

## COURT THWARTS SNOOPING SPOUSES!

**A recent Court of Appeal ruling has effectively abolished so-called “Hildebrand Rules” that allowed spouses to make use of illegally obtained information in divorce proceedings, subject to certain rules of disclosure.**

In the case of *Tchenguiz v Imerman*\* the court held that there was no justification for permitting a spouse to retain copies of documents which had been unlawfully obtained on the grounds that to do so would assist in incurring a less than frank disclosure of assets by the other spouse.

For many years, forensic accountants have been provided with “Hildebrand” documents and asked to provide their opinions on them in the context of ancillary relief proceedings.

For example, a wife once told the writer that she suspected that her husband was fraudulently using company monies to pay for personal benefits with the knowledge and connivance of his two fellow shareholder-directors. It was alleged that an extension had been built to her former matrimonial home and that the builders had been persuaded to invoice the company for “Works to the warehouse”.

### **Her husband’s “Little Black Book”**

The wife subsequently obtained, by dubious means, copies of her husband’s “Little Black Book” (which amusingly had those very words written neatly on the top of the first page in the husband’s own hand). The book set out a running tally by which the three directors were able to ensure that each received an equal value of benefit.

In that case, as with many similar matters in which Hildebrand documents play a part, the disclosure of the



documents did little to improve the husband’s credibility, never mind the financial impact they had on the value of his company.

### **A husband has the same right to confidentiality as he would have if he were not married**

From now on, in divorce proceedings, it is clear that a husband has the same right to enjoy confidentiality against his wife as he would have if they were not married. The same is of course true for wives, all of which is likely to come as a great surprise to many a married person!

On a more serious note, family practitioners are likely now to face a number of practical difficulties. If and when they become aware of the existence of what were previously Hildebrand documents, they will have a professional duty to ensure that they are returned, that any copies are destroyed and that they are not used in any way.

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## BIGGER FAG PACKETS REQUIRED

Calculating a claimant's net pay from his gross pay used to be relatively easily done on the back of a fag packet, but the Emergency Budget has made the maths much harder for those earning more than £100,000 per annum.

From 6 April 2010, a top rate of tax of 50% applies to those earning £150,000 or more. However, the effect of the removal of the personal allowance means that some tax-payers have a marginal rate of tax of 60%.

The personal allowance is currently £6,475 but it reduces by £1 for every £2 of taxable income above £100,000.

By way of an example, consider a tax-payer who has a gross taxable income of £110,000. His income exceeds £100,000 by £10,000. Consequently his personal allowance will be reduced by £5,000 from £6,475 to £1,475.

The effect of this is to cause him to pay tax on the top £10,000 slice of his income at a rate of 60%. This is demonstrated in the inset box below which compares the tax-payer's tax bill with the tax he would have paid had he earned only £100,000.

By the time one takes into account the dividend rates of 32.5% and 42.5%, the effect of any benefits in kind, the new rules on pension tax relief and the 10% starting rate of tax on savings, what used to be a relatively simply calculation becomes far less straightforward.

The additional complexity may not, in itself, justify the instruction of a forensic accountant but it highlights the need for great care when number-crunching for clients, even if reliance is being placed on facts and figures or at a glance!

Income	£100,000	£110,000
Less personal allowance	£(6,475)	£(1,475)
<b>Taxable income</b>	<b>£93,525</b>	<b>£108,525</b>
Taxable at 20%	£37,400	£37,400
Taxable at 40%	£56,125	£71,125
	<b>£93,525</b>	<b>£108,525</b>
Tax at 20%	£7,480	£7,480
Tax at 40%	£22,450	£28,450
<b>Total tax</b>	<b>£29,930</b>	<b>£35,930</b>

**£6,000** of additional tax is payable on £10,000 of additional income giving rise to a marginal top rate of 60%

## PUTTING A PRICE ON THE COMPANY CAR IS JUST THE START

Valuing Benefits in Kind can be fraught with difficulty, whether for the purposes of establishing the quantum of loss of earnings or calculating the disposable income of a divorcing spouse.

Just because HM Revenue and Customs calculates the taxable benefit of a company car with reference to its CO<sub>2</sub> emissions and fuel efficiency does not mean that is an appropriate approach for the purposes of litigation.

For this reason great care should be taken before reliance is placed on the figures that appear in the annual tax form P11D on which an employee's benefits are itemised.

In the case of company cars, the tables of motor running costs issued by the Automobile Association are probably a better yardstick but other benefits can be even less easy to evaluate. One of the most difficult benefits to value are share options which have become increasingly popular in the financial sector by virtue of the public unpopularity of bankers' bonuses.

Share options can be worth a great deal but their value can also fluctuate wildly from year to year or even month to month, as many a banker will be only too keen to tell you.

There are a number of sophisticated methods by which share options can be valued but, whatever approach is taken, solicitors need to ensure that they can justify their advice. Often a brief letter from a forensic accountant can be all that is needed to minimise the risk of a potential PI claim that can easily arise if litigation is settled based on a valuation of share options that differs significantly from the price for which they are ultimately realised.

Further care needs to be exercised in relation to the taxation of share options since some are taxed as income and others as capital.



# RELATIONSHIPS MATTER – ESPECIALLY ROUND THE BOARDROOM TABLE

**Consider this... A minority shareholder sells his shareholding in a family company for £10 a share. Three weeks later the whole company is sold at a price of £90 a share. Did the directors have a duty to “tip off” the minority shareholder about the imminent sale?**

As is often the case, the short answer is “it depends”. It was established at the turn of the last century in the case of *Percival and Wright*\*\* that:

*“The directors of a company are not trustees for individual shareholders and may purchase their shares without disclosing pending negotiations for the sale of the company’s undertaking.”*

In that instance a director of a company bought shares from a member at a price less than that for which the director knew that a third party had expressed interest in buying all of the shares in the company. The latter proposal came to nothing, but the selling member sued the director for breach of fiduciary duty to the member in not disclosing the interest expressed by the third party.

*Swinfen Eady J* rejected the claim, holding that the purchasing director was under no obligation to disclose to the vendor shareholders the negotiations which ultimately proved abortive.

This suggests that the position is clear cut.

However the decision in *Percival and Wright* has been criticised, not because it was based on the ground that a director’s fiduciary duties are owed to the company and not to individual members, but because the application of that doctrine in those circumstances led to a supposed unfairness which ultimately led to the enactment of legislation against insider trading.

There is little doubt that it would be ludicrous to suggest that the board of directors of a plc was under an obligation to disclose potential sale negotiations to every shareholder who was selling shares in the company.

However the position is very different in the case of an unquoted or family company. Subsequent commentary and case law seems to suggest that the courts take the view that there are almost certainly circumstances in which a fiduciary relationship to shareholders (rather than to the company as a whole) can arise.

## Improper and unfair

Specifically, courts will be more likely to find that the directors owe fiduciary duties to their shareholders in cases in which the directors, for their own benefit, seek to use their position and special inside knowledge to take advantage of other shareholders. That is likely to be seen to be improper and unfair.

Similarly if a family or quasi-partnership relationship exists between the directors and certain shareholders, fiduciary duties may well be easier to establish.

In this context, forensic accountancy opinion can often be helpful in establishing the facts surrounding the way in which a company operates and takes decisions with a view to assisting the court to determine whether or not it is run as a quasi-partnership.

\*\* *Percival and Wright* [1902] 2 Ch 421

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In practice, however, clients who have obtained such documents will (perhaps understandably) be very keen to see that they are brought to the attention of the court by some means or other. It seems that the only way in which that is likely to be capable of being achieved is by means of some sort of Anton Piller order for search and seizure.

Such orders are typically only granted on the basis of strong evidence and, of course, the Hildebrand documents that are being sought cannot be used in the application for their own discovery.

Not only are search and seizure orders difficult to obtain but they are notoriously costly and may well be disproportionately expensive in all but the largest cases.

## Apply for the order for search and seizure

In any event, it is very likely that expert accountancy evidence will have a role to play in assessing the likely financial value of the undisclosed documents. Once that has been determined, an informed decision can be made as to whether or not to apply for the order for search and seizure.

If such an application is to be made then further accountancy advice can often provide invaluable supporting evidence.

\* (1) *Robert Tchenguiz* (2) *Vincent Tchenguiz* (3) *Tim Mcclean* (4) *Nouri Obayda* (5) *Sarosh Zaiwalla v Vivian Imerman : Vivian Saul Imerman V Elizabeth Tchenguiz Imerman* (2010) [2010] EWCA Civ 908

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## INCREASE IN EMPLOYEE THEFT CAUSES “COLLATERAL DAMAGE”

**Often allegedly innocent parties are caught up in confiscation proceedings issued against their fraudulent spouses or former-spouses.**

In light of proposed pay freezes in the Public Sector, higher taxation, the squeezing of bonuses in the finance sector and the increasing risk of unemployment, the pressure on employees to maintain their standard of living poses a significant risk to employers.

The effects of the recession are already being felt by way of increasing frauds by employees within business and Public Sector organisations. According to the Credit Industry Fraud Avoidance System (“CIFAS”), (essentially the UK’s main fraud prevention service) dishonest action by staff to obtain a benefit by theft or deception is on the increase. It reports a 45% rise between 2008 and 2009.

This suggests that the impact of the recession is causing ever more employees turn to fraud as a way of supplementing their legitimate income.

**Barely a week goes by without reports of embezzlement, misappropriation of funds or deception.**

Employees who are found guilty of fraud face the prospect not only of a custodial sentence but also to confiscation proceedings under the Proceeds of Crime Act.

Often these proceedings can cause real hardship for those closely associated with the fraudster. A number of recent cases in which NIFA members have been involved have concerned ex-spouses and ex-partners of those convicted of fraud who have found that their assets have been made subject to a restraint order.

Often it can be very difficult for them to obtain public funding for the legal representation that they so desperately need. Their cases are seldom straightforward and typically require a forensic accounting analysis to establish how assets and property purchases were funded. It is important to establish whether and, if so, to what extent, property has been tainted by the proceeds of crime.

