Imerman:Why new restraints on self help mean lawyers may no longer be able to help themselves.

The recent judgment in Imerman on the types of material that can be admitted into evidence in financial hearings has caused a visible stir amongst family lawyers, judges and prospective divorcees but more provocative still is the political nature of the decision, which cuts to the heart of the current problems the family justice system faces and is arguably what is the most fascinating aspect of this judgment.

Lawyers have spent the Summer moaning bitterly about Imerman but much of what the legal sector has expressed, in their fevered articles decrying the decision and painting the judgment as a Cheat's Charter, is in part, the stuff of smokescreens. To understand better why the decision is not as clear cut as the lawyers would like us to believe we need to look not only at the judgement but also at the current dilemma the family justice system faces.

Lords Neuberger, Moses and Munby dedicate forty nine pages to the philosophy behind the disclosure of documents taken from one spouse by another to illustrate the extent of that spouse's financial position, a philosophy that stems in some measure from the now infamous rules in the Hildebrand case. These Rules allowed a spouse to gather material obtained illegally or deceitfully which could then be disclosed at the questionnaire stage of ancillary relief proceedings with a view to showing dishonesty on the part of the asset concealing spouse. There follows a very helpful, if meandering, explanation on how the process of disclosure in such cases work.

The judges tell us that the process of collecting documentation in court is made up of three stages: Disclosure, discovery and evidence. In matters relating to finances between spouses in court, both parties are asked to fill out what is known as a Form E. This form focuses on disclosure and as per Livesey v Jenkins [1985] AC 424, we are told that both parties have a "duty to the court to make full and frank disclosure of all material facts to the other party and the court. Unless the parties make full and frank disclosure of all material matters, the court cannot lawfully or properly exercise [its] discretion". This sounds efficient in theory, but unfortunately, it is not and the clue to impending tyranny is in the last part of that sentence, where the court effectively admits to being unable to help the parties sort out their financial differences unless both parties agree to act with honesty and integrity. A tall order at a time when spouses no longer trust each other and faith in the family justice system is at an all time low.

In order to accommodate the family court's brand of blind justice, disclosure comes in the form of documents cited on the Form E as ones which "must" be provided and those which are "necessary to clarify". So whilst the court has been turning a blind eye to the reality of life during family breakdown, necessary documents and must have materials are lost to shredders and stowed away memory sticks whilst thousands of spouses hide assets away and cheat the system, with ease.

This of course, is what the Hildebrand Rules were designed to counteract, and were reinforced by Ward LJ in *White v Withers LLP and Dearle* [2009] EWCA Civ 1122, [2010] 1 FLR when he stated that "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….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" but that "the wrongful taking of documents may lead to findings of litigation misconduct or orders for costs". Yet it is the very acceptance of those less than ethical methods for procuring such documents by the judiciary and the courts that have left the Hildebrand Rules open to attack.

And in Imerman the lines of attack are many. Firstly, the Law Lords have taken exception not to obtaining documents through illegal or deceitful means (as long as no force is used) but to the indefinite holding of such documents by the probing spouse. The judges then go on to consider more weighty options, like the law of confidence. Designed to protect confidential information, the law of confidence works so that anyone who should try to take information protected under that privilege could be found guilty of breaching that law. This is because under the law of confidence, there is a "reasonable expectation of privacy" and so a spouse who then goes on to take documents covered by the privilege (which most documents of this nature will be), is likely to get into trouble with the courts. On this point, the judges felt that any spouse who took documents covered by the privilege would essentially be in breach of the law but they do not go on to expressly forbid it. Imerman, whilst narrowing the margin for unethical behaviour on the part of the snooping spouse leaves the door open to that conduct, perhaps because the judges are aware that that very conduct is still the only way the courts can function in the majority of cases involving ancillary relief. Ironically though, the judges still take the view that such conduct can lead to punishment, either through actions in other areas of the law or a reduction in the amount awarded at the financial hearing. Is it then just for our judges to bite the helping hands that feed them or is it an impossible catch 22 in a system that implicitly cannot deliver ethical solutions to unethical problems?

Still, the judges go on to further narrow the Hildebrand Rules in the judgment, through family law and procedure as well as the laws of tort, legitimate justification, crime and even The Human Rights Convention. Despite the judges limiting instances when the taking of material under such circumstances is acceptable and for all their admonitions of the way in which these documents may find their way to court, Imerman is essentially not ruling out the possibility of 'awkwardly' acquired financial evidence being presented in ancillary relief hearings and that "Ultimately, [it] requires the court to carry out a balancing exercise" by taking into account "the importance of the evidence [and] the conduct of the parties".

In reality, the judges appear to be trying to appease all sides by attempting to remove the unpleasant undertone the Hildebrand Rules bring to the table, whilst trying to infuse the family justice system with a more noble outlook and in so doing, attempting, but I would modestly suggest failing, to purify its reputation and renew the public's faith in the family justice system.

And whilst lawyers may be concerned that this new precedent might put off prospective clients who feel the law can no longer help them and make current clients less profitable by reducing their chances of finding the big golden pot at the end of the rainbow (and this case is only really of interest to the super rich and those that represent them), there is a much more

pressing problem that is unwittingly highlighted both by Hildebrand and Imerman and reflect, with cruel precision, the underlying tension between family procedure and pragmatism.

The Family Proceedings Rules tell us (at 2.51D) that the "overriding objective" in ancillary relief proceedings is for the courts to be able to "deal with cases justly". There then follows a long list of factors the court should take into account, which include "ensuring that the parties are on an equal footing". By allowing self help, the courts are trying to ensure an equal footing in this context but, and here's the rub, they are not ensuring that equal footing themselves. Rather, they are asking the parties to take a risk, to gather the evidence and risk at best being reprimanded by the court for being "underhand" as one judge puts it or at worst, facing the possibility of an action based in tort or any of the myriad areas this sticky territory might take you. Not exactly an ideal or just way to go about things and the judges know it.

The Rules also ask that the court deal with a case in a way which is proportionate to the amount of money involved. In relative terms, this hits hardest at the modest end of the family case spectrum, where spouses who hide assets away also know only too well that their other halves have no ability whatsoever to mount an action or if they succeed in achieving the impossible and securing legal aid or borrowing from family, to then get together enough funding from either the state or themselves to see the action through and gather the evidence required of them under their duty to disclose. Despite the judges' claims in Imerman that the courts now have sophisticated ways of dealing with half hearted disclosers, this simply does not ring true for the majority of spouses who find themselves without the necessary help to gather that evidence. Those that try often find themselves stripped of their savings and then to add insult to injury, chastised by a court process for trying to fulfil their duty to disclose because it fails to understand the reality of divorce on the ground. Hildebrand Revised may still be good for the divorcing elite, but in real terms, it means very little to the demographic that needs the most help.

The rise of Self Help is a stark reminder that the system is not well equipped as it stands to offer justice to the parties that come before it and in a twist that confirms fact is indeed stranger than fiction, there is a strong argument here, when faced with a system that has great trouble in efficiently and fairly detecting the salient issues in a case and addressing them (and this is true not just of ancillary relief proceedings but ricochets throughout contact proceedings and beyond) that our system is not just in need of a review, but a long overdue overhaul. Self Help has always been frowned upon in other areas of family law, often the only way to gather the necessary evidence and arguably in matters where the stakes are much higher, where children are involved and their safety and welfare are in question but under these circumstances, the "underhand" party is often reprimanded for disclosing evidence showing this kind of abuse. These conflicting messages in a system that is torn between two worlds, raises a serious question about the nature of evidence gathering as it essentially leaves the parties with no other viable option other than to break the law and take a risk. What message then, does this send out to parties? And can our family justice system really call itself progressive with these measures?

These are the questions I believe concerned Lord Justices Neuberger, Munby and Moses, although I am not sure that their views on the matter will do much to help solve the questions this fascinating judgment raises. And if you're a half hearted discloser still rubbing your hands with glee, you haven't paid attention.