
# Non-disclosure/Dishonesty

**How do you prove material non-disclosure and/or dishonesty, bearing in mind the restrictions placed on you when handling documents belonging to the other party?**

**Is there a conflict between *Sharland* and *Gohil* and *Imerman*?**

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The question posed by this paper is not straightforward and I have therefore considered in three stages, by asking the following three questions:-

1. What is material non-disclosure?
2. What are the restrictions imposed by *Imerman*?
3. Is there a conflict between *Sharland/Gohil* and *Imerman?*

## QUESTION 1: WHAT IS MATERIAL NON-DISCLOSURE?

1. Livesey v Jenkins [1985] AC 424 remains good law: a financial remedy order will be set aside if it is found that:-

    a. A party failed to provide proper disclosure to the court; **and**

    b. That non-disclosure is material, in that if proper disclosure had been made, this would have resulted in a different order.

### (a) What is 'proper' disclosure and where does the duty lie?

2. The function of the Court is inquisitorial: Charles v Charles (1866) 1 P & D 960 [at 264].

3. Section 25(1) MCA 1973 states:

    *"It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner,* ***to have regard to all the circumstances of the case."***

4. The duty to give disclosure of "all the circumstances" is therefore central to the Court's inquisitorial function. The provision of full and frank disclosure is the means by which the court is able to discharge its statutory function: if the court is not in possession of all the relevant facts then it cannot take into account all the relevant circumstances of the case. As per Lord Brandon in Livesey v Jenkins [436G to 437A]:

> *"The scheme which the legislature enacted by sections 23, 24 and 25 of the Act of 1973 was a scheme under which the court would be bound, before deciding whether to exercise its powers under sections 23 and 24, and, if so, in what manner, to have regard to all the circumstances of the case, including, inter alia, the particular matters specified in paragraphs (a) and (b) of section 25(1)**. It follows that, in proceedings in which parties invoke the exercise of the court's powers under sections 23 and 24, they must provide the court with information about all the circumstances of the case, including, inter alia, the particular matters so specified. Unless they do so, directly or indirectly, and ensure that the information provided is correct, complete and up to date, the court is not equipped to exercise, and cannot therefore lawfully and properly exercise, its discretion in the manner ordained by section 25(1)"***

5. The duty to disclose remains with the disclosing party and it is not permissible for the non-discloser to rely on the fact he was not asked specific questions about this financial circumstances: *J v J* [1955] P 215 and *Robinson [1983] 4 FLR 102*.

6. The duties of (a) the parties to make proper disclosure and (b) the court to consider all the circumstances before making an order exist if the parties seek an order by consent: *Livesey v Jenkins* [at 438B]:-

7. To the extent this was challenged by the husbands in *Sharland* and *Gohil*, the Supreme Court confirmed the duty of full and frank disclosure applied to consent orders as much as to orders imposed by the court following a contested hearing.

8. The duty of disclosure is usually prioritised over the need to preserve the confidentiality of commercial sensitive information. In *AB v CD* [2016] 4 WLR 36, notwithstanding the fact the Court accepted that W considered herself

prohibited, reasons of confidentiality, from disclosing the investment by a hedge fund into a company in which she held shares, the information was held to be nevertheless material and an earlier consent order was set aside.

9. Where the courts had to deal with sensitive information that might influence share value, the duty of confidence between it and the parties usually meant that disclosure was the safest route in cases of doubt. The disclosed information would remain confidential as between the parties and the court, and the disclosing party would not be exposed to the risk of any resulting order being set aside in future. In cases of extreme commercial sensitivity, the disclosed information could be protected by injunction.

**(b) What makes the non-disclosure 'material'?**

10. The *Livesey v Jenkins* test is a two-stage process. A finding of non-disclosure is the first part of that test. The second is materiality. As per Lord Brandon [at 445 G]:-

> "*It is not every failure of frank and full disclosure which would justify a court in setting aside an order…on the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making...an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good".*

11. The test of materiality is therefore whether, had proper disclosure been made, the Court would have made a different order. This test has now been revised in the light of *Sharland* and *Gohil* – see below.

12. The authorities suggest that a 'different order' is not necessarily a different *final financial remedy* order. In *I v I* [2009] 2 FLR 922 (case also known as *Bokor-Ingram*), the Court of Appeal held that, had full disclosure been made, the Court would have been likely to adjourn proceedings. As per Thorpe LJ [at paragraphs

15 and 17]:-

> *"[17] We are concerned that the judge's erudition may have blinded him to the simplicity of the case and its proper outcome. Had there been full and frank disclosure of the imminence of the new contract of employment it is inconceivable that the wife would not have raised her sights. It is also inconceivable that the District Judge would have rejected the information as irrelevant. There were only two options. Either the FDR had to be adjourned to eliminate the risk that the very advanced negotiation would not lead to contract or the parties and the court had to come to a fair conclusion that assumed that the contract would be signed but with some discount for the risk of breakdown. In my view, those alternatives are purely theoretical. In the real world the first was the only true option. Thus we consider that Charles J was wrong to conclude that the breach of the duty had no effect upon the outcome of the case."*

13. This approach was refined by the Supreme Court in *Sharland*:-

    a. For cases of **innocent or negligent** non-disclosure, *Livesey* remains good law: the Court has the power to set aside an order where it can be shown **by the person seeking to set aside** that:-

        i. The non-disclosure vitiates the agreement or order (for instance because it induced the claimant to enter into the agreement, or it undermined the whole basis upon which the order was made); and

        ii. Had the non-disclosure not occurred, the court would have made a substantially different order from that which it made.

14. Note the burden of proof remains on the *claimant* in cases involving innocent or negligent non-disclosure.

15. However, in cases involving fraud, the burden of proof passes to the *respondent*: materiality will be *assumed*, on the basis that a party practising deception with a view to a particular end cannot then deny its materiality.

16. The victim of the fraud will be entitled to have the order set aside unless the perpetrator of the fraud can establish that, at the time the agreement was reached or the order was made:-

    a. The fraud would not have influenced a reasonable person to agree to it; and

    b. Had it known then what it knows now, the court would not have made a significantly different order, whether or not the parties had agreed to it.

## QUESTION 2: WHAT ARE THE RESTRICTIONS IMPOSED BY *IMERMAN*[1]*?*

### (a) Historical Perspective

17. Until *Imerman*, family practitioners would routinely welcome (if not encourage) a spouse's 'self-help', relying on what was understood to be the *Hildebrand*[2] rules.

18. The Hildebrand rules were summarised by Ward LJ in *White v Withers LLP and Dearle* [2010] 1 FLR 859 as follows:-

> "*It may be appropriate to summarise the Hildebrand rules as they apply in the Family Division as follows. The family courts will not penalise the taking, copying, and immediate return of documents but do not sanction the use of any force to obtain the documents, or the interception of documents or the retention of documents nor would I add, though it is not a feature of this case, the removal of any hard disk recording documents electronically. The evidence*

[1] *Imerman v Tchenguiz & Others* [2010] 2 FLR 814
[2] From *Hildebrand v Hildebrand* [1992] 1 FLR 244

> *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 litigation misconduct or orders for costs*"

19. A re-reading of Hildebrand reveals that it does not, in fact, offer a sound basis for the contention that a spouse may take, copy and retain documents that would in all other circumstance be considered to have been unlawfully obtained; it simply offers authority on a relatively narrow point: at what point should copies of documents obtained unlawfully or clandestinely be disclosed to a spouse? The clear answer is 'promptly', and at the latest, when the questionnaire is served.

20. Crucially, however, there was no suggestion in ***Hildebrand*** that the manner in which the husband had obtained the documents (by secretly entering the wife's home and filling a crate full of her private papers) rendered them inadmissible.

21. Post-*Imerman*, even family practitioners now share the shock expressed by Tugendhat J in *L v L and Another* [2007] 2 FLR 171 that the wife had been advised by her leading counsel to take her husband's laptop and pass it to a team of experts to copy the contents of the hard drive. Pre-*Imerman* however, such advice might not have been unusual.

22. In *L v L* however, the Court expressed clear views as to the admissibility of evidence which was unlawfully obtained:-

    a. If a party was permitted to rely on material obtained unlawfully, that party would have avoided having to meet the stringent test for the grant of a search order (formerly an Anton Piller order) and without offering a respondent the various safeguards to protect his rights usually built into a

search order[3];

b. The taking of the laptop and copying of it's hard drive was unnecessary: the wife could have applied for an order pursuant to CPR Part 25.1.(1)(c)(i) preserving the laptop so that none of the information it contained could be destroyed[4].

c. He expressed doubts as to the ***Hildebrand*** approach as being out of step with both criminal and civil litigation, where the courts were increasingly exercising discretion to exclude such evidence. He hinted that the time was ripe for the approach in the family courts to be considered further.

23. In ***White v Withers LLP and Dearle***, the husband (Marco Pierre White) sued his former wife's solicitors for interference with his goods by retaining (for many months) documents taken from him by his wife. At first instance Eady J ruled that ***Hildebrand*** provided an absolute defence to such civil tort.

24. On appeal, the husband was successful, but on a narrow ground only – *when* documents taken by the wife, passed to her solicitor and then copied by the wife's solicitor should be returned to the husband. The answer was 'immediately' (after being copied).

25. The three justice Court of Appeal disagreed as to whether ***Hildebrand*** provided a defence to civil tort – Ward LJ and Sedley LJ considered it did not, but if ***Hildebrand*** was followed to the letter, any claim in tort would attract only nominal damages and might be struck out for an abuse of process, whilst Wilson LJ considered that ***Hildebrand*** offered an absolute defence.

[3] See now PD20A FPR 2010 for the power of the Court re search orders and orders requiring the preservation of property

[4] This would now be an order pursuant to r.20.2(c)(i) FPR 2010 "*for the detention, custody or preservation of relevant property*"

26. *Imerman* was therefore a game changer and widely reported as a "*cheat's charter*"[5].

**(b) The facts of *Imerman***

27. The husband was a hugely successfully businessman who was involved in various business ventures with the wife's two brothers. They shared both office space and a computer network (with a shared server). Within weeks of the wife issuing her divorce petition in December 2008, the brothers had evicted the husband and his staff from their business premises.

28. Between January and February 2009, unknown to the husband, one of the wife's brothers downloaded thousands of documents from the husband's password protected computer (mainly in the form of emails and attachments). It later transpired that he had been looking for anything relevant to the wife's potential ancillary relief proceedings; when he found something he considered to be relevant, he printed it off. He also retained two memory sticks containing information taken from the husband's computer. The wife's brother alleged that he did this against a background of threats made by the husband that he would hide assets from the wife in the event of their divorce.

29. The documents ran to eleven box files of material. The brothers instructed a barrister to go through the files and remove anything he considered to be privileged. The volume of documentation was vast - the husband alleged that they ran to two and a half million pages. Seven lever arch files of material were left after the privileged documents were removed, and the brothers then instructed a forensic accountant to prepare a report on the husband's financial position on the basis of the same.

[5] Solicitors Journal: S.J. 2010, 154(30), 5

30. Meanwhile, the wife's solicitors has issued a Form A and her brothers subsequently handed over the seven lever arch files of information to her solicitors, who, in turn, sent copies to the husband's solicitors. Throughout January and February 2009 there was correspondence between the husband and wife's respective solicitors, and talk had turned to exchange of Form E's. Mutual requests were made for the delivery up of any *Hildebrand* documents.

31. Upon production of the seven files to his solicitors, the husband agreed that the Family Division should be left to decide whether or not the wife could rely upon the same in the ancillary relief proceedings. The more contentious issue became whether or not the brothers should be compelled to hand back the balance of the documents held by them (i.e. all those documents that their barrister had not considered to be legally privileged). The brothers refused, arguing that there may be as yet unidentified documents amongst that disclosure that could help the wife establish the true nature and extent of the husband's finances.

32. It is important to note that at the stage that the husband's computer was first accessed the husband and wife had not exchanged Form E's, and therefore the duty upon each party to disclose had not yet been triggered.

33. Thereafter the husband applied to the QBD for injunctive relief restraining the brothers from further disclosing the balance of the material to the wife's solicitors, or from copying or using it in any way (*Imerman v Tchenguiz* [2009] EWHC 2024 (QB)). Eady J granted the interim relief sought and the brothers appealed.

34. Meanwhile, the husband applied to the Family Division for delivery up of the seven files held by the wife's solicitors, and an order preventing her from using them in any way, including within the ancillary relief proceedings. Moylan J dismissed the husband's application, and ordered that the wife must return the files to the husband's solicitors in order that he could remove any privileged documents, after which the husband was to return the balance to the wife in

order that she could use them in the ancillary relief proceedings (*Imerman v Imerman* [2009] EWHC 3468 (Fam)).

35. The husband appealed; the wife cross appealed on the basis that she was unhappy with the process by which the husband could claim privilege and thereby make documents unavailable to her. She further appealed the refusal by the trial judge to make an order preventing the husband from disposing of two memory sticks.

36. The approaches of the first instance tribunals could not have been more different, Eady J was clear that the QBD did not recognise any right to reach the truth by clearly unlawful means whilst Moylan J acknowledged the idea of 'self-help', a phrase coined by the wife's legal team as a euphemism for unlawful methods.

37. On the Husband's appeal to the Court of Appeal, the central question to be determined was whether there was any legal justification for permitting a wife to retain copies of information that she has unlawfully obtained on the grounds that she feared that the husband would conceal assets from her and the Court. The answer advanced by the Court of Appeal was an emphatic 'no'. The following points arise from the judgment:-

    a. Nothing in the so called '*Hildebrand* Rules' can be relied upon as justification of, or providing a defence to, potentially criminal or actionable conduct;

    b. Where information obtained illicitly is passed on to a third party the claimant can expect to obtain relief against that third party (unless they can show that they are a bone fide purchaser of the said information). This defence is unlikely to be available to a solicitor acting for a wife is AR proceedings (see *Re Z (Restraining Solicitors From Acting) [2010]* 2 FLR

132);

c. Mrs Imerman was not entitled to information at the time that she sought it in any event as the information was obtained prior to disclosure of Form E;

d. The admissibility of evidence obtained in such circumstances will be for the Court to decide. The Court has the power to exclude the same; in reality the issue will likely be whether the wife's recollection of what was in the returned documents calls into question the husband's Form E disclosure. In the case of *Imerman,* the wife was restrained from using the information obtained pending exchange of Form E, at which point it may have become apparent that the husband had provided full and frank disclosure in relation to the assets the wife alleged he was set to conceal. Consideration of the wife's ability to utilise the information was therefore premature, and would fall to be considered if necessary post Form E;

e. There is of course, no process by which the recollections of the wife as to the contents of the illegally obtained disclosure can be removed;

f. The court gave short shrift to the assertion that s 25 of MCA 1973 required the Court's to take an investigative role in relation to the parties' assets, and admit any document relating to their respective finances, however it was obtained. If certain evidence was excluded then the court could well conduct the exercise required by that section on the basis of the documents that the court considered admissible.

**(c) Post-*Imerman* and practical advice**

38. There is, perhaps surprisingly, not much by way of authority post-*Imerman* but the issue of unlawfully obtained evidence arose in *Arbili v Arbili* [2015] EWCA Civ 542.

39. In *Arbili*, the husband had obtained evidence from the wife's computer which he alleged purported to show that her evidence (as to her family's ownership of a property in France) was a sham. The husband applied to set aside the original ancillary relief order on that basis however, the judge dismissed his application and did not read the illicitly obtained documents. The Court of Appeal upheld the judge's decision, setting out in the judgement that:-

    a. where a party was in receipt of illicitly obtained materials, those materials had to be returned;

    b. the recipient's duty to make any relevant disclosure arising from them within the proceedings was triggered;

    c. the ability of the party who originally obtained the material illicitly to challenge the sufficiency of disclosure was confirmed to evidence of their memory of the contents of the materials, but was admissible;

    d. it was not incumbent upon the judge to have read the illicitly obtained materials before ruling on their inadmissibility.

40. It is worth considering the advice given by the Bar Council's Ethics Committee (which has just been reviewed in the last few days) to practitioners faced with prospect of illicitly obtained material – to be found at www.barcouncil.org.uk/media/440128/evidence_obtained_illegally_in_civil_and-_family_proceedings.doc.pdf.

41. In terms of judicial guidance as to the principles invoked and the practical steps to be taken upon being presented, as a practitioner, with material obtained by a client illicitly and/or material, possession of which breaches the other party's confidence or privacy, see paragraph 56 of Mostyn J's judgment in *UL v BK (Freezing Orders: Safeguards: Standard examples)* [2014] 2 WLR 914:

*"**56** The principles are these:*

*(1) Whatever the historic practice (and however alluring the arguments for pragmatism and practicality) it is simply and categorically unlawful for a wife (for it usually is she) to breach her husband's privacy by furtively copying his documents whether they exist in hard copy or electronically. There may be factual issues about whether the documents are actually in the husband's private domain; but if they are (and they almost always are) then it is wholly impermissible for the wife to access and copy them.*

*(2) If a wife does access such private documents she is not only in jeopardy of criminal penalties but also risks being civilly sued by the husband for breach of confidence and misuse of his private material.*

*(3) If a wife supplies such documents to her solicitor then the solicitor must not read them but must immediately seek to obtain all of them from the wife and must return them, and all copies (both hard and soft), to the husband's solicitor (if he has one). The husband's solicitor, who owes a high duty to the court, will read them and disclose those of them that are both admissible and relevant to the wife's claim, pursuant to the husband's duty of full and frank disclosure. If before that exercise has taken place the husband's solicitor is dis-instructed the solicitor must retain those documents pending a further order of the court.*

*(4) If the husband does not have a solicitor the wife's solicitor must retain the documents, unread, and in sealed files, and must approach the court for directions. Those directions will likely be to the effect that the wife shall pay for an independent lawyer to be instructed to determine which of those documents are admissible and relevant to the wife's claim. Copies can then be provided to the wife's solicitor before the files of documents are returned to the husband.*

*(5) The wife is permitted to rely on her knowledge of the documents to challenge the veracity of the husband's disclosure in the proceedings. Her knowledge is admissible evidence. For this purpose she can express her recollection to her solicitor, and the solicitor can advise on it. However, if the expression of that recollection involves the revelation of clearly privileged matters then the solicitor must stop the conversation immediately. If things have gone too far the solicitor will have to consider carefully whether (s)he can continue acting for the wife. It is open to the husband to apply to the court, in the interests of justice, for an order barring the wife from relying on her knowledge in this way.*

*(6) By the same token, if the wife's recollection is that the documents clearly show that the husband is unjustifiably dealing with his assets and that there is therefore a clear risk of dissipation to her prejudice then she can inform her solicitor of this. Subject to the point about privilege mentioned above, the solicitor is entitled to give advice on her recollection and can draft an affidavit in support of a freezing application. But if the wife elects to go down this route she is bound in that affidavit candidly to reveal that her knowledge derives from illegitimately obtained documents, and must explain how she got them. She must do this even if this leads to a civil suit or criminal proceedings. That is the price that she will (potentially) have to pay for making an application based on illegitimately obtained knowledge. Of course, there is no question of the wife being forced to incriminate herself as she has a free choice whether to go down this route."*

## QUESTION 3: IS THERE A CONFLICT BETWEEN *SHARLAND/GOHIL* AND *IMERMAN?*

42. This is the essential question posed in the title to this paper: in effect, if party B fails to provide full and frank disclosure of his/her financial circumstances, where does this leave party A, who is unable to take the law into his/her own hands and help themselves to confidential information?

43. Remember that the family practitioner has a whole host of procedural rules of which they can take advantage to obtain disclosure from a reluctant spouse: questionnaires, third party disclosure orders etc can all be employed to elicit information.

44. As set out in *Imerman* and clarified in *Arbili*, party's A's recollection of any material he or she has seen is admissible as evidence. This may of course leave party A in the position of being unable to substantiate his/her allegations in the face of an outright denial by party B, but this is where adverse inferences come to fill the gap.

45. In *Gohil*, the Supreme Court confirmed that the court may make adverse inferences in the face of an uncommunicative spouse (affirming *Prest v Petrodel Resources Ltd* [2013] UKSC 34): per Lord Wilson:

> ***[41]*** *The husband argues that if, from the evidence in relation to the funds held by Odessa and to the purchase of the further, adjoining, flats in Mumbai, there was any ground for inferring that in 2006 and 2007 he held undisclosed assets, there remained no ground for inferring that he held them in 2004. In the light of his conviction for offences committed no earlier than 2005, any such assets, so his argument runs, were clearly the product of his criminal activities. On examination the argument is as unsound as at first sight it is unattractive. For it fails to allow for the role of adverse inferences in the court's generation of its factual conclusions. In Prest v Petrodel Resources Ltd and Others [2013] UKSC 34, [2013] 2 AC 415, [2013] 2 FLR 732, Lord Sumption quoted at para [44] the following statement of Lord Lowry in R v Inland Revenue Commissioners and Another ex parte TC Coombs and Co [1991] 2 AC 283, at 300:*

> *'In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence.'*

46. Lord Sumption added at para [45] that:

> *'judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing.'*
>
> *The husband was well aware that the inquiry conducted by Moylan J was into the extent of his assets on 30 April 2004. It is clear that he held assets in 2006 and 2007 and he must have been aware of their origin. Had he demonstrated that they originated in or after 2005, they would have been irrelevant to the inquiry. Instead, however, he chose to obfuscate about their origin. In those circumstances it was reasonable for Moylan J to infer that a truthful explanation of their origin would have been probative of the existence of undisclosed assets on 30 April 2004 and that the husband's withholding of it should be no less probative.*

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