demand return of the original of it. But, since the daughter's letter is undated and since the defendants are unable at present to identify the date when the claimant's wife delivered it to them, it may well prove to be that for a significant period of time they not only kept the original but failed to serve a copy of it and, if so, they may be open to substantial criticism, as Ward LJ has suggested at [14] above. The daughter's letter had no conceivable relevance to the financial proceedings; and its relevance even to the issues surrounding the children of the marriage is far from clear. The defendants will have to explain why they took

possession of it at all, let alone why they retained it perhaps for a significant period of time.

88. In relation to the interception of documents, the claimant's wife by inference admits that she intercepted the letter dated 1 November 2007 sent through the post by P and O Cruises to the claimant at the matrimonial home; and, if it were to transpire that the claimant did indeed first see the two letters from his children as a result of their disclosure by the defendants, it would presumably follow that she intercepted them too. She may also have intercepted other of the *Hildebrand* documents. But the claimant's allegation, not – in my view – directly articulated in these proceedings until clarified by him pursuant to Rule 18.1(1)(a) of the CPR, is that the defendants instructed or advised her to intercept documents addressed to him. In the light of the denials both of the defendants and of the wife that they did so instruct or advise her, I confess to having been considerably attracted to the judge's robust view that the claimant has no real prospect of success on this issue within the meaning of Rule 24.2(a)(i). In the end, however, I have been persuaded otherwise by the views of Ward LJ set out at [43] above.

89. Unprotected, as they therefore are, by the *Hildebrand* "rules" and thus by the exception from liability in tort which those "rules" may well create, the defendants cannot, in my view, validly contend that the claimant discloses no reasonable grounds for his contention that, by retaining his original documents and/or by instructing or advising his wife to intercept documents addressed to him, they perpetrated a trespass towards them and/or a conversion of them. For sure, the defendants have arguable defences, in relation, for example, to the apparent absence of damage; but, for the reasons given by Ward LJ, I am persuaded that, subject to whether the claim is an abuse of the court's process within CPR 3.4(2)(b), it cannot be said that there are no reasonable grounds for bringing it.

90. Whether however the claim should be struck out as an abuse of the court's process is a question which I have found difficult to answer. In the light of his earlier determinations, the judge said that he had no need to reach a final conclusion about it. There is no respondent's notice but its absence would not disable us from protecting the process of our courts from abuse.

91. The animosity which often fuels litigation between spouses in the wake of divorce not uncommonly spills over towards the legal representatives of the other spouse. This is a claimant who admits that, in a telephone conversation as early as December 2006, he told the second defendant "I hope you and your family rot in hell because that is where you've sent mine". His assertion in this action is that the defendants "manipulated" his wife and, hyperbolically, that, as a result of the conduct which he alleges against them, they "irrevocably harmed and damaged every member of [his] family". Was his issue of this civil action against the defendants part of a strategy to make it impossible for them to continue to represent his wife? The question was brought sharply into focus by his issue, less than a month later, of an application in the divorce proceedings for a declaration that the first defendants should cease to act for her. The basis of that application, as presented on his behalf to McFarlane J on 31 January 2008, was that the allegations made against the defendants in relation to the *Hildebrand* documents raised a conflict of interest between them and the wife which precluded their continuing to represent her. McFarlane J dismissed the application on the basis that it had "absolutely no merit". The judge was also perplexed by the

claimant's failure to serve his wife with the claim in the civil action even though she was then the third defendant to it; and the judge directed him to explain in writing within 14 days why he had not done so. The claimant disobeyed that direction, never did serve his wife with the claim and in May 2008 filed notice of discontinuance of it as against her. The wider context of the civil action is that, following the claimant's service back in July 2007 of an affidavit in Form E in which he claimed that the total value of his assets was only £94,000 and that his total income was nil, there had been a series of hard-fought interlocutory applications in the divorce proceedings in respect of financial issues as well, apparently, as issues in respect of the children.

92. These factors combine to create a powerful case that the present civil action represents satellite litigation of an unwholesome kind, not genuinely founded on damage suffered but, rather, designed both to destabilise prosecution of the wife's claims against the claimant and to secure vengeance for perceived wrongs perpetrated by the defendants in providing the wife with the expertise with which energetically to challenge his assertion that in effect he had no money with which to maintain her. On the other hand the defendants' retention of 24 original documents ran counter to the *Hildebrand* "rules" and may prove to have constituted the tort of trespass and/or conversion. If so, can we properly prevent the defendants from being brought to book? Reluctantly I agree with my Lords that it would go too far for us to uphold the strike-out on the alternative basis of abuse of process.