

Case Bulletin: 2019/08

Duty of Full and Frank Disclosure

In a series of *China Medical* related proceedings¹, the courts examined a number of important civil procedure principles. In this article, we look at the duty to make full and frank disclosure in *ex parte* applications, particularly whether or not the duty is a continuing one applicable to an extension of validity of a writ. For background and the defined terms used in this article, please see our publication “Extension of Validity of a Writ”.

When applying for an *ex parte* order, it is the duty of the applicant to make full and frank disclosure to the court of all the relevant facts of which he knows and failure to do so may itself be a ground for setting aside such an order. It is a fundamental rule of practice, now expressed in Order 32 rule 6 of the Rules of the High Court (Cap. 4A), that a party affected by an *ex parte* order may apply to the court to discharge it, inasmuch as he has not had an opportunity of being heard. This rule also enables the court to vary the order. The duty of full and frank disclosure continues while the proceedings remain on an *ex parte* basis.

I. Background

1. In *China Medical v BOC*, it was not disputed that after P obtained the Extension Orders, P had not returned to the Master with news of the Harris J’s Judgment in dismissing the Examination Application, nor had they alerted the Master to any possible defence of BOC arising out of that judgment.
2. In relation to the continuing duty of full and franks disclosure, P raised a

¹ *China Medical Technologies, Inc (in liquidation) v Bank of China (Hong Kong) Limited* [2018] HKCFI 1395, [2019] HKCA 402 & [2019] HKCA 735, and *China Medical Technologies, Inc (in liquidation) v Bank of East Asia, Limited* [2019] HKCFI 2143.

number of arguments including that it does not apply to an extension application, and in light of the on-going complex investigations, it would be unworkable and unnecessary waste of time, costs and court resources to update the court of every development potentially relevant to P's understanding during the period of extension. In relation to the material non-disclosure of the limitation defence, P argued that it is possible to invoke the fraud exception, deliberate concealment exception and statutory exception under section 31 of the Limitation Ordinance (Cap. 347), and the consequences of a refusal to re-grant would be disproportionate to the prejudice to the banks.

II. Key Points

1. In relation to the duty of full and frank disclosure, the test as to materiality is an objective one. It is not for the applicant or his legal advisers to decide the question, hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important.
2. Material information means all matters which are relevant to the court's assessment of the application in question, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same.
3. It will usually not be a sufficient answer to an allegation of non-disclosure for an applicant to say that the relevant information giving rise to the defence was contained in an exhibit though not referred to in the body of the affidavit in the context of a possible defence. The applicant has the responsibility of ensuring that all relevant points are presented clearly and distinctly.
4. The duty of disclosure extends to identifying potential defences (such as limitation), which although not yet taken, would have been available to be taken by the defendant had he been present at the application, provided that:
 - (1) the defence is one which can reasonably be expected to be raised in due course by the defendant; and

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- (2) the defence is not one which can be dismissed as without substance or importance.
5. In deciding whether to set aside an *ex parte* order on the ground of material non-disclosure, the court adopts a four-limb test:
 - (1) Was there non-disclosure of facts?
 - (2) Were the facts not disclosed material?
 - (3) Was the non-disclosure innocent?
 - (4) If there was material non-disclosure, should the court nevertheless exercise its discretion not to discharge the *ex parte* order?
6. There is a continuing duty to make full and frank disclosure after an *ex parte* order in situations where the claimant discovers the *ex parte* order was obtained on a basis he knows that he could no longer support, or where the court has been misinformed, or has been given materially incomplete information.
7. The continuing duty applies to all *ex parte* applications, not just *Mareva* injunctions or *Anton Piller* orders. Whether something fell within the continuing duty of disclosure is to be decided objectively by the court.
8. If the court finds that there has been material non-disclosure, the general rule is that it should discharge the order and refuse to renew it. Nevertheless, the court has jurisdiction to continue or re-grant the order.

III. Findings

While the law does not require P to continuously update the Master on every development in the investigation, it is the material changes of circumstances that P needs to report to the Master. The court found that there was material non-disclosure in that P failed to bring Harris J's Judgment to the attention of the Master after the grant of the Extension Order, but it was innocent and a re-grant would have been ordered.

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However, there was also material non-disclosure and misrepresentation in that P failed to properly inform the Master of the limitation defence, which is a crucial failure. The Court of Appeal confirmed that limitation issues are of crucial importance to the exercise of discretion whether to extend the writ and for how long.

In coming to the conclusion, the court was conscious of the legal safeguards to ensure fairness to both parties. On the one hand, the prejudice against P may be reduced if the liquidators can establish claims against other entities. P would have to establish BOC's knowledge of the fraud in establishing the claim and invoking the exceptions to the statutory time-bar, but P could not point to any direct evidence of actual knowledge. On the other hand, the prejudice to BOC, if there is a re-grant, would be great, for BOC would have to incur costs for striking out the action on limitation grounds. At the end, the Extension Order was set aside without a re-grant.

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