[2015] JMSC Civ 248

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV03627

(NO 2)

IN THE MATTER OF AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR A RESTRAINT ORDER PURSUANT TO SECTION 32 (1) (a) OF THE PROCEEDS OF CRIMES ACT, 2007

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**APPLICANT**
AND	**MICHAEL BROWN AKA ERDLEY BARNES**	**FIRST RESPONDENT**
AND	**PATRICK OSWALD PRINCE**	**SECOND RESPONDENT**
AND	**VALRIE YEE (NEE WEATHERLY)**	**THIRD RESPONDENT**
AND	**ANTHONY CLARKE**	**FOURTH RESPONDENT**
AND	**TYRONE GRANT**	**FIFTH RESPONDENT**
AND	**CONROY ROWE**	**SIXTH RESPONDENT**
AND	**DAVID BROWN**	**SEVENTH RESPONDENT**

AND	**COURTNEY MEREDITH**	**EIGTH RESPONDENT**
AND	**UDELL ELVIRA DOYLEY**	**NINTH RESPONDENT**
AND	**MINETTE SMITH**	**TENTH RESPONDENT**
AND	**TEVAUGHN PRINCE**	**ELE 'TH RESPONDENT**
AND	**KERRY ANN WATSON**	**TW ' FTH RESPONDENT**

IN CHAMBERS

Peter Champagnie for Patrick Prince

Susan Watson Bonner and James Glanville for the Assets Recovery Agency

December 9 and 15, 2015

PROCEEDS OF CRIME – RESTRAINT ORDER – WHETHER RESTRAINT ORDER SHOULD BE DISCHARGED FOR MATERIAL NON-DISCLOSURE

SYKES J

Background

[1] On July 28, 2015, this court granted a restraint order under the Proceeds of Crimes Act on a without-notice application by the Assets Recovery Agency ('the Agency') against a number of persons including Mr Patrick Prince. The court was told via affidavit evidence that Mr Patrick Prince along with two other persons were arrested and charged with conspiracy to commit an indictable offence, possession of property obtained by crime and possession for the purpose of trafficking in cocaine. The arrest occurred after premises with which Mr Prince was associated were searched and three persons, including Mr Prince, were

arrested. The implication here is that Mr Prince may have been actually at the house when the search was conducted and he was arrested. No drugs were found in the house but cocaine was found in a motor vehicle on the premises. When the initial application was made there was no evidence stating to whom the vehicle belonged or who had custody and/control of it at the time of the search. Inside the house the police found US$394,000.00 and CAD$107,050.00. The affidavit described the house as 'the 2nd Respondent's (sic) premises in Canada.'

[2] The court was also told that Mr Patrick Prince absconded from Canada and currently residing in Jamaica. The court was also told that there was no evidence that Mr Prince entered Jamaica lawfully. The basis for this conclusion was that there was no record from the relevant Jamaican government agency (Passport, Immigration and Citizenship Agency 'PICA') that Mr Prince entered Jamaica through any of the legitimate ports of entry. It was also said that there was no record of Mr Prince's departure from Canada. It was also said that a warrant had been issued in Canada for his arrest. From this narrative the picture painted by the Agency was that Mr Prince, having been arrested and charged by the Canadian authorities, somehow left their custody, fled Canada (hence the use of the word absconded), slipped into Jamaica undetected. The unstated conclusion is that Mr Prince is a fugitive hiding from Canadian justice.

The application

[3] Mr Prince has filed an application to discharge or vary the order on the basis of material non-disclosure. Mr Prince has filed a number of affidavits. He says that he was not at the premises where the search warrant was executed. He states that he was never arrested and charged with any of the offences alleged and neither does he know of any arrest warrant out for him in Canada.

[4] Mr Prince has exhibited pages from his passport showing that he in fact entered Jamaica lawfully on his Jamaican passport. He arrived in Jamaica June 14, 2014 from Halifax, Canada, four days after the execution of the search warrant in Canada. At the time of his departure from Canada, based on the information now

available, no warrant had been issued for his arrest. In fact his passport reveals that he entered Jamaica in February and April of 2014 on his Jamaican passport.

[5] Having regard to his history of travel to and from Jamaica it is odd that the Agency could assert that they have no record of him entering Jamaica through any of the legitimate ports of entry.

The response

[6] The Agency has filed an affidavit in response. All of Mr Prince's assertions have apparently been accepted by Agency save perhaps that he does not know of a warrant being issued for his arrest. There is an exhibited letter from the Canadian authorities dated September 2, 2015 which purports to set out the allegations against Mr Prince. That letter has documents dated September 2014. The letter indicates that Mr Prince has been charged on an information sworn on September 10, 2014 for three offences relating to possession, dealing and trafficking in cocaine. The warrant for his arrest was authorised on September 16, 2014.

[7] The exhibited document states that Mr Prince and another man were associated with the searched property by way of surveillance and video. This ultimately led to search warrants being obtained and the warrants being executed on June 10, 2014.

[8] The explanation in the affidavit from the Agency's deponent explaining how it came to be telling the court that there was no record of Mr Prince entering Jamaica lawfully is that it gave the PICA the incorrect information on Mr Prince. In fact the information given related to another respondent. There is no explanation from the Agency explaining why it told the court that Mr Prince was arrested and charged on June 10, 2014 when that was not the case except to say that whatever was placed before the court was the information in its possession at the time of the application. The Agency has not explained satisfactorily why it told the court that Mr Prince absconded from Canada and

suggested that Mr Prince entered Jamaica by surreptitious and clandestine means when that was not accurate. This begs the question of how could the Agency have received such incorrect information when, as it now appears, written documentation to the contrary was either available or at least in existence? What was the source of the initial information and how reliable was it?

[9] The Agency is now saying that when the vehicle at the premises was searched items and documents were found in the name of Mr Patrick Prince. None of this was in the original application. It is now being said that the substance taken from the vehicle was tested and it was found to be cocaine. It is also now being said that a key for the vehicle in which the documents were found was found at the house. It is being asserted that the search was videotaped. Again, none of this was in the original application. If this information now being placed before the court is correct and in existence from 2014, several months before the without-notice application was made, the intriguing question is why didn't the Agency know of this information and if it did, why was it not placed before the court? Why is this information only surfacing because Mr Prince has applied for a variation or discharge of the restraint order? Why now this strenuous effort to resist the application with providing information which was in existence for nearly one year? In other words information that was in existence and possibly available when the application was being made in July 2015 was not placed before the court. No reason has been advanced for not placing this additional information before the court. Bear in mind that the application was made in July 2015 and the search was conducted in June 2014 and it now being said that information and warrants were sworn on September 10 and 16, 2014, the court cannot help but conclude that critical information was either not provided to the Agency, or if it was, then it does not appear that any follow up was done after the initial receipt of information in order to determine whether the information being presented to the court was current and accurate, or if follow up was done then the Agency was being selective in what information placed before the court. As will be shown below if this latter possibility (and the court is not saying that it was) was the thinking of the Agency then it is high-risk strategy fraught with danger having

regard to the high duty of full, frank and fair disclosure imposed by law on all without-notice applicants. This duty is not an option but a mandatory requirement.

The law

[10] There is no doubt that some of the information supplied to the court was inaccurate. Equally, there is no doubt that not all relevant information was provided to the court. At the risk of repeating what is already a well travelled path the court wishes to emphasise that there is an extraordinary duty placed on the shoulders of persons who apply for without-notice orders. Such applicants must make full, frank, fair and accurate disclosure of all material facts to the court. They must make all (not some) reasonable enquiries that needs to be made, having regard to all the circumstances, to make sure that the information being presented in accurate, current and up to date. The applicant must put himself in the boots of the person to be affected and ask, 'What material facts would these persons have advanced had they been present at this application?' Had the Agency done what the law required the Agency would have known that Mr Prince was not arrested. The Agency would have known that he was not charged with any criminal offence. The Agency would have known that he entered Jamaica on his Jamaican passport through a legitimate port of entry. The Agency did not know these things and could not know because, it appears, that it did not make reasonable enquiries from its Canadian counterparts that ought to have been made. If it did then wrong information, misinformation or no information was transmitted to the Agency. There is a duty not to misrepresent even if innocently done.

[11] This can only repeat the advice of Hughes LJ in **In re Stanford International Bank** [2011] Ch 33 at paragraph 191:

> *191 Whilst I respectfully agree with the view expressed by Slade LJ in Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 that it can be all too easy for an objector to a freezing order to fall into the belief that almost any failure of disclosure is a passport to setting aside,* ***it***

> ***is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice.*** *Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable.* ***The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted.*** *The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously.* ***In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge.*** *This application is a clear example of the duty either being ignored, or at least simply not being understood. This application came close to being treated as routine and to taking the court for granted. It may well not be the only example.* (emphasis added)

[12] The court cannot help but observe that this is the second matter in which the question of serious non-disclosure has been raised. In the first matter, the Agency asserted that the defendant was charged with offences when the true position was that the charges were dropped and even more remarkably this additional fact was not known by the Agency until the respondent put in an affidavit several months after the charges were dropped (**ARA v Smith** [2015] JMSC Civ 168). In that case this court cited extensively most of the major recent cases setting out the duty of without-notice applicants generally and in particular without-notice applicants in Proceeds of Crime Act applications. All those decisions emphasised the need for careful thought, careful preparation and

presentation that need to go into these applications. The duty of full, frank and fair disclosure cannot be overemphasised. This rule is a long standing. The court will set out even older cases (from the nineteenth century) in order to show that this is not a principle of this court's making. In **Castelli v Cook** 66 ER 36 Vice Chancellor Wigram said at page 38 :

> *The rule, as I understand it, is this: that a Plaintiff applying* ex parte *comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the Plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go. But if the case has been properly brought forward, and there has been no concealment, the Court, if any considerations affecting the question have been overlooked, will say it has itself to blame for not having looked more carefully into the case; and the Court then hears the motion, and deals with it according to the merits.*

[13] Kay J said in **Republic of Peru v Dreyfus Brothers & Co** cited by Scutton LJ in **R v The General Commissioners for the Purpose of the Income Tax Acts for the District of Kensington, Ex parte Princess Edmond de Polignac** [1917] 1 KB 486, 514:

> *I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex parte applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made.*

[14] Viscount Reading in the **General Commissioners** case put it in his customary trenchant style at pages 495 – 496:

> *Before I proceed to deal with the facts I desire to say this: Where an ex parte application has been made to this Court for a rule nisi or other process,* ***if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits****. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit.* (emphasis added)

[15] The passage highlighted from Viscount Reading speaks to the reason for this rule. It is to protect the courts' processes and prevent abuse. If the information is inaccurate then it means that the courts' processes would have been set in motion on the basis of false information even if innocently done. If the person putting forward the false information knows that the information is false then the court would have been deliberately deceived in these circumstances the Lord Chief Justice states that the remedy is to refuse to hear anything further on the merits of the case. This is how seriously this rule of full and frank disclosure is taken. The Lord Chief Justice was careful to make the point that the conclusion of deliberate deception is not one lightly arrived at. The court should take the time to examine all the facts and circumstances before arriving at such a damning conclusion.

[16] If this passage from the Lord Chief Justice is compared with the two earlier passages it will be seen that the two other judges did not require any deception; they simply required a failure to state fully, frankly and fairly the facts on which

the without-notice applicant relies. There cannot be any doubt about the very, very strict rule applicable to without-notice applications.

[17] Mrs Susanne Watson Bonner submitted that because the Agency is enforcing the general law and not any private law right then the public interest is such that even if there was material non-disclosure the outcome should not be the discharge of the restraint order or even if the court discharges the order it should be re-granted. Learned counsel was deeply apologetic about the state of affairs that has come about.

[18] Counsel relied on Laws LJ in **Jennings v Crown Prosecuting Service** [2006] 1 WLR 182 at paragraph 56:

> *56 It seems to me that there are two factors which might point towards a different approach being taken to without notice applications for restraint orders in comparison to applications in ordinary litigation for freezing orders; but they pull in opposite directions. First, the application is necessarily brought (assuming of course that it is brought in good faith) in the public interest. The public interest in question is the efficacy of section 71 of the 1988 Act. Here is the first factor: the court should be more concerned to fulfil this public interest, if that is what on the facts the restraint order would do, than to discipline the applicant- the Crown- for delay or failure of disclosure. But secondly, precisely because the applicant is the Crown, the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state, and so should particularly insist on strict compliance with its rules and standards, not least the duty of disclosure.*

[19] The question that arises from this dictum is how does the court police this rule without discharging the restraint order? On the one hand the Agency must comply with the duty of full, frank and fair disclosure and there is also great public

interest in seeing to it that law enforcement agencies abide by the law. On the other hand there is the public interest in seeing to it that persons who are apparently benefiting from criminal activity should be held accountable. These two important public interests have now met. Which should prevail in this particular case?

[20] The court bears in mind the following passages from Ralph Gibson LJ in **Brinks Mat Ltd v Elcombe** [1988] 1 WLR 1350, 1356 – 1357:

> *In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1)* ***The duty of the applicant is to make "a full and fair disclosure of all the material facts:"*** *see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton L.J.*
>
> *(2)* ***The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers****: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.*
>
> *(3)* ***The applicant must make proper inquiries before making the application****: see Bank Mellat v. Nikpour [1985] F.S.R. 87.* ***The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.***

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 92-93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners'; case [1917] 1 K.B. 486, 509.

(6) ***Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application****. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.*

(7) ***Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may***

sometimes be afforded:" *per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.*

"when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell L.J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc., ante, pp. 1343H-1344A. (emphasis added)

[21] When Lord Denning spoke of a locus poenitentiae, which means a place for withdrawal from committing oneself to some obligation, his Lordship meant that there would be instances where an ex parte applicant may wish to resile from some assertions he may have made. When the context of this statement is examined what is seen is that Lord Denning had accepted counsel's submission that it was not for every slip or mistake that a freezing order should be discharged. However, that indulgence did not apply in that particular case (**Bank Mellat v Nikpour** (1985) FSR 87, 90). Counsel had submitted that the non-disclosure was innocent in that it was not the product of fraud, deception or anything of that ilk. Lord Denning nevertheless concluded that the injunction was not properly obtained. The law makes allowance for applications prepared in great haste where instructions are not very clear and the facts are unfolding. This is not the case here. It is not clear when the Agency received the information but what is beyond doubt is that the acts being relied on took place one year before the application was made and there was in fact sufficient time to make the necessary checks.

[22] Also when paragraph 6 of the passage from Ralph Gibson LJ is examined, it will be seen that his Lordship gave consideration to the question of innocent non-disclosure and held that even where the non-disclosure was innocent that fact was not decisive in favour of a continuation or re-grant of a without-notice order because 'of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.'

[23] There is one further point to make in respect of without-notice applications. In the case of **Commercial Bank of the Near East Plc v A, B, C and D** [1989] 2 Lloyd's Rep 319 Saville J stated at 322 - 323:

> *It is common ground between the parties that a plaintiff must return to the Court in circumstances where the Court has been misinformed or incomplete information has been given to it on the initial ex parte application. The Court is then in a position to reassess the position. Miss Dias submits that the same duty must apply to material changes which occur after the grant of the injunction – A Mareva injunction is sought ex parte and it behoves the applicant to return to the Court if circumstances later change.*
>
> *In my opinion Miss Dias is right to the extent that while the proceedings remain on an ex parte basis, in the absence of agreement by the parties enjoined or unless the Court otherwise directs, it is the duty of a party who obtains ex parte Mareva relief to bring to the attention of the Court any subsequent material changes in the situation, i.e. any new or altered facts or matters which, had they existed at the time of the application, should have been disclosed to the Court. It must always be remembered that the granting of ex parte relief provides (albeit so that justice can be done) an exception to the most basic rule of natural justice – that both parties should be heard. Thus the need for full disclosure by the party seeking relief – and thus to bear in mind the need to continue to make full disclosure while the proceedings remain on an ex parte basis.*

[24] So the duty is high and onerous and must not be lightly taken. What is pellucid is that for over one hundred years in none of the leading cases both in Jamaica, England and elsewhere has the strength-of-the-case submission overridden the

duty of full, frank and fair disclosure. Where there is material non-disclosure then an examination of all facts and circumstances takes place with a view to deciding how best to treat with the situation. Where the injunction has been continued or re-granted in many of those cases the court was able to find that the non-disclosure was innocent, or the circumstances had a significant impact on the ability to meet the full, frank and fair disclosure standard such as acting under significant time constraints.

The application to the facts

[25] The without-notice application was made over a year after the alleged events. In its response to Mr Prince's affidavits, the Agency is now putting forward written documentation in support of the allegations against Mr Prince. From the date on these documents (September 10 and 16, 2014) no good reason has been advanced explaining why that information was not placed before the court on the initial application. The court is aware that there is provision for the Agency to place hearsay statements before the court on these applications but that should not be taken as licence for not putting forward the best information that is in fact available.

[26] The material now being placed before the court all bear dates of September 10 and 16, 2014 which means that at the time when the without-notice application was being made these documents were already in existence and were available. The without-notice application was not heard until July 28, 2015. What then was the duty on the Agency in these circumstances? It goes without saying that if the Agency is relying on information regarding events that occurred in June 2014 to ground its application then surely that must mean that enquiries are made to check the continued accuracy of the information originally received in order to make sure that at the time it is making the application before the judge the actual information being placed before the judge is the latest position and it is indeed accurate. This is what the duty to make proper enquiries before making the application means. The Agency must not only disclose all material facts known to

it but all additional facts that it would have known had it made the relevant enquiries. Counsel for the Agency said that at the time the application was made what was placed before the court was the information the Agency had at the time. Accepting counsel's word on this it means that those providing instructions to her failed to get upto date information or worse, got it, kept it, or got it, misunderstood its importance, thus placing counsel in a very undesirable position.

[27] The court will have to decide whether the non-disclosure was of sufficient materiality to justify or require immediate discharge of the order. It is without doubt that the non-disclosure was material and important. It is true that the Agency did not know of true facts but that was the result of its own omission to make all proper enquiries and to give careful consideration to the case being presented. The information placed before the court was not full and it was not fairly presented. The court is not saying that there was an intention to deceive but the slant of the information was to place Mr Prince in the position of an arrested person who had fled Canada and slipped into Jamaica undetected.

[28] The court is mindful of the fact that it is not for every material non-disclosure that the order should be discharged. The court also bears in mind the dictum of Woolf LJ in **Behbehani v Salem** [1989] 1 WLR 723, 734 – 735:

> *In that passage to which I have made reference the judge does not refer to the obligation to make inquiries so as to ascertain the material facts or to the Spanish proceedings brought by the first defendant. He concludes by approaching the matter as being one of balance, and he puts in the scales on one side the strength of the plaintiffs' claim, and on the other side he puts the matters which were not disclosed. It is in the performance of that balancing exercise where the judge has gone wrong to a critical extent, and come to a conclusion which I can only regard as being wholly wrong.*

> ***I sought to indicate earlier that in my view there is a considerable public interest in the court ensuring that full disclosure is made on ex parte applications of this sort. If it is to be sufficient to outweigh that public interest to point to the harm that could befall plaintiffs if an injunction is not re-granted, then the whole policy which has been adopted by the court in this field in my view would be undermined.*** *Injunctions in the nature of Mareva and Anton Piller orders should not be granted unless the plaintiff can show a substantial case for saying that unless they are granted they will be under serious risk that assets which might otherwise be available to meet the judgment being dissipated or evidence which might otherwise be available disappearing.* ***In my view it cannot be sufficient to carry out a balancing exercise in the way it was carried out by the judge. It would seem to me that if that approach were adopted, a judge would inevitably come to the conclusion that the injunction must be re-granted.***
>
> *I am very conscious of the passages which I have cited, particularly from the judgments of Balcombe and Slade L.JJ. which refer to the danger of applications to discharge injunctions which have been granted resulting in injustice if the court refuses all relief to a plaintiff. It is true here, as I have sought to indicate, that if the plaintiffs are right, there has been large scale fraud.* (emphasis added)

[29] This passage comes from a case where the court accepted that there was a very strong case of fraud. The court did not re-impose the order but persuaded counsel for the defendant not to transfer or deal with the properties in question without notifying the claimant. To extract such a significant undertaking from counsel and client was undoubtedly due to the very high regard with Woolf LJ

was and still is held. Nourse LJ left to himself would not have sought such an undertaking. Nourse LJ stated his position at pages 738 – 739:

> *The fact that at the end of the day Roch J. might nevertheless have made the orders sought, which I am perfectly prepared to assume that he would, is, as Woolf L.J. has said, entirely beside the point. That is not a consideration which can relieve an ex parte applicant of the duty of disclosure.*
>
> *While I take full account of all the points which Mr. Brodie has made to us, including his submissions on the depth and scale of the defendants' iniquity, as it was seen by the judge, particularly perhaps in Canada and France, and also the requirement that the rule of policy should not become an instrument of injustice, I am in the end satisfied that Rougier J.'s decision cannot be sustained. I certainly do not say that a judge's view of the general merits of the plaintiff's case is a consideration which cannot be weighed in the balance, although my clear impression of the cases is that it has never played the same part on an application for discharge as it does on the initial ex parte application. Indeed, I do not see how it could play such a part if the rule of policy is to be maintained, as it is essential that it should be. Be that as it may, I am entirely satisfied that, on the facts of this case and on the material before him, the judge was in error in allowing that consideration to outweigh the rule of policy. Whether it is more correct to say that he erred in applying established principles of discretion on which the court acts or that he failed to take into account important matters which he ought to have taken into account or that his decision was plainly wrong may not matter very much.*
>
> *If I had been left entirely to myself, I think it likely that I would have allowed this appeal without requiring the undertakings which*

> *counsel for the defendants has now offered. However, since they have been offered and since it is a matter to which Woolf L.J. attaches importance, I certainly do not wish to differ on that point. In the circumstances and subject to those undertakings, the form of which can now be discussed further, I too agree that this appeal must be allowed.*

[30] In **Behbehani** the issue was whether the judge was correct to allow himself to be persuaded that notwithstanding the material non-disclosure the strength of the claimant's case coupled with the depths of the defendants' iniquity was such that the order should still stand since it would have been granted in any event had all the facts been disclosed. Both Lords Justices were very clear that this was not the correct approach because that would mean that in every case where there was a strong case against the defendant the principle of full disclosure would be overridden which would mean that the principle of full disclosure would now be subject to the strength of the allegations against the defendant. Both Lords Justices affirmed the commitment to the principle of full and frank disclosure and it trumped every other consideration.

[31] The court is aware that Woolf and Nourse LJJ were speaking in the context of party and party litigation and not where the state was seeking to enforce the general law. That being said this court is of the view that the principle of full, frank and fair disclosure must stand supreme over and above other considerations. If this court may be permitted to modify the words of Woolf LJ:

> *If it is to be sufficient to outweigh that public interest to point to the harm that could befall [the Agency] if a [restraint order] is not re-granted, then the whole policy which has been adopted by the court in this field in my view would be undermined.*

[32] The court is mindful of Laws LJ's dictum in **Jennings** and this court is not about disciplining the Agency but more concerned to see that all without-notice applicants fully appreciate the heavy burden they are under especially where the

orders sought have such damaging effects on the lives of persons. The court must endeavour to see that it procedures are not misused and its standards undermined. All things considered this is not a case where the Agency was operating under great time pressure, not a case where the facts were still unfolding at a rapid pace and not all material facts were known, not a case where the facts were difficult to unearth and in all the circumstances the restraint order ought to be discharged.

Disposition

[33] The order against Mr Patrick Prince is discharged without prejudice to the Agency to re-apply for another restraint order. Costs to Mr Prince to be agreed or taxed.