IN THE SUPREME COURT OF JUDICATURE No. CHANI 1999/0636/A3
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM (HIGH COURT OF JUSTICE
CHANCERY DIVISION (HART J)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 21st January, 2000

B e f o r e:

LORD JUSTICE MUMMERY
LORD JUSTICE ROBERT WALKER
AND
MR JUSTICE ALLIOTT

– – – – – – –

SIDHU & ANR

Appellant

– v –

MEMORY CORPORATION PLC

Respondent

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD
Tel No: 0171 421 4040,
Official Shorthand Writers to the Court)

Mr R Howe (instructed by Gouldens for the Appellant)
Mr T Higginson (instructed by Mishcon de Reya for the Respondents)

J U D G M E N T

As Approved by the Court

LORD JUSTICE ROBERT WALKER:

This is an appeal with the permission of the judge from part of an order of Hart J made in the Chancery Division on 21 May 1999. The relevant part of the order dismissed an application by the first defendant Mr Sukhbir Singh Sidhu for the immediate discharge, on the ground of material non−disclosure, of a freezing order and a search order made by Hart J on 27 January 1999 (on an application made without notice) and continued (in a modified form) by Jacob J on 1 February.

The first claimant Memory Corporation plc (Memory) is a Scottish company and is the holding company of a group engaged in the design, manufacture and sale of computer hardware and software. The second claimant Datrontech Hong Kong Ltd (DHK) is a Hong Kong company which has since mid−1998 been a wholly−owned subsidiary of a joint venture company called Dtech Memory Corporation (Holdings) Ltd, a Scottish company owned as to 51 per cent by Memory and as to 49 per cent by Datrontech plc. DHK is engaged in sourcing, assembling and distributing high−volume semi−conductors for use in personal computers.

Mr Sidhu was employed by DHK in June 1998 as its acting managing director to run its office in Hong Kong. The office is in Kowloon and has a staff of about eleven. Mr Sidhu had a written contract requiring him to devote the whole of his time to his duties and not, without the consent of DHK's board of directors, to have any outside business interests in which he had more than a ten per cent holding. The other members of the board are Mr Mark Doughty (who lives in Scotland and is finance director of Memory) and Mr David Savage and Mr William Hipp (who are also directors of Memory, Mr Savage being the chief executive). The claimants' complaints against Mr Sidhu are summarized at the beginning of an affidavit sworn by Mr Doughty on 26 January 1999 in support of the application, without notice, to

Hart J:

> "Without the prior knowledge or consent of the other directors of DHK or Memory, Mr Sidhu has substantial interests in at least two other businesses, including the intended Second Defendant Sunsar Limited ("Sunsar"), a company registered in England and Wales and carrying on business here. He is also a director and shareholder in a company called Microsimm India PVT Limited ("Microsimm India"). Those two companies have been doing substantial business with DHK. Mr Sidhu has been using his position as Managing Director of DHK with a view to benefiting those two companies unlawfully thereby causing substantial loss to Memory and DHK."

Mr Sidhu accepts that the affidavit of Mr Doughty establishes that DHK (but not Memory) has a good arguable case for relief.

The claimants' application was made on 26 January 1999, before any writ had been issued. The claimants were represented by experienced junior counsel, Mr Timothy Higginson, instructed by Mishcon de Reya (that is the same counsel and solicitors as represent Memory and DHK on this appeal). The hearing began at about 5.15 pm on 26 January. It was adjourned at about 6 pm and continued on the next day at 9 am. The evidence before the judge was Mr Doughty's affidavit (extending to 30 pages with over 200 pages in an exhibit). At the end of the hearing (at about 10 am) the judge made two separate orders, a freezing order against each defendant in respect of world−wide assets up to the value of US $1m, and a search order against the defendants in respect of Sunsar's premises at 61A High Street, Witney, Oxfordshire. In view of the criticisms made of the form of one of these orders, as well as the circumstances in which they were obtained, it is necessary to describe the freezing order in some detail.

The freezing order is most easily described by reference to its similarities to, and differences from, the standard form set out in the 1999 Supreme Court Practice, Vol 2 p274 (paras 2C−68 and following). The introductory parts and paragraphs 1 and 2 (restriction on disposal of assets by the first and second defendants respectively) were in standard form for a world−wide order, setting a limit of US$ 1m in respect of each defendant and listing a number of specific assets of each defendant (including five separate bank accounts at the

Maidenhead Branch of National Westminster Bank to which it will be necessary to return on a separate issue in this appeal).

Paragraph 3 (disclosure of information, corresponding to paragraph 2 of the standard form) followed the precedent but in a rather expanded form and with the addition at the end (after the reference to possible self−incrimination) of this sentence,

> "In the event that the Defendants claim to be entitled to the benefit of such a privilege, they must provide such allegedly privileged information to the supervising solicitor who will hold such information to the order of the court."

The order did (unusually for a freezing order, as opposed to a search order) appoint a supervising solicitor.

Paragraphs 4,5,6 and 7 of the order were not in standard form. Paragraph 4 required the defendants to inform the claimants' solicitors, and to confirm by affidavit within seven days, (i) what documents they had (anywhere in the world) in their possession, power or control "which relate to or evidence the existence, location or value" of any assets referred to in paragraphs 1 and 2, or disclosed under paragraph 3, and (ii) the location of all such documents. Paragraph 5 imposed on the defendants obligations, expressed in wide terms, for the preservation and delivery (or for giving instructions for delivery) to the plaintiffs' solicitors of all those documents. Paragraph 6 ordered Mr Sidhu to hand over to the plaintiffs' solicitors every passport which he held, and not to leave England and Wales until 48 hours after he had properly complied with his obligations under paragraphs 3 and 4 (or for nine days after service of the order, if sooner). Paragraph 7 imposed restrictions on the defendants as regards informing third parties of the order before the return date.

The exceptions to the order were in standard form, Mr Sidhu being allowed £750 a week for living expenses and each defendant £10,000 for legal advice and representation. The return date was fixed for Monday 1 February 1999 (instead of 3 February as proposed in the draft; this is one of several time limits which the judge required to be altered).

The remaining notes and the schedule of undertakings given to the court by the plaintiffs (schedule 2) were in conventional form, although not exactly in the published standard form. There were two further schedules of undertakings (schedules 3 and 4, given by the plaintiffs' solicitors and the supervising solicitor respectively) which were not in standard form (since they relate to non−standard provisions in the body of the order) but to which no particular objection has been taken.

The claimants issued their writ and effected service in accordance with their undertakings. The search provided for by the search order was carried out at Sunsar's premises at Witney on 27 and 28 January 1999. Mr Sidhu instructed solicitors and counsel (Morgan Cole of Reading and Mr Robert Howe) and was represented by them on the return date, when the matter came before Jacob J. On that occasion Mr Sidhu through his counsel reserved his position as to whether both orders ought to be completely discharged for material non−disclosure, but argued that in any event certain parts of the freezing order ought not to be continued as being unusual, disproportionate and oppressive. It is understandable that Mr Sidhu wished to reserve his position on the wider issues since his lawyers had been unable, at that stage, to obtain any attendance note (still less any verbatim transcript) of what had been said to Hart J on 26 and 27 January. Since then a verbatim transcript of the hearing on 27 January (but not of the hearing on the previous evening) has become available.

On 1 February Jacob J continued the freezing order against both defendants, but in a modified and more conventional form. Paragraph 1 of his order reproduced the combined effect of paragraphs 1 and 2 of the original order but with an overall limit of US$ 1m (rather that two separate limits). Paragraph 2 reproduced paragraph 3 of the original order (disclosure of assets) except for the last sentence, as to delivery of incriminating material to the supervising solicitor. That last sentence, and the whole of paragraphs 4 and 5 of the original freezing order, were discharged by paragraph 3 of the order of Jacob J. Paragraph 4 directed the plaintiffs' solicitors to return Mr Sidhu's passport within 48 hours after

service of an affidavit confirming his assets. There was one simple schedule of undertakings to the court given by the plaintiffs.

Before making his order Jacob J gave a short judgment explaining his reasons for modifying the freezing order. In connection with the provision about incriminating material he referred to the decision of this court in *Den Norske Bank v Antonatos* (then reported at [1998] 3 WLR 711 and [1998] 3 AER 74, and since reported at [1999] QB 271). It will be necessary to come back to that case in some detail. At this stage it is sufficient to note that Jacob J said,

> "In the end counsel for the plaintiffs felt unable to maintain that sentence in view of that authority which was not shown to Hart J. He, himself, was not aware of that authority. I think it is unfortunate that his solicitors may have been (they were also solicitors in Den Norske) but that is not a matter for me to deal with today."

He also regarded the provisions of paragraphs 4 and 5, as to disclosure and delivery of documents, as unusual and oppressive. He said,

> "It seems to me that here we have an example of an order which, although there may be cases in which parts or even all of it are justified, is not an order which ought normally to be made where a Mareva order is granted. Its extremely oppressive nature is not justified on the material before me. All I have on the material before me is evidence suggesting that this defendant dishonestly operated a company, of which he was managing director, for the plaintiffs by doing transactions with companies in which he had an interest when he should not have done.
>
> Necessarily, there is always evidence of dishonesty where there is a successful application for a Mareva order, and if the plaintiffs were right in this case then the additions to the standard they have obtained here would be made in all cases. The additions themselves would become the new standard."
>
> I think an extension from the standard form of order of this great extent requires special justification. I am told that the Vice−Chancellor made such an order in the Den Norske case, but I do not know the details of what happened before the Vice−Chancellor. It is also the case that the order itself was, to some extent, challenged in the Court of Appeal and this aspect of it was not challenged. Whether the order would have been found to be oppressive or not I do not know."

Mr Sidhu did therefore succeed before Jacob J in knocking out most of the unusual provisions in the original freezing order. He and his brother Mr Sohan Sidhu also established, without the need for a court order, that parts of paragraph 1 of the original order were misconceived since the five accounts at the Maidenhead branch of National Westminster Bank listed in para 1(b) (i) to (v) belonged to Mr Sohan Sidhu (who is a solicitor and has the same initials as the first defendant). Morgan Cole contacted the bank about that on 28 January and Mr Sohan Sidhu wrote a letter of protest to Mishcon de Reya on 1 February. These five accounts were again referred to in the order of Jacob J but it is common ground that they should have been excluded. The incident is significant for present purposes only as evidence of one of Mr Sidhu's outstanding complaints, that is the probability that details of the bank accounts were obtained illegally, and that Hart J was not told of that at the original hearing.

After obtaining more information about the original hearing, and taking further advice, Mr Sidhu made an application to discharge the two original orders in their entirety on the ground of material non−disclosure. The application also sought other relief, including the striking out of Memory's claim against Mr Sidhu and security both to fortify the claimants' cross−undertakings in damages and to provide for Mr Sidhu's litigation costs. The application came before Hart J (by what the judge referred to as an accident of listing). He granted the other relief sought by the application but refused to discharge the original orders.

In his affidavit evidence in support of the application to discharge the orders Mr Sidhu relied on a variety of grounds. Some of these (which might be called allegations of material non−disclosure of a conventional character) were abandoned before Hart J, or were rejected by him and are not pursued on appeal. In this court Mr Howe (for Mr Sidhu) has relied on two matters. The first is that Mr Higginson misled the judge by telling him that paragraphs 3,4 and 5 of the draft freezing order were in the form prescribed by the practice direction as to the forms of order in force at the time (see *Practice Direction (Mareva Injunctions and Anton Piller Orders: Forms*) [1996] 1 WLR 1552). Those forms were to

be used "save to the extent that the judge hearing a particular application considers there is good reason for adopting a different form" (see the earlier direction at [1994] 1 WLR 1233, which was not wholly superseded). The second matter is that the judge was not told of the probability that bank account details had been obtained illegally.

Before any detailed consideration of the authorities, of the judgment of Hart J, and of counsel's submissions on this appeal, it is necessary to set out some more matters of fact. These are derived partly from the affidavit evidence before the judge and partly from what Mr Higginson has told this court from his own recollection of the matter. Mr Higginson had not prepared any written witness statement recording what happened immediately before and during the without notice hearings on 26 and 27 January 1999. In a matter as contentious as this, it would be better if he had done so. On this point I respectfully agree with the observations of Mummery LJ, whose judgment I have read in draft.

It appears from the affidavit of Mr Doughty that suspicion first fell on Mr Sidhu in October 1998, when company searches disclosed that Mr Sidhu was a director and shareholder in Sunsar, which was a customer of (and had substantial liabilities to) DHK. In November DHK's board of directors tried to obtain further evidence by placing an investigator called Johnnie Lew in the Kowloon office, ostensibly to work on the IT systems and other projects but in fact to obtain information. However this proved unsuccessful. Early in January 1999 Mr Savage visited Hong Kong and obtained some relevant documents. But a complete search of the Hong Kong office was possible only when the board of DHK called Mr Sidhu to a meeting in London on 27 January, and instructed a security firm, Network Security Management Limited, trading as Network International (Network) to search the office in his absence. Mr Sidhu left Hong Kong on 23 January and the search took place after his departure. The final version of Mr Doughty's affidavit could not be prepared until after Network had carried out its search and reported to DHK's solicitors in London.

Mr Higginson explained that, in those circumstances, he was instructed only at a late stage, the timing of the without notice application was of critical importance, and the claimant's advisers were under great pressure. None of those features is uncommon on an application of this sort. That was the extent of the explanation offered (either orally by Mr Higginson, or in an affidavit sworn by Mr Anthony Morton−Hooper, a partner in Mishcon de Reya) for the failure of the claimants' legal representatives to produce, at the first hearing on the early evening of 26 January 1999, either a written skeleton argument or drafts of the orders which the judge was being asked to make. The earlier practice direction ([1994] 1 WLR 1233), which was not superseded by the later practice direction except as regards the standard forms, required that the papers to be used on the application should where practicable be lodged with the judge at least two hours before the hearing. The requisite papers are not specified, but the need for an affidavit and a draft order are obvious.

In this case the judge was shown the affidavit of Mr Doughty only when he sat, and he had no skeleton argument and no draft order. The absence of a skeleton argument can probably be overlooked, especially since Mr Doughty's affidavit is both clear and comprehensive. But the absence of a draft order is astonishing, especially as the claimants were seeking a freezing order in unusual terms and hoped to obtain both orders that day, before Mr Sidhu met the board of DHK the next morning. If the delay in producing draft orders was caused by last−minute investigations into Mr Sidhu's bank accounts and other assets (a possibility which was not clearly addressed either in the affidavit evidence or in counsel's account of the matter) it should still have been possible to put the basic form of the proposed order before the judge, with some gaps in the enumeration of particular assets. As it was, the judge had not even a rough draft order to consider overnight, before he sat again at 9 am the next morning.

When the judge sat again he was shown a form of order which was not (as counsel told us) drafted by him. Mr Morton−Hooper stated in his affidavit that he had adopted the wording of the freezing order made by the Vice−Chancellor in *Den Norske Bank v Antonatos* (a case in which Mr Morton−Hooper's firm had acted for the claimants, although

Mr Morton−Hooper had not been personally involved). He was not aware that the form of order had been disapproved by the Court of Appeal, apart from what he called a faint recollection (derived from an All England report published in June 1998) of a limitation on cross−examination of a deponent who was subject to freezing and search orders.

Mr Antonatos was the manager of a Norwegian bank's Greek shipping finance business. There was powerful evidence that he had, through a Liberian company, received at least ten bribes totalling over $700,000 from four different customers of the bank, causing it losses of over $24m in bad debts. He was also alleged to have made an unauthorised and illegal profit of over $1m. On 18 February 1998 Sir Richard Scott V−C made freezing and search orders against him. The full terms of the freezing order are not set out in reports of the subsequent proceedings on appeal ([1999] QB 271, [1998] 3 AER 74) but copies produced to this court show that it contained a provision requiring allegedly self−incriminating material to be handed to the supervising solicitor, and (in paragraphs 4, 5 and 6) very wide orders as to disclosure and delivery of documents, and surrender of passports, almost identical to the same numbered paragraphs in this case. The order also contained (and this is a feature not replicated in this case) a paragraph referring to receipts from certain identified customers of the bank, this part of the order being based on a restitutionary claim of a proprietary character.

After service of the orders Mr Antonatos made an affidavit stating that he had disclosed some material to the supervising solicitor on the ground that he claimed privilege against self−incrimination. He refused to provide any information as to gifts or bribes from customers. A senior officer of the bank made a further affidavit describing further investigations suggesting Mr Antonatos' dishonest involvement with three other companies in different parts of the world. Mr Antonatos made a further affidavit stating that he was not using the privilege against self−incrimination in order to keep secret any assets frozen by the injunction.

In those circumstances the bank sought permission to cross−examine Mr Antonatos on his first affidavit. On 10 March 1998 Steel J ordered cross−examination and the course which it took has been described in the judgment of Waller LJ in this court ([1999] QB at pp 280−2; [1998] 3 AER at pp 80−3). The appeal was against Steel J's initial decision to order cross−examination, and against some rulings which she made in the course of the cross−examination hearing on 12 and 13 March 1998. It was concerned with the scope of the privilege against self−incrimination and with associated procedural issues. It was not directly concerned with the orders originally made by the Vice−Chancellor. But Waller LJ (with whom Millett and Chadwick LJJ agreed) expressed the view that the provision for the supervising solicitor to take allegedly incriminating material did not provide effective protection to the defendant ([1999] QB at pp 285 and 295; [1998] 3 AER at pp 85 and 94). Mr Higginson has submitted that this view was not necessary to the decision. Mr Morton−Hooper has in his affidavit questioned the proper interpretation of what he calls ‘the dicta of the Court of Appeal'. The fact remains, however, that what Waller LJ said (with the concurrence of the other members of the court) was a considered view which followed from the principle of the decision. It was something which any lawyer seeking a freezing order should not consciously disregard. It is regrettable that the claimants' counsel and solicitors have shown themselves disposed to question the relevance of the decision rather than to apologise for having overlooked its significance.

On 27 January Mr Higginson returned to court accompanied only by a trainee and a clerk from Mishcon de Reya. Mr Morton−Hooper and his assistant solicitor did not come to court but were deployed elsewhere for service and execution of the orders which they hoped to obtain. The draft order was, it seems, provided by Mishcon de Reya and it may be that Mr Higginson did not have long to study it before the judge sat at 9 am. The transcript of the proceedings that morning shows that the judge was handed two draft orders either when he sat, or just before, and that after some preliminary matters most of that morning's hearing was taken up with consideration of the draft orders (the judge having by then already considered the evidence and said that he was disposed to grant relief). The search order was considered first. It referred to various classes of documents and the judge seems

to have noted an overlap with the freezing order "so far as the wide casting of the net is concerned". Then counsel's submissions moved on to the freezing order. He is reported as having said that this was in the form prescribed by the practice direction. A little later he is reported as having said,

> "Paragraphs 3 and 4 are again in the form prescribed by the practice direction, and 5."

(The transcript actually reads ‘proscribed' in each place, but it is agreed that that is an obvious error.) There was some discussion to the effect that the appointment of a supervising solicitor was not a normal part of a freezing order, but that Mr Gould (the supervising solicitor for the search order) had recommended it.

Mr Higginson has emphasised to this court that the hearing on 27 January took nearly an hour, and that the greater part of the time was occupied by the judge reading and considering the two draft orders (a fact borne out, counsel said, by the relative brevity of the transcript of an hour's hearing). Nevertheless judges at all levels have to rely on the assistance of the advocates who appear before them, especially in considering relatively long and complex documents put before them at short notice. In this case Hart J acknowledged that, for the reasons given by Jacob J, he (Hart J) had been mistaken in including many of the non−standard provisions of the freezing order. He cannot have been overstating the position when he said that Mr Higginson's representation that the provisions were standard "should be viewed as having contributed to that mistake".

It is appropriate to set out in his own words the judge's perception of the mistake (which he had already described as serious),

> "I should at this point record my firm conclusion, formed as a result of the way in which he conducted himself both on the original application and on the present discharge application, that there was nothing deliberate in Mr Higginson's acts and omissions. Mr Howe, on behalf of the first defendant, made much of the fact that I had been left without a full explanation as to how the misrepresentation came to be made to me. The fact was that Mr Higginson was at a loss to explain how he had come to say the fateful words. I think the explanation probably was that the draft was based on the form of the order recently obtained by his solicitors from the Vice−Chancellor in the

> *Den Norske* litigation, and which was being used as a precedent within the firm. The basic format of that order was in accordance with the standard form, but the exceptional nature of paragraphs 4 and 5 had not been noted, and was regrettably missed by Mr Higginson when he presented it to the Court."

The compelling duty on a litigant to make full and frank disclosure on a without notice application (and especially on a without notice application for relief which freezes the defendant's assets, invades his privacy and threatens his reputation) is not in dispute. The principle goes back to *Castelli v Cook* (1849) 7 Hare 89, 94 and to the well−known case of *Rex v Kensington Income Tax Commissioners ex parte de Polignac* [1917] 1 KB 486, 509, in which Warrington LJ said,

> "It is perfectly well settled that a person who makes an ex parte application to the court − that is to say, in the absence of the person who will be affected by that which the court is asked to do − is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

This court has also been referred to a number of more recent cases directly concerned with freezing orders and search orders.

Most of these recent authorities were cited to Hart J on the application to discharge the injunctions. However the judge accepted the submission that there was a significant distinction between the duty of full and frank disclosure which applies on without notice applications, and what the judge called "the separate duty owed to the court by counsel in relation to matters of law and practice". The judge saw the former duty as a duty in relation to disclosure of material *facts* ; as owed by the claimant himself (although the claimant's lawyers could be expected to play a critical role in its performance); and as arising only because the application was made in the absence of the defendant. The judge saw the relevant duty owed to the court by an advocate as different in all three respects.

The judge continued,

> "Of course, in the context of an application without notice the existence of both duties provides an important safeguard to the defendant, and a breach of either duty in that context requires to be treated very seriously. It does not, however, follow, that, because both duties in that context share the same aim, the same consequences should flow from a breach of either. The sanction underpinning the duty of disclosure is the threat that if it is not complied with the party who, or whose lawyers, are in breach will be deprived of the fruits of the process. ... The effective policing of the advocate's duty does not, however, in the same way require (although it may in a particular case justify) the imposition of that particular sanction."

He then recorded (in a passage set out earlier in this judgment) that he was satisfied that Mr Higginson had not deliberately misled him; and he concluded that the error was not such as to warrant the drastic sanction of the freezing order being discharged and the claimants denied relief.

Mr Howe, for Mr Sidhu, has criticised the judge's approach on four grounds. He has submitted that the misrepresentation about the form of the order was not only a breach of the advocate's duty to the court, but was also a failure to disclose material facts; that the judge's distinction (in terms of responsibility and consequences) between the litigant and his lawyers was contrary to authority and to the general policy of the court; that the breach of an advocate's duty should not have less serious consequences than a breach of the duty of disclosure; and that the judge should not have excused the misrepresentation in the absence of a proper explanation (that is, a fuller explanation than the claimants' counsel and solicitors had given) of how it came to be made. In those circumstances there was, Mr Howe submitted, no basis for the court to exercise its exceptional discretion to continue the freezing order. In describing the discretion as exceptional he relied on various authorities, including what was said by Balcombe LJ in *Brink's Mat v Elcombe* [1988] 1 WLR 1350, 1358 ("the discretion is one to be exercised sparingly") and by Dillon LJ in *Lloyds Bowmaker v Britannia Arrow* [1988] 1 WLR 1337, 1347 ("an element of discretion which, despite non−disclosure, might allow an injunction to stand in an exceptional case").

I see some force in some of these criticisms, if and so far as the judge intended to draw any fundamental distinction between the litigant's duty of full disclosure of material facts, and the advocate's duty to assist the court by reference to (or correct summary of) relevant authorities, statutory provisions and practice directions. In the context of what should be disclosed to the court on a without notice application, the distinction between fact and law is not clear−cut. Many of the authorities already cited refer almost interchangeably to non−disclosure of ‘material facts' or ‘relevant matters'. Little weight can be attached to these slight variations in language. But some statements of the principle of full disclosure extend to what the court is told about matters of law.

> In *Bank Mellat v Nikpour* [1985] FSR 87, 92 Slade LJ said,
>
> "The applicant should recognise his responsibility to present his case fully and fairly to the court and that he should support it by evidence showing the principal material facts upon which he relies."

In *Siporex Trade v Comdel Commodities* [1986] 2 LLR 428, 437, Bingham J said that the claimant

> "Must show the utmost good faith and disclose his case fully and fairly ... He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences."

In *Tate Access Floors v Boswell* [1991] Ch 512 (a decision of Sir Nicolas Browne−Wilkinson V−C not cited to this court, but referred to in some of the cases that were cited) the two matters considered by the Vice−Chancellor (at pp 534−5) as possible breaches of the duty of full disclosure (although not accepted by him) were not as to past facts, but as to the likely future course of litigation overseas, and as to the legal implications in terms of self−incrimination of a search order. In *Marc Rich & Co Holding v Krasner* (18 December 1998) Carnwath J cited *Tate Access* and said,

> "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."

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 (even if the non−disclosure was based on legal advice, as in *Behbehani v Salem* [1989] 1 WLR 723) and breaches of an advocate's duty which are exclusively or primarily a matter of professional discipline. The well−known decision of this court in *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 1666 illustrates that an advocate's professional failure may lead to his client suffering the severe sanction of having his defence struck out. It also (in the judgment of Ward LJ at p.1675) contains a clear statement of the principle which applies:

> "Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself."

That was said in the context of an unless order but the same principle applies to without notice applications.

The correct view, it seems to me, is that the advocate's individual duty to the court, and the collective duty to the court, on a without notice application, of the claimant and his team of legal advisers, are duties which often overlap. Where they do overlap it will usually be unnecessary, and unprofitable, to insist on one categorisation to the exclusion of the other. It will however always be necessary for the court, in deciding what should be the consequences of any breach of duty, to take account of all the relevant circumstances, including the gravity of the breach, the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant (which will include the question whether the consequences of the breach are remediable and have been

remedied). Above all the court must bear in mind the overriding objective and the need for proportionality. As Balcombe LJ said in *Brink's Mat v Elcombe* [1998] 1 WLR 1350, 1358, this judge−made rule cannot itself be allowed to become an instrument of injustice. The relative degrees of culpability of the client and of his lawyers are not irrelevant but will seldom if ever be determinative.

The above remarks cover the first three of Mr Howe's four criticisms of the judge. I see no force in the fourth criticism, that the judge erred in making a positive finding that the breach of duty on counsel's part was not deliberate. As the judge who had heard the original without notice applications as well as the application to discharge the orders, Hart J was in an uniquely good position to make a finding on that point. As I have already mentioned, I think that Mr Higginson would have been well advised, as soon as the events of 26 and 27 January 1999 became controversial, to have made a written statement of his recollections and furnished it to Mr Sidhu's advisers and to the court. But his omission to do so does not mean that he did not offer any explanation. He offered an oral explanation (so far as he could) and an apology both to Hart J and to this court. Hart J decided, in the exercise of his discretion, not to apply the severe sanction of completely discharging the orders. Whether he erred in the exercise of his discretion can best be considered after addressing the other outstanding matter of complaint, which relates to the (incorrect) information about Mr Sidhu's bank accounts placed before the court, and the means by which that information was obtained.

When the original applications were made to Hart J he was told nothing about how information as to Mr Sidhu's bank accounts had been obtained, and the judge did not raise the issue himself. On the later application to discharge the orders there was some evidence about how the information was obtained, but it was extremely tenuous. Mr Morton−Hooper said in his affidavit that the information had been obtained through Network, the investigators instructed by the claimants, and that he (the deponent) believed, having been so informed by Mr David Burger, Network's managing director, that no unlawful act was committed in obtaining details of the bank accounts. The most likely form of any illegality

would be an offence under s.5 of the Data Protection Act 1984, which had not at the time been wholly replaced by the Data Protection Act 1998.

Mr Burger made an affidavit stating that the information had been obtained by a subcontractor whom the deponent did not identify. He stated that Network was a highly ethical company and aimed to ensure that its subcontractors knew of its ethics and complied with the law. He deposed (in what may be carefully chosen words),

> "I am not aware of the method that was used to obtain the information because it is considered to be a business secret. However, based on the above criteria, I do not believe that there has been a breach of the Data Protection Act 1984."

"The above criteria" appears to refer to what the deponent had said about ethics and compliance.

The judge summarized the evidence on this point and noted that the gathering of evidence by illegal means has not in general led to its exclusion under the English law of evidence. He referred to *Kuruma v Regina* [1955] AC 197 (it is not here necessary to note more recent statutory developments in the field of criminal evidence). He said that the claimants were not put on inquiry, since the information might have been obtained without fraud or criminal conduct.

The judge then reached a conclusion on this point as follows,

> "It is the fact that the information turned out to be inaccurate which points much more forcibly to the probability that in obtaining it the sub−contractor employed means which constituted an offence under the Data Protection Act 1984. But the applicants were obviously unaware of the inaccuracy of the information. While the consequence may be (I do not decide the point) that documents obtained or produced in the course of the investigation will not enjoy the privilege from discovery which otherwise they might (see *Dubai Aluminium Co v Al Alawi & Ors* [1999] 1 AER 703), I am not persuaded that the applicant was in breach of its duty of disclosure in not airing with the court the possibility that the information had been illegally obtained. I should add that , in arriving at this conclusion, I am very far from accepting Mr Burger's evidence that, in the circumstances which now obtain, there is any relevant confidentiality in the name of the sub−contractor or in the method

> actually used by the sub−contractor to obtain the information in question. I would also add that it seems to me desirable that the court should in the future be more astute than perhaps it has been in the past to be satisfied that information of this nature, placed before it on a without notice application, is both accurate and lawfully obtained."

It is not entirely clear from this part of his judgment whether the judge regarded the procurement of evidence by illegal means, that is, by conduct amounting to a criminal offence or fraud, to have been established as a probability, or merely a possibility. His use of both words suggests that he may not have seen it as essential for him to make a finding on the point. Mr Howe's complaint to him (as to this court) was at one remove, that is of Mr Higginson's omission to draw the matter (either as a probability or as a possibility) to the attention of the court on the without notice application for a freezing order. Mr Howe submits that that was a material non−disclosure because the circumstances in which the evidence was obtained were relevant (first) before of the "clean hands" maxim (which is relevant on any application for an equitable remedy) and (secondly) as having some bearing on the reliability of the evidence.

Mr Howe has criticised the judge's reasoning and conclusions on this part of the case under four heads: (i) that the judge was not entitled to find (as he did, at least implicitly) that the claimants and their legal advisers had no knowledge of the use of illegal methods; (ii) that the judge was wrong to ask himself whether the claimants and their legal advisers were on enquiry as to illegality; (iii) that if that was the right question, the judge answered it wrongly; and (iv) that his overall approach was too lenient.

Before addressing these particular criticisms I would note that the "clean hands" doctrine must not be pressed too far. It requires "an immediate and necessary relation to the equity sued for" (*Dering v Earl of Winchelsea* (1787) 1 Cox Eq 318, 320). Moreover its present status seems a little unclear since *Tinsley v Milligan* [1994] 1 AC 340 (see Lord Goff's observations at pp 357 and 362 but compare the observations of Lord Browne−Wilkinson, who was in the majority, at p 375 as to the fusion of law and equity). It should also be noted that although any doubts as to the quality of the evidence laid before

the court on a without notice application ought to be explained to the court, in this case the location and numbers of Mr Sidhu's bank accounts was a matter of very little concern to the judge, once he had decided to grant a freezing order. It would no doubt have been different if the judge had been told that Mr Sidhu had enormous sums standing to his credit in the accounts. The identification of the accounts was largely a matter of convenience for the claimants (or would have been, if the information had been correct) in communicating with the various banks in order to carry out the order.

Mr Howe relied on the decision of Rix J in *Dubai Aluminium v Al Alawi* [1999] 1 AER 703 (which was, as Hart J noted, a case on discovery and the limits of legal professional privilege). In his judgment in *Dubai* Rix J referred to an interim statement by the Bar Council on the Data Protection Act 1984 which is reproduced in Gee on Mareva Injunctions and Anton Piller Relief (4th ed p 121), (but has not, it seems, been followed by a fuller statement). Rix J continued (at p 708),

> "It seems to me that if investigative agents employed by solicitors for the purpose of litigation were permitted to breach the provisions of such statutes or to indulge in fraud or impersonation without any consequence at all for the conduct of litigation, then the courts would be going far to sanction such conduct. Of course, there is always the sanction of prosecutions or civil suits, and those must always remain the primary sanction for any breach of the criminal or civil law. But it seems to me that criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct, and which are relevant to the issues in the case, are discoverable and fall outside the legitimate area of legal professional privilege."

That was a case where evidence of breaches of English and Swiss law as to banking confidentiality had not been challenged at all. Rix J was careful to limit his remarks to legal professional privilege and it is far from obvious that these concerns should be added to the heavy responsibilities already undertaken by lawyers who are making a without notice application, except perhaps in circumstances where the evidence in question is of central importance to the application. Even when the evidence is of central importance (for example, evidence as to the sale of contraband goods in a case of piracy of intellectual property rights) ‘trap orders' and other conduct involving impersonation or deception have

been commonplace in the Chancery Division for a century or more, and do not seem to have attracted censure.

This is not an area in which it would be appropriate to attempt to lay down any general rule. Certainly the court should not condone any illegal conduct. But the court's general attitude to evidence obtained by questionable means (as shown by *Kuruma*) indicates that the court may admit such evidence without condoning illegality, although the court always has to decide what weight to give it.

In this case the judge was on any view entitled to conclude, on all the material before him, that the claimants and their lawyers were not aware that the information about the bank accounts was incorrect and were not therefore put on enquiry as to how it had been obtained. The judge was entitled to conclude that the claimants and their lawyers, by omitting to raise this point on the without notice application, were not in breach of their duty of full disclosure. In those circumstances the question of the judge being over−lenient does not arise on this part of the case.

I must now return to the serious breach of duty which the judge did find established, that is counsel's incorrect representation that some non−standard parts of the freezing order were in standard form (or to put it negatively − there is no difference in substance − his failure to disclose that parts of the order were non−standard). For the reasons which I have already given, I consider that the judge approached the exercise of his discretion on this point in an unduly restricted way, and did not recognise that even where the breach could be described as a professional failure, it might still be appropriate to apply the sanction of depriving the client of the benefit of the freezing order.

This court will not interfere with the judge's exercise of his discretion, especially on a matter on which the judge was in an uniquely good position to assess its seriousness, unless satisfied that the judge erred in principle. Having studied the judgment I have the strong impression that the judge would have reached the same conclusion even if he had not

seen his discretion as being restricted in the manner which I have mentioned. I am doubtful whether his exercise of discretion was significantly flawed. But if it was, I would exercise this court's discretion in just the same way. I would do so principally for the following reasons: (i) the error was not deliberate; (ii) the error affected the form of the order, not the judge's decision whether to grant relief at all; (iii) the error was rectified within three working days; (iv) counsel explained the error as best he could (even though it is still not fully explained) and he apologised for it; and (v) (though this is probably the point of least significance) the discharge of the freezing order because of a professional error on the part of counsel might unduly prejudice his clients in an important case in which the claimants make serious allegations of fraud.

For those reasons I would dismiss this appeal.

MR JUSTICE ALLIOTT:

I have had the opportunity of reading in draft the judgments of Lord Justice Mummery and Lord Justice Robert Walker and I agree with both.

LORD JUSTICE MUMMERY:

I agree. I have short comments on two points.

1. Evidence of Counsel

The ground of material non−disclosure relied on to discharge the freezing order is based on serious criticisms of counsel's conduct on a without notice application. It is

regrettable that counsel has not at any stage even attempted to supply the other party's advisers or the court with a written statement of his recollection of the hearings that took place before Hart J late in the afternoon of 26 January and early in the morning of 27 January 1999. In particular he has not supplied a written explanation of how, as is evident from the transcript, he came to misinform the court on 27 January (albeit not deliberately) that certain paragraphs in the draft freezing order were in the standard form , when in fact those paragraphs were clearly not in the standard form and the judge was not given any good reason in argument or in the evidence for departing from the standard form.

In my judgment it is always prudent in cases where an advocate's conduct of a case is subject to, or is likely to be subject to, controversy for the advocate to make a full written account of his recollection as close in time to the events in question as possible. This is particularly desirable where the impugned conduct occurred at a hearing at which the other side were not present and no transcript is available, as was the case with the hearing late in the afternoon of 26 January. Within the limits allowed by legal professional privilege, if it is not waived by the client, the advocate's statement should be made available to the other side and to the court.

It is unsatisfactory for the advocate to do what counsel has seen fit to do in this case, namely to give oral evidence to Hart J and to this court many months after the relevant events and as an integral part of his overall submissions in the course of seeking to retain for his client the benefit of the order obtained in the disputed circumstances.

It was only when this court asked to see the papers in the Den Norske litigation used by Memory's solicitors in connection with the application for the freezing order in this case that they were provided to the court. It was only when Alliott J indicated in the course of the hearing of this appeal that an apology in this court might be appropriate that counsel offered an apology. I cannot help thinking that if counsel had at an early stage written down his recollection of what had happened in connection with the January hearings he might have formed a keener appreciation of the seriousness of the criticisms of his conduct and of the appropriate response to those criticisms.

2. Duties to the Court.

It cannot be emphasised too strongly that at an urgent without notice hearing for a freezing order, as well as for a search order or any other form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared by him personally and lodged with the court before the oral hearing; and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed.

There was a lapse of duty in the failure to provide Hart J with a skeleton argument and a draft order before the oral hearing on 26 January 1999 started. It is unsatisfactory for an advocate to hand to the court for the first time during the course of an urgent hearing a long and complex draft order which requires close reading and careful scrutiny by the court. If the advocate is unable to produce a draft order for the judge to read before the oral hearing starts then the application should not be made, save in the most exceptional circumstances, until the order has been drafted and lodged.

I emphasise the special responsibility of the advocate for the preparation of draft orders for the use of the court. There may be a convenient precedent to hand on the word processor of the instructing solicitors or in their files or in counsel's chambers, but it is the duty of the advocate actually presenting the case on the oral hearing of the application to settle the draft order personally so as to ensure that he is thoroughly familiar with the detail of it and is in the best possible position to respond to the court's concerns and to assist the court on the final form of the order.

Applications of this kind should never be treated by the advocate and those instructing him as involving routine pieces of paper work containing common form orders to be printed out from a computer and rubber stamped by the court. The urgency of the application and the absence of the other side necessarily mean that the court is even more reliant than it normally is on the scrupulous and meticulous assistance of the advocate in deciding whether or not to make extreme orders of this kind in the circumstances of the particular case.

In this case I am sorry to say that Hart J did not receive from counsel as much careful assistance as he was entitled to expect on the detailed form of the freezing order. That lack of assistance contributed to the judge making an order in a form which I am confident he would not have made if counsel had performed his functions to the high standard required of the profession of an advocate.

Order: Appeal dismissed with costs.