Full and frank disclosure and a duty of fair presentation

What can you realistically ask for or hold back?

Notes

Very topical in the context of *Privatbank v Kolomoisky & Ors* [2019] EWCA Civ 1708 on appeal from Fancourt J., followed in *Tugushev v Orlov* [2019] EWHC 2013 (Comm) by Carr J – although principally focused on facts, repeated confirmation of *Brink's Mat* principles (at [250]). But the ratio focusses on facts. Is there a separate duty of fair presentation, and, if so, how is it separate, what does it mean and how does it arise?

Full and frank disclosure has a long history going back to *Dalglish v Jarvie* (1850) LJ Ch 475 – without notice applications are likened to insurance policies and so should require the utmost degree of good faith *"uberima fides"* per the Lord Chancellor Baron Rolfe at 243. Framed in terms of fact that are material to the decision of the Court.

R v Kensington Income Tax Commissioners ex p Polignac [1917] 1 KB 486 is probably the first case one turns to for the classic exposition: Lord Cozens-Hardy MR "the general proposition which I think has been established, that on an ex parte application uberrima fides is required": Warrington LJ "under an obligation to the Court to make the fullest possible disclosure of facts within his knowledge": Scrutton LJ "the utmost good faith must be observed" (also service out).

One starts to see fair presentation emerging in *Bank Mellat v Nikpour* [1985] FSR 87. Lord Denning MR held (at 89):

> "I would like to repeat what has been said on many occasions. When an *ex* parte application is made for a *Mareva* injunction, it is of the first importance that the plaintiff should make full and frank disclosure of all material facts. He ought to state the nature of the case and his cause of action. Equally, in fairness to the defendant, the plaintiff ought to disclose, so far as he is able, any defence which the defendant has indicated in correspondence or elsewhere."

Donaldson J distinguished failure to give full and frank disclosure in freezing injunctions and service out (at 91).

Finally, Slade LJ "Furthermore, I think that, as is well established by authority, it is their duty on any such application to state any defence which they anticipate will be relied upon by the other side." (at 93).

Matters move on to Carnwath J in *Marc Rich & Co v Krasner* (unreported) 18 December 1998 – set out in *Memory Corporation v Sidhu (No 2)* [2000] 1 WLR 1443, at 1454 at H: "Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Once that confidence is undermined he is lost."

Having quoted this passage in *Memory Corp*, Robert Walker LJ then says: "For these reasons I cannot fully accept the judge's restriction of the duty of full disclosure to matters of fact. Nor can I fully accept his corresponding distinction between non-disclosure of facts for which the client must bear responsibility ….. and breaches of an advocate's duty which are exclusively or primarily a matter of professional discipline."

The *uberrima fides* line of thought has evolved further in recent years – see Popplewell J in *Fundo Soberano v Dos Santos* [2018] EWHC 2199 (Comm) at [51] to [53], quoted by HHJ Klein in *Vestey Foods v Cox & Ors* [2018] EWHC 3466 (Ch) at [66]. Worth reading quote in full:

> "Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. **If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.**
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> The second is that although the principle is often expressed in terms of a duty of disclosure, **the ultimate touchstone is whether the presentation of the application is fair in all material respects**: see Robert Walker LJ in *Memory Corporation v. Sidhu (No 2)* [2000] 1 WLR1443, citing formulations from, amongst others, Slade LJ in *Bank Mellat v. Nikpour* [1985] FSR 87, 92, Bingham J in *Siporex Trade v. Comdel Commodities* [1986] 2 Lloyd's Rep 428, 437 and

> Carnwath J in *Marc Rich & Co. Holding v. Krasner* (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. **The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided.** In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.
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> Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to disclosure of documents (see CPR PD31A and *Hedrich v. Standard Bank London Ltd.* [2008] EWCA Civ 905)" (emphasis added)."

And having considered that, if you really want to understand the full extent of the duty and terrify yourself in the process, please read Chapter 9 of Stephen Gee's book on Commercial Injunctions.

When does the obligation arise? All ex parte applications!

Hoffmann J in *Re First Express* [1992] BCLC 824 at 828:

> "It is a basic principle of justice that an order should not be made against a party without giving him an opportunity to be heard. The only exception is when two conditions are satisfied. First, that giving him such an opportunity appears likely to cause injustice to the applicant, by reason either of the delay involved or the action which it appears likely that the respondent or others would take before the order can be made. Secondly, when the court is satisfied that any damage which the respondent may suffer through having to comply with the order is

compensatable under the cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made.

There is, I think, a tendency among applicants to think that a calculation of the balance of advantage and disadvantage in accordance with the second condition is sufficient to justify an ex parte order. In my view, this attitude should be discouraged. One does not reach any balancing of advantage and disadvantage unless the first condition has been satisfied. The principle audi alterem partem does not yield to a mere utilitarian calculation. It can be displaced only by invoking the overriding principle of justice which enables the court to act at once when it appears likely that otherwise injustice will be caused."

Paragraph 3.4 of PD25A provides that "Where an application is made without notice to the respondent, the evidence must also set out why notice was not given

Paragraph 4.3(3) of PD25A provides that "except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application."

See also the decision of the Court of Appeal in *Thane Investments v Tomlinson* [2003] EWCA Civ 1272, at [20] to [27] and [34] to [36].

If you are not within the ambit of Hoffmann's formulation, you cannot apply without notice, so you don't need to give full and frank disclosure. If you do think you are within formulation, then you need to articulate <u>why you are within it</u> clearly on the face of the evidence. If when you write it out it is not clearly within the ambit, then don't apply without notice!

What sort of applications are we talking about?

Freezers and search and seizure applications – departure from the example terms.

Applications for permission to serve out - jurisdictional heads.

Norwich Pharmacal applications – Human Rights defences.

But do you have to apply without notice?

What happens if you don't?

If you do, how far do you have to go?

Can you craft your order so that you don't have to say too much?

Can you rely on a presumption in relation to foreign law being identical to English law? (Fentiman – Foreign Law in English Courts: Andrew Baker J in *Iranian Offshore v Dean Investment* [2018] EWHC 2759 (Comm).)

If you are a respondent, can you run every point? Is there a "full stop" argument – see Spencer J in *DBI Innovations v the May Fair Avenue General Trading LLC & Ors* [2019] EWHC 2235 (QB) at [46] & [47]?