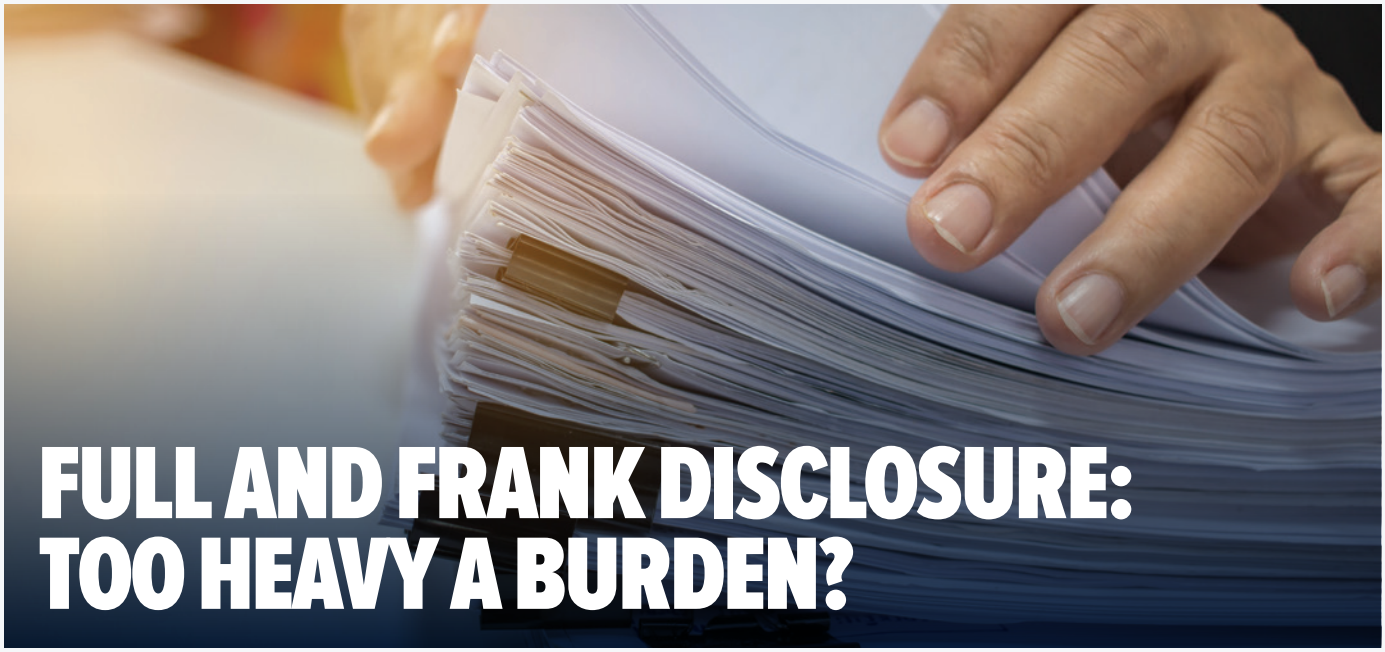

FULL AND FRANK DISCLOSURE: TOO HEAVY A BURDEN?

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RECENTLY, A NUMBER OF HIGH-PROFILE WORLD-WIDE FREEZING ORDERS (WFOS) HAVE BEEN SET ASIDE BECAUSE OF THE CLAIMANTS' FAILURE TO DISCHARGE THEIR DUTY OF FULL AND FRANK DISCLOSURE.

Recently, a number of high-profile world-wide freezing orders (**WFOs**) have been set aside because of the claimants' failure to discharge their duty of full and frank disclosure. WFOs are almost always obtained "ex parte" (i.e. in secret, without informing the opponent). In these circumstances, the claimant always has a duty of full and frank disclosure. This means that the claimant must fully and accurately disclose all material facts and present them to the Judge in a fair manner.

The duty is well established and wide, yet claimants continue to fall foul of the rules. In the recent cases of *Rogachev v Goryianov* and ***Tugushev v Orlov*** the breaches that led to the court setting aside the WFOs included the claimant's failure to make reasonable enquiries about the underlying facts of the case.

In *Rogachev v Goryianov*, the court accepted there was no evidence to suggest the Claimant was aware of a particular issue (an advert placed on a Russian property website). However because this fact would have been discoverable by more careful inquiry, the court found he was in breach of the duty. This was of particular concern to the court because had the document been discovered (and disclosed), the Claimant would not have been able to assert that the Defendant was acting *"clandestinely"* (under English law, secrecy is a key indicator of fraud and therefore important in supporting an application for a WFO).

> **"IN ROGACHEV V GORYIANOV, THE COURT ACCEPTED THERE WAS NO EVIDENCE TO SUGGEST THE CLAIMANT WAS AWARE OF A PARTICULAR ISSUE (AN ADVERT PLACED ON A RUSSIAN PROPERTY WEBSITE)."**

In *Tugushev v Orlov* the fatal instance of non-disclosure was the claimant's failure to disclose documents signed by the claimant in 2003 showing that he had disposed of shares upon taking up a position in the Russian government. These documents were subsequently located by the defendant's advisers and shown to the court at his application to set aside the WFO. The claimant said that he had no recollection of signing the documents, and that he did not have copies of them. His legal team argued that his duty to make reasonable enquiries should not extend to events that happened over 15 years ago and which he could not recall. The Court disagreed, stating that the documents were highly relevant to the case and that the claimant should have made full enquiries of the relevant authorities before presenting his case to the Court on a without notice hearing.

Practical considerations

There is a lot of interest in the effect of English WFOs and how to obtain them. Far less is said about the duty of full and frank disclosure, and the risks of obtaining a WFO if it is later discharged. Any litigant considering applying for a WFO in England should ensure they understand fully what the requirements are and whether they can meet them. Parties outside England should consider very carefully at the outset whether they are willing and able to comply with the duty of full and frank disclosure. This includes considering:

- Are they willing to tell the Court the full truth about the dispute, and importantly any related matters? In particular, are they willing to instruct their lawyers to tell the Court, in detail, about any weaknesses in their case?
- Are they willing to make all enquiries that their lawyers ask them to make? Whilst some enquiries can usually be made by the claimant's lawyers, some may have to be made by the claimant themselves. This can be time consuming as they may have to search old records or get in touch with third parties.
- Are they willing to admit things they may see as personal failings? If a claimant cannot recall the facts of a historical event or whether a document ever existed, it is better to admit that uncertainty than stay silent or deny outright. Similarly, a claimant may have to admit that they were naïve in being misled or that their anti-fraud systems were not as good as they should have been.
- Are they willing to give a fair view of their case to the Court? Victims of fraud often rightly feel very aggrieved and understandably want their lawyers to focus on the strength of their case. However, if seeking a WFO it is essential not to over-state a case.

Winning the battle but losing the war

If the court considers that there has been deliberate and material non-disclosure on a without notice hearing, it will generally set aside a WFO. This is true even if, had the disclosure been made, it would have granted the WFO in any event. This approach is designed to encourage compliance with the rule of full and frank disclosure.

Having a WFO set aside is almost always worse than not obtaining a WFO in the first place. Claimants risk being ordered to pay significant legal costs and damages for any harm caused to the defendant.

"IF THE COURT CONSIDERS THAT THERE HAS BEEN DELIBERATE AND MATERIAL NON-DISCLOSURE ON A WITHOUT NOTICE HEARING, IT WILL GENERALLY SET ASIDE A WFO."

Leaving that aside, the Court will regard any claimant who has wrongfully obtained a WFO with a significant degree of caution for the rest of the proceedings. Tactically, this is a terrible outcome for the claimant: the defendant will remind the Court of the defendant's failings on every occasion.

Whilst these cases should cause all claimants to exercise great caution in seeking WFOs, the message is not a negative one. WFOs are some of the most effective weapons in the English Court's arsenal. They can be determinative of a case, and can make the difference between an effective, enforceable judgment, and a pyrrhic victory. The lesson to be learned from these cases is not that claimants should avoid these orders; it is simply that claimants should expect to spend material time and resources in complying with the duty that comes with an ex parte application.