EX-PARTE ORDERS: EXTENT OF DUTY OF DISCLOSURE & CONSEQUENCES OF THE BREACH

I. Introduction

There is, in the administration of our system of justice, a procedure that enables one party to seek relief, usually temporary relief, ex parte. There are special rules governing this procedure. The most important aspect of this procedure is the duty to disclose all material facts failing which the order is discharged. This judge-made rule, established in the last century, has shown some sign of reform: a movement away from the indiscriminate and rigid enforcement of the rule in all cases of non-disclosure. The purpose of this article is to examine the rule, its content, the consequences of its breach in its orthodox setting and the impact of the new-found indulgence on the rule. Though this indulgence emanated from England, as did the rule itself, there does not seem to be any reported Malaysian case where the new indulgence had been invoked or applied.

II. Exparte Applications

In the adverserial system of justice proceedings are always *inter partes*. Ordinarily in that system orders made without service of proceedings on the defendant are void and are liable to be set aside. It is contrary to the very principle of justice that one should be condemned unheard.

> Where there is no service of process any order made in the litigation in which process should have been served must necessarily be void, unless service has in some way been dispensed with.[1]

[1] *Ebrahim* v *Ali* [1983] 3 All E.R. 615, 616.

Orders of superior courts, on the other hand, seem to enjoy special status. Their orders would not on that count of non-service or lack of jurisdiction be void; these orders have to be obeyed until set aside.[2] They will be set aside once the non-service was brought to the attention of the court[3] in the absence of waiver or estoppel.[4] An application by a motion or summons is unnecessary.[5]

The interests of justice however dictate, and indeed compel, the court to proceed ex parte on grounds of urgency or necessity.[6] It might be too late if the court did not intervene at that stage[7] and an ex parte order is always provisional and is liable to be set aside at the instance of the party affected.[8] There is no need to reserve "liberty to apply" in ex parte orders; it is inherent in any ex parte order.[9] Statutes often provide for applications ex parte: s 326 of the National Land Code 1965 (dealing with applications for extensions of private caveats) and ss 19 and 23 of the Debtors Act, 1957 (dealing with attachments and arrests before judgments)[10] are examples. S 16 of the Trade Descriptions Act 1972, though silent as to the mode of application for a trade description order, was interpreted by the Privy Council in *Socoil Corporation Sdn Bhd* v *Ng Foo Chong*[11] to authorize applications ex parte.

[2]*Isaacs* v *Robertson* [1985] A.C. 97 (PC).
[3]See e.g. *Ramanathan Chettiar* v *Periakaruppan Chettiar* [1962] MLJ 207 (PC); *United Overseas Bank* v *Chung Khiaw Bank* [1968] 2 MLJ 85 affd [1970] 1 MLJ 185 (PC); *Ng Mo Lin* v *Ng Chee Kong* [1982] 2 MLJ 42; *Munks* v *Munks* The Times October 25, 1984 (CA).
[4]*Hitachi Sales (U.K.) Ltd* v *Mitsui OSK Lines* [1986] 2 Lloyd's Rep 574 (CA); *Toh Seak Keng* v *Lim Huang Chew* [1989] 2 MLJ 492 applying *Abuakwa* v *Adanse* [1957] 3 All ER 559 (PC).
[5]*McLaren* v *Stainton* (1852) 16 Beav 279; 51 E.R. 786. See also *S.A. Andavan* v *Registrar of Titles* [1977] 1 MLJ 220.
[6]*Brink's-MAT Ltd* v *Elcombe* [1988] 3 All E.R. 188, 193.
[7]*Asia Television* v *Viva Video Sdn Bhd* [1984] 2 MLJ 304 (FC). An application for custody of children can also be made ex parte when the interests of justice or the protection of the children demand the immediate intervention of the court: *Tan Poey Kheng* v *Mah Peng Kiat* [1984] 1 MLJ 58.
[8]*Tohtonku Sdn Bhd* v *Superace (M) Sdn Bhd* [1989] 2 MLJ 298, 299 per Wan Adnan J. *Ghulam Mohammad Sayeed* v *Perwira Habib Bank (M) Bhd* [1989] 2 MLJ 375, 377 applying the dicta of George J in *Lim Kit Siang* v *Government of Malaysia* [1988] 1 MLJ 50.
[9]*Ghulam Mohammad Sayeed* v *Perwira Habib Bank* [1989] 2 MLJ 375.
[10]*Hari Singh* v *Sundrammal* [1965] 2 MLJ 174; *Dato Abu Mansor* v *Bank Kerjasama Rakyat* (1982) 1 MLJ 258 (PC); *Serply Sdn Bhd* v *Protexa Drilling (M) Sdn Bhd* [1984] 2 MLJ 237.
[11][1984] 2 MLJ 85 (PC)

Similarly the rules of court authorize ex parte applications and some of these instances are applications for renewal of writs,[12] service out of jurisdiction,[13] leave to apply for judicial review[14] and leave to appeal to the Supreme Court.[15] Further a court can under its inherent jurisdiction also make orders ex parte: the *Mareva* injunctions and *Anton Piller* orders are examples.[16]

This duty also extends to solicitors acting in immigration matters for persons refused entry.[17] Urgent applications for stay or bail may be made on their behalf. Such a duty is also imposed on solicitors in applications for arrest of ships in the admiralty jurisdiction.[18]

III. The Golden Rule

An applicant for an ex parte order[19] is under an obligation to make a full and frank disclosure of all material facts.[20] This rule is so basic and fundamental, so often repeated in the cases, that no authority need be cited in support of it: for it is very trite.[21] This principle, one of practice rather than law and derived from the courts of Chancery,[22] is

[12]Order 6 r. 7 of the Rules of the High Court, 1980 ("RHC"). See *Golden Glow Nut Food Co* v *Commodin Produce) & Societie Generale de Surveillance* SA [1987] 2 Lloyd's Rep 569 (CA).
[13]Order 11 r. 4(1) of the RHC.
[14]Order 53 r. 1(2) of the RHC.
[15]Rule 60 of the Rules of the Supreme Court, 1980.
[16]See eg *Pacific Centre Sdn Bhd* v *United Engineers (M) Sdn Bhd* [1984] 2 MLJ 143 where a *Mareva* was granted after the discharge of an order under s 19 of the Debtors Act 1957.
[17]*R* v *Secretary of State for the Home Department*, ex p *Mamun* The Times March 29, 1984.
[18]The *"Stephens"* [1985] 2 Lloyd's Rep 344. Failure to disclose the existence of an arbitration clause in the bill of lading or the negotiation for security when applying for a warrant of arrest of the ship is not a material non-disclosure: *The Evmar* [1989] 2 MLJ 460.
[19]*Republic of Peru* v *Dreyfus* (1886) 55 LT 802; *Simpson* v *Murphy* [1947] GLR 411 (NZ).
[20]*R* v *Kensington Income Tax Commissioners*, ex p *Princess Edmond de Polignac* [1919] 1 KB 486, 514; *Siporex Trade SA* v *Comdel Commodities* [1986] 2 Lloyd's Rep 428, 437 "He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify the likely defences" per Bingham J; *Creative Furnishing Sdn Bhd* v *Wong Koi* [1989] 2 MLJ 153 SC; *Bun Sen Hong Sdn Bhd* v *Malaysian French Bank* [1989] BLD S1125.
[21]See *Bank of Mellatt* v *Nikpour* [1985] FSR 87.
[22]*Lloyd Bowmakers Ltd* v *Britannia Arrow* [1988] 3 All ER 178, 186 per Dhillon LJ.

referred to, in view of its importance, as the "Golden rule".[23] The rule imposes a heavy duty on the applicant[24] and is founded on good sense: to prevent abuse of process of the court and, not only to protect the right of the absent defendant[25] but, also to maintain the purity of justice and its administration.

> On any ex parte application, the fact that the court is being asked to grant relief without the persons against whom relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all facts known to him had he made all such inquiries as were reasonable and proper in the circumstances.[26]

The importance of this duty was treated as analogous to the duty of disclosure in insurance law[27] by Harman J in *Swedac Ltd* v *Magnet Southern plc*[28]

> The principle is one which is of great importance in the courts and never more so than today. The courts are behest by ex parte applications which are made in very heavy matters, leading to very serious orders of the *Anton Piller* and the *Mareva* types. The obligation upon the parties coming before the court to assist the judge to reach a right conclusion by disclosing to the judge all material matters is a duty which, in my view, is of the most fundamental importance to the administration of justice.

It is precisely because a party has chosen to move the court ex parte that he is burdened with the duty of placing before the court all facts, material and relevant, to the decision of the court.[29]

[23]*Swedac Ltd* v *Magnet & Southern plc* [1989] FSR 243, 251.
[24]*Brink's MAT Ltd* v *Elcombe* [1988] 3 All ER 188, 194; *Tunas (Pte) Ltd* v *Mayer Investments Pte Ltd* [1989] 2 MLJ 132 (Singapore).
[25]See eg *Cheah Theam Swee* v *Overseas Union Bank* [1989] 1 MLJ 426 (ex parte injunctions are not granted to erode the status quo to the detriment of the respondents).
[26]*Brink's MAT* v *Elcombe* [1988] 3 All ER 188, 193.
[27]Isaacs J drew the same analogy in *Thomas A Edison* v *Bullock* (1913) 15 CLR 679, 681-82.
[28]*supra*, 251-52.
[29]*Sari Artists Production Sdn Bhd* v *Malaysia Film Industries Sdn Bhd* [1974] 1 MLJ 123, 126; *Adelaide Steamship Co* v *Martin* (1879) 5 VLR (E) 45.

There is a tendency on the part of litigants moving the court ex parte to take advantage of the absence of the defendant. In applications especially for *Mareva* injunctions the plaintiff is required to disclose the defences of contentions the defendant had indicated in earlier correspondence that he would raise,[30] including any defence anticipated by the plaintiff.[31] Non-disclosure of material facts is tantamount to misleading the court either by an implied representation or even suppression. Untold and irremediable damage are often caused to the absent defendant. So a party moving ex parte must act both reasonably and responsibly towards the court and the absent defendant. A failure to inform the court of any such fact is, rightly, treated as a fraud on the court.[32] Sometimes this duty is said to be founded on a contract with the court.[33] The Court will not permit a party to justify or retain the ex parte order on fresh evidence produced at the inter partes hearing. Such evidence is not admissible on an application to dissolve an ex parte order.[34]

IV. Elements of this Duty

Disclosure is demanded of "material facts". Some judges use "material matters".[35] The use of the latter expression can be misleading and deceptive. "Matters" in ordinary

[30] *Third Chandris Shipping* v *Unimarine* [1979] 1 AC 645, 668; *Bank of Mellatt* v *Nikpour supra* 89.
[31] *Lloyd Bowmakers Ltd* v *Britannia Arrow Holdings* [1988] 3 All ER 178 (CA).
[32] *Rowley* v *Graves* (1848) 11 LT (OS) 239.
[33] See eg *Castelli* v *Cook* (1849) 7 Hare 89; 68 ER 36.
[34] *Hari Singh* v *Sundrammal* [1965] 2 MLJ 174; *Datuk Abu Mansor* v *Bank Kerjasama Rakyat* [1982] 1 MLJ 258 (FC). Cp. *Bank Bumiputra Malaysia* v *Lorraine Esme Osman* [1985] 2 MLJ 236 that such fresh evidence, even though available but not produced at the ex parte hearing, may be produced at the inter partes hearing (for the dissolution of the order). His reasoning that both *Hari Singh* and *Datuk Abu Mansor* were cases under s 19 of the Debtors Act, 1957 and therefore required different treatment cannot be supported. Both those cases were concerned with orders made ex parte and not with the source or the subject matter of the orders. The rule against admissibility of fresh evidence was applied in relation to an injunction in *Bird* v *Lake* (1863) 1 H & M 111; 56 ER 49. In a more recent decision, *Pan Asian Services* v *European Asian Bank* [1989] 3 MLJ 385 the Singapore Court of Appeal, albeit obiter, approved Zakaria J's reasoning in *Bank Bumiputra* case. It is possible that the court retains a discretion to admit fresh evidence but at least there must be an explanation why it was not produced at the ex parte hearing. Otherwise it destroys the effect of the rule as to disclosure by a side wind.
[35] See eg Harman J in *Swedac*, *supra* quoted at p. 4 ante in the text

parlance is wider than "fact". This then raises the question: must law also be disclosed to the court on an ex parte application? What if a party misunderstood or misinterpreted the law? Would the ex parte injunction on that count alone be set aside?

The uncritical reference or description of the rule as applying to "matters" as opposed to "facts" has led to its misapplication. It is easier for a defendant to seek, and for a court, to set aside an ex parte order on the ground of non-disclosure. No one would question the wisdom of such decision. The rule is too plain for disputation.

A. Non-disclosure of law

The principle in its unadulterated form applies to non-disclosure of facts only. However, in a more recent decision, *Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar* v *Dato James Lim Beng King*,[36] the High Court set aside an ex parte interlocutory injunction for non-disclosure of s 23A of the Banking Act 1973. The plaintiff, who had agreed to buy from the Defendant the latter's shares in a bank, had obtained an interlocutory injunction restraining the defendant from transferring or disposing the shares. One of the grounds for setting aside that injunction was non-disclosure of s 23A.

> Having heard and considered this case I was satisfied that there was non-disclosure of material facts. ... The plaintiff in her application for interim injunction through her present solicitors had also failed to draw the court's attention to s 23A of the Banking Act 1973 and to the fact that up to the present date there had been no approval of the Minister of Finance for the said agreement pursuant to s 23A of the Banking Act 1973.

The applicability of the provisions of s 23A of the Banking Act 1973 is clearly one of law; it is not one of *fact*. The judge seems to have proceeded on the premise that material

[36] [1989] 2 MLJ 249.

facts have not been disclosed and identifies the failure to draw s 23A to the attention of the court, when seeking the ex parte order, as non-disclosure of a fact.

No authority was cited for this conclusion. There is no explanation or even a suggestion of a probable basis for this view: that failure to draw the court's attention to a particular statutory provision is non-disclosure of a material fact. The court seems to have taken for granted that there was non-disclosure. Authorities are seldom cited for well established and well known propositions. One can only surmise that the misapprehension arose from the use of the phrase "material matters" as opposed to facts.

Law, though not strange to lawyers, is most awesome to lay litigants. There is no presumption that every person knows the law: the maxim is *ignoratia juris neminem excusat*.[37] As long ago as 1908 Braddell JC in *Chang Lin* v *Chang Swee Sang*[38] said:

> There is no presumption that every person knows the law and Maule J in *Martindale* v *Falkner*[39] said it would be contrary to common sense and reason if it were so. The true meaning of the maxim *ignorantia juris non excusat* is that parties cannot excuse themselves from liability from all civil or criminal consequences of their acts by alleging ignorance of the law, but there is no presumption that the parties must be taken to know all the legal consequences of their acts.[40]

Ong CJ had made similar observations in the Federal Court.[41]

On those statements of high authority could a person be faulted if he disclosed the facts and made no reference to the law? Could he be guilty of non-disclosure or suppression of

[37] *Evans* v *Bartlam* [1937] AC 473, 479 per Lord Atkin.
[38] (1908) Innes 95, 101-102.
[39] (1846) 2 CB 706, 720; 135 ER 1124.
[40] He also cited *Seaton* v *Seaton* (1888) 13 App Cas 61, 78.
[41] *Chin Thai* v *Siow Shiow* [1971] 1 MLJ 67, 68 (FC) "No one is presumed to know the law; least of all to have knowledge of an express condition attached to grant of an approved application ..."; *Nathan Bros* v *Tong Nam Constractors* [1959] MLJ 240 (Singapore) (There is no presumption that everyone knows the law. The proposition is that ignorance of the law will not excuse a man from the penal consequences).

material facts? If a judge can be excused for not knowing the law, so can a litigant. When the case is properly before the court and in the absence of any improper concealment of facts, the court should look at the application carefully. If the court fails to do that then the court should consider it blameable. On an application to dissolve the ex parte injunction, the court should consider the merits rather than the technicality.[42]

In *West* v *Arnold*[43] the plaintiff had not disclosed certain facts, namely the notice to pull down and the certificate of the surveyor under the Bristol Town Improvements Act 1840-48.These facts were only relevant as raising a point of law based on an unreasonable construction of the Act and therefore the court held that these facts were not material.

The clearest statement yet on this subject is to be found in *Hispanica de Petroleos SA* v *Vincendora Oceanica Navegacion.*[44] It was alleged that the plaintiffs had been guilty of misrepresentation in obtaining the *Mareva* injunction. Parker LJ in rejecting the contention said:

> What happened was simply that they [the plaintiffs] drew what may have been a wrong legal conclusion from the facts, or more probably made an assumption without giving the matter serious thought.
>
> A mistaken submission of law clearly cannot amount to a non-disclosure of (sic) material misrepresentation. The court was not deprived of knowledge of any material *fact.*

If a positive but erroneous misrepresentation of law is not, and thus saves an ex parte order from being dissolved on ground of, a breach of the duty of disclosure, why should the non-disclosure of the relevant law be treated differently. With respect, this part of the decision in *Tunku Kamariah, supra* needs serious re-consideration. There is a tendency to deal swiftly with interlocutory applications

[42]*Castelli* v *Cook* (1849) Hare 89; 68 ER 36. If at the inter partes hearing it turns out that the order was unauthorised or there was a misrepresentation as to the law, the court can consider whether the order can be continued on fresh grounds rather than dissolving it altogether for non-disclosure of material facts.
[43](1878) 8 Ch App 1084.
[44][1986] 1 Lloyd's Rep 211, 236 (CA).

especially those concerned with injunctions at the risk of misapplying principles.

B. Knowledge of facts not disclosed

The duty of disclosure cannot be considered in the abstract. A person is only required to disclose what is within his knowledge.[45] It is idle to argue that a party was guilty of non-disclosure of a fact he did not know. Dissolution occurs only when a party has withheld from the court material facts within his knowledge.[46] The defendant is required to disclose a defence only if he knew of that defence in advance.[47]

The examples in the decided cases also bear this out. In *Sari Artists,* the non-disclosure related to proceedings in Indonesia; the plaintiff was a party to those proceedings too. So he knew that fact and failed to disclose what he knew. In the more recent English case, *Behbehani* v *Salem*[48] the plaintiff's failure to disclose the Spanish proceedings and the settlement in relation to the same matters in issue in the English proceedings was found to be a serious breach of the duty of disclosure.

The basis for the disclosure of the Spanish proceedings was stated by Woolf LJ:

> ... it is ... equally important that the court should be aware of the [Spanish proceedings], because the fact that there are proceedings being brought or about to be brought by a defendant is a matter which the court would want to investigate since the defendant's proceedings could be a trigger proceedings which are being brought for some improper purpose by a plaintiff within this jurisdiction. The defendant's proceedings may also throw light on the true nature of the relations between the parties.[49]

However, in *J H Rayner (Mincing Lane Ltd)* v *Manilal & Sons*[50] the point of non-disclosure of foreign proceedings,

[45]See *Mohammed Zainuddin b Puteh* [1978] 1 MLJ 40, 41.
[46]*Hatch* v *Borsley* (1835) 4 LJ 160; *Hispanica d Petroleos, supra,* 235.
[47]*Hispanica, idem.*
[48][1989] 2 All ER 143 (CA).
[49]*Ibid*
[50][1987] 1 MLJ 312.

though available, was not relied on to support a plea of non-disclosure. The whole action was stayed on the ground of abuse of process by reason of the foreign proceedings. With the stay of the action the *Mareva* also fell.

The fact that the plaintiff could not meet his undertaking in damages (because of his impecuniosity) was fatal in *Swedac Ltd, supra*. No one would know his financial circumstances than the plaintiff himself. So also in *Tunku Kamariah* the plaintiff would know about the letter his solicitors, albeit the former ones, had sent in relation to the very same matter which was the subject of the proceedings.

Therefore the fact that a party had forgotten about a fact is immaterial and is not an excuse for non-disclosure.[51] However, mere ignorance of what a party might have known is not equivalent to knowledge so as to amount to non-disclosure.[52]

That last proposition has been affected by a series of cases especially those dealing with Mareva injunctions and possibly Anton Piller orders. As already seen the plaintiff seeking a Mareva injunction should disclose the anticipated defences. This obligation requires the plaintiff to make proper inquiries. The plaintiff is affected not only by what he actually knows but also by what he ought to have known. Ralph Gibson LJ in *Brink's-MAT* v *Elcombe*[53] put the matter clearly:

> The applicant must make proper inquiries before making the application: see *Bank Mellatt* v *Nikpour*.[54] The duty of disclosure therefore not only applies to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> In this sphere constructive knowledge is sufficient.

This duty to make inquiries is not of general application and seems to be confined to cases involving *Mareva* injunctions.

[51] *Clifton* v *Robinson* (1841) 16 Beav 355; 51 ER 816; *Hilton* v *Lord Granville* (1841) 4 Beav 130, 137; 49 ER 288, 290; *Sari Artists, supra* 124; *Leong Wan Yin* v *Nestra Plantations Sdn Bhd* [1982] 2 MLJ 65, 66; *PMK Rajah* v *Worldwide Commodities* [1985] 1 MLJ 86.
[52] *Semple* v *London & Birmingham Ry* (1838) 2 Jur 560.
[53] [1988] 3 All ER 188, 192.
[54] [1985] FSR 87.

Brink's-MAT was itself a case that concerned the dissolution of a *Mareva*. In *Bank Mellatt's* case Slade LJ himself confined his observations as to disclosure of the anticipated defence to an application for a *Mareva*.

> Unless the applicants in any given Mareva application have directed their minds to the nature of the cause of action, they are not in a position to identify the relevant facts. Furthermore I think that, as it is well established by authority, it is their duty on any *such* application to state any defence which they anticipate will be relied upon by the other side.[55]

The emphasised word related to the *Mareva* application and not to any application for an ex parte order.

C. Determination of materiality

If a party is bound to disclose "material" facts, who decides the "materiality" and how is it decided? On principle a party under such a obligation should not be made the judge of "materiality" of the fact. His subjective views can never be a substitute for the objective assessment by the court. Otherwise he would usurp the powers of the court which holds the balance between the plaintiff and the defendant. The rule enjoins the plaintiff to disclose "not only the facts that he considers material but all [material] facts".[56] There is abundant authority for the proposition that materiality must be decided by the court and not by the party or his legal advisers.[57]

D. What is "material"

A fact is material if it would affect or influence the decision of the judge; if it would not affect or influence the judge then it is immaterial. Non-disclosure or misrepresentation

[55][1985] FSR at 93.
[56]*Mohamed Zainuddin b Puteh, supra* 41.
[57]*R v Kensington Tax Commissioners, supra* 504; *Daglish v Jarvie* (1850) 2 Mac & G 231, 238; *Thermax Ltd v Schott Industries Glass* [1981] FSR 288, 295; *Dean v Newall* (1837) 2 My & Cr 558; 40 ER 752.

must be such as to "mislead" the court in making the order.[58] In *Prof A Kahar Bador* case Hashim Yeop A Sani J (as he then was) said:

> In the context of the facts now available before the court it is my opinion therefore that the omissions by the plaintiff to mention certain matters in his affidavit are not fatal to the application for interlocutory injunction. The omissions did not amount to a suppression of material facts or omissions intended to mislead the court nor was the court in fact misled.[59]

Facts which are the subject of dispute between the parties are not material.[60]

Even a material misrepresentation should not be misleading or amount to suppression.[61] Failure to disclose that the prior caveat had been withdrawn or that the statement of claim had been amended are material facts.[62] These will have a bearing on the exercise of the judge's discretion whether an injunction should be granted for the protection of the very property in respect of which the caveat was lodged and withdrawn. Other instances have already been adverted to: there must be disclosure of the foreign proceedings between the same parties on the same subject matter;[63] the lack of financial resources to meet an undertaking in damages.[64] On an application by the tenants for an injunction to restrain their eviction by the landlord's mortgagee, the fact that the tenants had, through their member of Parliament, requested for grace period to vacate and the correspondence between their solicitors and the mortgagee's solicitors was material.[65]

A party cannot paint a black picture about the absent respondent and expect to get away. Such a presentation of

[58] *Prof Dr A Kahar Bador* v *N Krishnan & Ors* [1983] 1 MLJ 407, 409.
[59] *Ibid.*, 410.
[60] *Mohamed Zainuddin b Puteh, supra* 42.
[61] *Creative Furnishing Bhd* v *Wong Koi* [1989] 2 MLJ 153 (SC).
[62] *Tunas (Pte) Ltd* v *Mayer Investments* [1989] 2 MLJ 132 (S'pore); *Koperasi Sarbaguna Cuepacs* v *City Investment* [1983] 1 MLJ 367.
[63] *Sari Artists, supra.*
[64] *Swedac Ltd., supra.* Though this point could also have been raised in *Cheah Theam Swee* v *Overseas Union Bank* [1989] 1 MLJ 426 it does not seem to have been raised.
[65] *Mohamed Said b Ali* v *Ka Wa Bank* [1989] 3 MLJ 200 (S'pore).

facts and circumstances was clearly intended, and in the ordinary circumstances bound, to prejudice the absent respondent in ex parte proceedings. The absent respondent is entitled to be treated fairly. As Dhillon LJ said in *Lloyd Bowmakers* v *Britannia Arrow*[66]

> ... if he puts matters of prejudice, he must put them as fully as is necessary to be fair. He cannot pile on the prejudice and then, when it is pointed out that he has only told half of the story and has left out matters which give quite a different complexion, say, 'Oh, well, it is not material. It is only prejudice and so, on a strict analysis of the pleadings, does not have to be regarded.

Similarly in *Ali & Fahd Shobkshi Group Ltd* v *Moneim*[67] the plaintiffs' reference to the defendant's arrest in Cairo on fraud charges fell far short of the required standard of disclosure. The plaintiffs had failed to disclosure, though known to them, that the defendant had vehemently denied the charges. Other instances of material facts are set out in the judgment of Mervyn Davies J. These are: non disclosure of the fact that the defendant was given a power of attorney by the plaintiffs to operate their account, the defendant had openly operated the account with the Bank of America; the three sums complained of were paid into the account as part of a complex transaction with the plaintiffs; several bank statements of accounts (operated by the defendant) were sent to the plaintiffs who were aware of the existance and operation of the accounts and of the transactions.[68]

V. Consequences of Non-Disclosure

The strict rule has always been that an ex parte injunction would be discharged for non-disclosure of material facts irrespective of the merits.[69] The order is set aside ex debito justitiae.[70] The object of this rule is to deprive the party of

[66][1988] 3 All ER 178, 187.
[67][1989] 2 All ER 404, 410.
[68]*Ibid.*, 409-411.
[69]*Vandergucht* v *de Blaqiere* (1838) 8 Sim 315; 59 ER 125; *Hilton* v *Lord Granville* (1841) 4 Beav 130; 49 ER 288 and *Harbottle* v *Pooley* (1869) 20 LT 436.
[70]*Cameron* v *Cole* (1944) 68 CLR 571, 589 "... if the principle be not observed the person affected is entitled ex debito justitiae, to have any determination affecting him set aside" per Rich J.

any advantage or benefit he might have obtained as a result of the ex parte order.[71] It also acts as deterrence to would be applicants to observe the duty of disclosure.[72] The court did not even allow the injunction to be supported by a new set of facts.[73] This rule has been followed faithfully in this country too.[74]

Nevertheless the breach or dissolution was not an anathema. The court always entertained a new application for an injunction *de novo* provided sufficient explanation is given for the previous non-disclosure.[75] This would, no doubt, entail delay and the loss of the benefit derived from the previous order. Any new application could also be met with an objection that it tends to interfere with rather than preserve the status quo.

Some recent cases recognize the power to re-grant the same injunction immediately, and in suitable cases the courts have indeed granted orders continuing the same injunction notwithstanding the non-disclosure. A related example is *Pacific Centre Sdn Bhd* v *United Engineers*[76] the High Court, after dissolving an order under s 19 of the Debtors Act 1957 for non-disclosure, immediately granted a *Mareva* on an application de novo. On the application to set aside the court became aware of all the relevant facts and circumstances.

> 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.[77]

[71] *R* v *Kensington Tax Commissioners, supra* 509; *Bank of Mellatt* v *Nikpour, supra* 91-92 ("... is deprived of any advantage he may have derived from that breach of duty ...").
[72] *R* v *Kensington Tax Commissioners, supra; Yardley Ltd* v *Higson* [1984] FSR 304.
[73] *AG* v *Liverpool Corp* (1835) 1 My & Cr 171; 40 ER 342.
[74] See eg *PMK Rajah* v *Worldwide Securities* [1985] 1 MLJ 86; *Cheah Theam Swee* v *Overseas Union Bank, supra; MRK Nayar* v *Ponnusamy* [1982] 2 MLJ 175 (FC); *Che Mah binte Hashim* v *Perbadanan Pembangunan Luar Bandar* [1989] 2 CLJ 149 where Edgar Joseph Jr J relied on *Thermax, supra* for this proposition which he described as "trite".
[75] See eg *Grant Matich & Co Pty Ltd* v *Toyo Menka Kaisha Ltd* (1978) 3 ACLR 375; *South Down Packers Pty Ltd* v *Beaver* (1984) 8 ACLR 990 (FC)
[76] [1984] 2 MLJ 143.
[77] *Brink's-MAT Ltd* v *Elcombe* [1988] 3 All ER 188; (1989) 15 FSR 211, 219; *Lloyd Bowmakers Ltd* v *Britannia Arrow Holdings* [1988] 3 All ER 178; [1988] 1 WLR 1337, 1343H - 1344A per Glidewell LJ.

The principles calling for automatic dissolution for breach of the "golden rule" are all found in cases in the last and in the beginning of this century. The fact there can be an application de novo after a dissolution itself is a gloss on the strict application of the rule. Such somewhat inflexible rule resulting in a dissolution for non-disclosure does not seem to accord with modern views on the exercise of judicial discretion.[78]

There are some examples of cases in England in which the courts have actually continued the injunction despite the non-disclosure. In *Yardley Ltd* v *Higson*[79] the injunction was continued, though in a limited form, when a full explanation for the previous non-disclosure was made at the subsequent inter partes hearing. Similarly in *Brink's MAT Ltd, supra* the injunction was continued. The discretion is sparingly exercised.

There are sound reasons in principle for this approach by the courts. After all the rule is a self-imposed one of practice; the purpose is to facilitate the administration of justice. The rule should not therefore be used to deny justice. In explaining this approach Slade LJ referred to

> the growing tendency on the part of some litigants ... or of their legal advisers, to rush to the *R* v *Kensington Income Tax Commissioners* principles as a *tabula in naufragio*, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunction in cases where there is little hope of doing so on substantial merits of the case on the balance of convenience.[80]

"A *locus poenitentiae* may sometimes be afforded".[81]

The most important consideration seems to be the innocence of the non-disclosure, that is, it should not have been deliberate and whether the injunction would have been properly granted had the undisclosed facts been disclosed to the court.[82] The

[78] *South Down Packers Pty Ltd* v *Bearer* (1984) 8 ACLR 990.
[79] [1984] FSR 304.
[80] *Brink's-MAT, supra* 195.
[81] *Bank Mellatt* v *Nikpour* [1985] FSR 87, 90.
[82] *Lloyd Bowmakers* v *Britannia Arrow Holdings plc* [1988] 3 All ER 178, 183; *Behbehani* v *Salem* [1989] 2 All ER 143 "... the questions which we should start discussing ourselves, are, first, whether it was innocent, and second, whether an injunction could properly have been granted if full disclosure had been made (in the first instance)" per Nourse LJ.

latter does not pose much of a problem. The former does and the "innocence" or otherwise of the non-disclosure would be much debated in courts.

Ralph Gibson LJ in *Brink's-MAT*[83] explained when non-disclosure was "innocent".

> The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or 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.

A non-disclosure was innocent where there was no intention to omit or withhold information which was thought (or found) to be material.[84]

A local case which recognized and applied this new development is the recent Singapore decision, *Mohamed Said b Ali* v *Ka Wa Bank*.[85] There the tenants, claiming to be protected under the Control of Rent legislation, sought to restrain the landlord's mortgagee from evicting them in the exercise of the mortgagee's rights under the mortgage. The tenants had obtained an interim injunction ex parte and subsequently applied inter partes to renew and continue that injunction. It was discovered during the inter partes proceedings that the tenants had been guilty of non-disclosure of material facts: that they had previously asked for a grace period to vacate and the correspondence between their solicitors and the mortgagee's solicitors.

Grimberg JC, after adverting to the departure in England from the orthodox approach, continued the injunction in a modified form. He declared that he had "power in [his] discretion to continue the injunction, if that is the course justice requires". In doing so the judge exonerated the tenants of any personal blame and considered their plight at being made homeless. The affidavit was settled by an inexperienced junior solicitor in a hurry as the ex parte injunction was applied for on the very day they were to have been evicted. The solicitor's inexperience saved the day for these tenants, who were "poorly off" living "cheek by jowl in a pre-war

[83][1988] 3 All ER 188, 193.
[84]*Dynacst (S) Pte Ltd* v *Lim Meng Siang* [1989] 3 MLJ 456 (Singapore).
[85][1989] 3 MLJ 300.

shophouse"[86] The judge followed *Eastglen International Corpn* v *Monpare SA*[87] where a solicitor's mistake mitigated the non-disclosure.

By any standard *Mohamed Said* is a wholly exceptional case. The tenants sought legal assistance which did not live up to the standards expected. By that failure the tenants risked the loss of the roof over their heads. The consequence was quite disastrous to them. Legally the mortgagee could not get possession without notice to the tenants. Technicality had to give way to justice. This case however, is not a licence for non-disclosure and does not encourage litigants to go to inexperienced solicitors in the sure exceptation that their ex parte injunctions would be saved from the consequences of non-disclosure.

Despite what appears to be a relaxation of the strict rule, the courts would no doubt continue to ensure that the rule as to disclosure of material facts is observed. While the court can continue an ex parte order despite the non-disclosure the courts would do so in limited circumstances as illustrated by *Pan Asian Services* v *European Asian Bank*.[88] The order ex parte for the appointment of a provisional liquidator was obtained without proper disclosure. The court found that the affidavit in support was "so hopelessly inaccurate and misleading" that the order was discharged.[89] It is only right that a mere omission or slip should not defeat substantive rights. However, inaccurate and misleading information or recklessness and a disregard of the rights of others must be treated differently. Otherwise the process of the court would be abused. The "golden rule" is aimed at preventing an abuse and not to punish a party for a slip or genuine mistake. There should be an explanation as to how and why the slip occurred. The continuation of the ex parte order despite the breach of the "golden rule" is an indulgence and should not be available as of right and even in *Pan Asian* Wee CJ limited the indulgence to "appropriate cases". The ex parte order was set aside in *Pan Asian*. As explained

[86]*Ibid.*, 204 "[The affidavit] was settled on behalf of the plaintiffs wholly unschooled in determining what material they should make available to an inexperienced solicitor ...".
[87](1987) 137 NLJ 56.
[88][1989] 3 MLJ 385 (Singapore CA).
[89]There was no evidence that the company's assets would dissipated.

in another Singapore case, *Dynacast (S) Pte Ltd* v *Lim Meng Siang*[90] the court would continue the order despite the non-disclosure only where "justice" so required and the discretion would be "sparingly exercised". The order was also discharged in *Dynacast*.

VI. Conclusion

The cases in which the court has dissolved the injunctions despite non-disclosure of material facts far outweigh those in which the injunctions have been continued. The exception, rather than destroying the rule as to disclosure, only reinforces the primacy of the rule. No one who is guilty of non-disclosure can expect to be received kindly by the court. The merciful hand of the court is reserved only for the deserving few.

There is no injustice in the imposition of a penalty for abuse of the privilege of proceeding ex parte. The risk of error is increased largely because solicitors often treat applications for ex parte orders as a routine matter. This tendency that ex parte orders are available or granted as of course and any errors or omissions can be made good at the application to dissolve ought to be discouraged. The courts should also take a more active role in granting ex parte orders, especially injunctions.[91] Such a role would at least minimise the risk of non-disclosure of material facts and ensure that the "golden rule" is observed.

There appears to be no reported Malaysian case on the continuation of an ex parte order on the basis of the indulgence recently recognized in England and followed in Singapore. Given that the source and practice of ex parte orders in Malaysia is English and similar to Singapore, there is no reason in principle why this new development should not be followed in Malaysia.

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[90][1989] 3 MLJ 456.

[91]See eg *Korea Industry Ltd* v *Andoll Ltd* [1989] 3 MLJ 449 (CA Singapore) Geintberg JC cited with apparent approval Sir John Donaldson Mr in *Bolivinter Oil SA* v *Chase Manhattan Bank* [1984] 1 Lloyd's Rep 251, 257: "Judges who are asked, often at short notice and ex parte, to issue an injunction restraining payment by a bank under an irrevocable letter of credit or performance bond or guarantee should ask whether there is a challenge to the validity to the letter, bond or guarantee itself."