STUARTS HUMPHRIES

Duty of Full and Frank Disclosure

Cayman Islands Litigation: Duty of Full and Frank Disclosure

Introduction

It is a core principle of justice in the Cayman Islands that both an Applicant and a Respondent be given an opportunity to address the Court before a Court Order is made. However, in certain circumstances, the Cayman Islands Court does allow an Applicant to apply for a Court Order without notifying the Respondent. These are known as without notice or *ex-parte* applications.

Ex-Parte Applications

Paragraph 2.1 of the Financial Services Division Guide stipulates that:

> "All applications should be made on notice, even if that notice has to be short, unless:
>
> i.) any rule or PD provides that the application may be made without notice; or
>
> ii.) there are good reasons for making the application without notice, for example, because notice would or might defeat the object of the application".

An orthodox basis for an *ex-parte* application is that the application needs to be made very urgently[1]. The classic example of an urgent *ex-parte* application is where the Applicant becomes aware that a Respondent is planning to transfer assets so as to make it harder for the Applicant to enforce a prospective judgment against them. In those circumstances, giving notice to the Respondent is likely to defeat the purpose of the application and so the Plaintiff may apply urgently *ex-parte* to the Court for a Freezing Order to prevent the transfer from happening. The Freezing Order would then be subject to a "return date" when the Respondent will have an opportunity to appear in Court.

Other examples of urgent *ex-parte* orders include Search orders and orders for the appointment of provisional liquidators.

There are a number of procedural circumstances where an application is required to be made on an *ex-parte* basis, for example, where the defendant is not yet on the Court record.

Applications to Serve Out of the Jurisdiction

A Plaintiff requires the Cayman Islands Court's permission to serve a Writ on an individual Defendant who is not present in the Cayman Islands (and accordingly, cannot be physically served with a Writ in the jurisdiction)[2]. Although this application is not urgent, it is made *ex-parte* for the simple reason that, if you need permission to serve the Writ on the Defendant, you cannot serve the application for permission before the Court grants that permission. Such applications therefore fall into the categories of procedural circumstances where it is necessary to make an application on an *ex-parte* basis.

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Duty to be Full and Frank and Duty of Fair Presentation

Where it is necessary to make an *ex-parte* application, it is necessary for the applicant to comply with his duties of both full and frank disclosure and of fair presentation of the case.

Paragraph 2.4 of the Cayman Islands FSD Guide provides that:

> *"On all ex-parte applications with or without notice it is the duty of the applicant and those representing him to make full and frank disclosure to the court of all matters relevant to the application".*

As the FSD Guide makes clear, even though an application for permission to serve proceedings outside the jurisdiction is not an "urgent" application like a Freezing Order or Search Order, the onerous duty to be full and frank applies just as much[3].

The Court reviewed a number of authorities explaining the practical considerations that should be applied in making *ex-parte* applications and the nature of the duty of full and frank disclosure. The Court cited with approval Popplewell J's dicta in the English case of Fundo Soberano De Angola -v- Jose Filomenc Dos Santos [2018] EWHC 2199 (Comm) that:

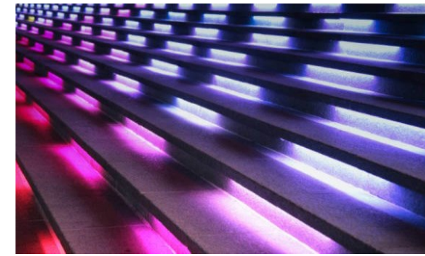
> *"The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision".*

The Court also cited with approval a summary of duty of fair and frank presentation as set out in the further English decision of Carr J in Tugushev v Orlov [2019] EWHC 2031 (Comm) and the warning that:

> *"If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived".*

In the context of an application for permission to serve Cayman proceedings outside the Cayman Islands' Courts jurisdiction, the Court explained that the focus of the enquiry on any such application is on whether the Court should assume jurisdiction over the dispute. The Court referred to Cayman Islands Court of Appeal authority which in turn had cited the English decision of *Libyan Investment Authority v JP Morgan Markets Ltd* [2019] EWHC 1452 where it was held:

> *"The importance of the duty of full and drank disclosure, on applications for permission to serve out, cannot be overstated. There is a difference in terms of what the disclosure must be directed at, and the matters being considered, but the underlying reason and rationale for the duty remains the same, as is the need to comply with the same. A failure to comply with that duty is by its very nature serious --- an individual or entity has been brought into the jurisdiction without having had the opportunity to address the court as to why permission should not be granted, and as demonstrated by the present case, they*



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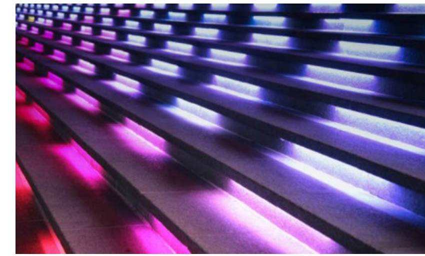

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are then exposed to very considerable costs upon an application to set jurisdiction aside."

Juan Enrique Rassmuss Raier v Luis Correa and Three Others KY [2023] GC 62

In the recent decision in *Juan Enrique Rassmuss Raier v Luis Correa and Three Others* KY [2023] GC 62, the Cayman Islands Court set aside five Court Orders obtained *ex-parte* by the Plaintiff for failure to comply with the duty to be full and frank. As a result, the proceedings against the relevant defendants were discontinued. The Court also awarded indemnity costs against the Plaintiff.

In its judgment, the Cayman Islands Court reminded litigants of the importance of the duty to be full and frank and to give fair presentation of a case on all *ex-parte* applications, including applications for permission to serve the proceedings out of the jurisdiction.

The Case

In March 2022, the Plaintiff issued a Writ against four defendants. The First Defendant was an individual resident in Chile. The Second, Third and Fourth Defendants were believed to be companies incorporated in the Cayman Islands (although the Plaintiff subsequently discovered that the Third Defendant had been re-domiciled in 2021).

After issuing the Writ, the Plaintiff obtained a report on Chilean law regarding the procedure for service of foreign proceedings in Chile. In May 2022, the Plaintiff applied *ex-parte* for permission to serve the First Defendant out of the jurisdiction in Chile. The Plaintiff did not provide a copy of the report on Chilean law to the Cayman Islands Court with the *ex-parte* application. The Court granted the Plaintiff's application on the papers.

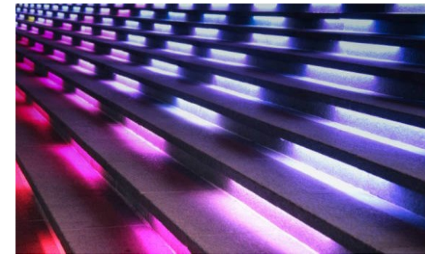
In June 2022, the Plaintiff's agents unsuccessfully attempted to serve the Writ on the First Defendant utilising a method of service which was inconsistent with Chilean law (and indeed the report on Chilean law that the Plaintiff had obtained).

Separately, in July 2022, the Plaintiff effected service on the Second and Fourth Defendants in the Cayman Islands. At around the same time, the Plaintiff became aware that the Third Defendant had been re-domiciled outside the Cayman Islands. Plaintiff did not contact the Third Defendant's about this re-domiciliation explaining this on the basis that this would "tip-off" the First Defendant and make it more difficult to serve the proceedings on him.

In September 2022, the Plaintiff made four further *ex-parte* applications:

1. For permission to serve the First Defendant by substituted means[4];
2. For permission to serve the Third Defendant out of the jurisdiction;
3. For permission to serve the Third Defendant by substituted means; and
4. For an extension of the validity of the Writ.

In October 2022, the Cayman Islands Court granted the four applications following an *ex-parte* hearing. The report on Chilean law regarding service of foreign proceedings was included in the evidence supporting that *ex-parte* application. The Plaintiff referred to this report in support of a submission that substituted service was necessary because service of the proceedings in Chile was impracticable. The Court's attention was not drawn to the fact that the attempts to serve the First Defendant in Chile had not been done in compliance with Chilean law.



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The Writ was subsequently served on the First and Third Defendants by means of substituted service.

The First and Third Defendants then applied to Court to set aside all of the *ex-parte* orders on the basis that the methods of service utilised by the Plaintiff were contrary to Chilean law and that the Plaintiff failed in its duty of full and frank disclosure. Separately, the Fourth Defendant applied to strike out the claim against it on the basis that it disclosed no reasonable cause of action.

Following a two-day hearing, the Court held that the Plaintiff had been in breach of its duty to be full and frank and to give fair presentation of the case. During the hearing, the Plaintiff also conceded to the Fourth Defendant's application.

After making these findings, the Judge emphasised that:

> *"........this Court needs to send out a message to applicants for ex-parte orders and their legal representatives that if they fail in their important duties to the Court there will be consequences. I do not go so far to say that the serious failings of the Plaintiff and his legal representatives were the result of intentional and deliberate decisions to attempt to mislead the Court. It appears that the errors were made because of an aggressive and unfair and unbalanced approach to the ex-parte proceedings. The Plaintiff and his legal representatives must take responsibility for their serious failings and recognise that this is not the proper way to progress ex-parte applications."*[5]

The Court therefore set aside all five *ex-parte* orders. As a result, the proceedings as against the First and Third Defendants were effectively terminated. Further, the Court ordered that the Plaintiff pay the First, Third and Fourth Defendants' costs on the indemnity basis.

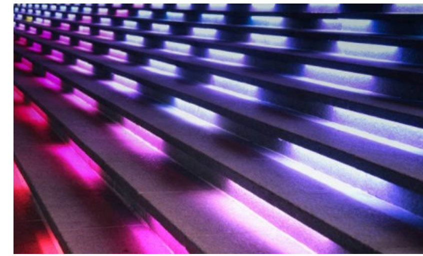
Conclusions

Compliance with the duties to be full and frank and of fair presentation on an *ex-parte* application is an essential safeguard for the proper administration of justice. As mentioned above, the Court will allow an application to proceed without notice to the other party where there is a "good reason" or where that is procedurally appropriate. In those circumstances, the Court must rely on the Applicant (and the Applicant's attorneys) to inform the Court of all relevant facts and issues to ensure that an Applicant does not obtain an undue advantage by securing a Court Order before the Respondent has an opportunity to be heard.

In this recent decision, the Court decided that it "*needs to send out a message*" to remind applicants of the importance of complying with the above duties and that, even in, often uncontentious, *ex-parte* applications, such as an application to serve proceedings out of the jurisdiction, these principles apply equally. The striking out of the *ex-parte* Orders made and the costs Orders imposed by the Court against the Plaintiff emphasise the seriousness with which the Court treats the applicant's obligations in this respect.

Richard Annette and Adam Russell-Knee of Stuarts Humphries acted for the First, Third and Fourth Defendants.

Notes



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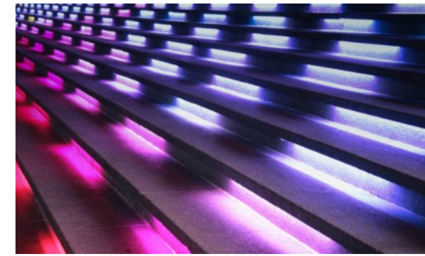
[1] *Indeed, urgency is recognised in the Cayman Islands Court rules – see GCR O.29, r.1(2), which specifies that "Where the applicant is the plaintiff and the case is one of urgency such application may be ex-parte on affidavit but, except as aforesaid, such application must be made by motion or summons".*

[2] GCR O.11, r.1

[3] *See also the Cayman Islands Court of Appeal decision in Ritchie Capital Management L.L.C and others v Lancelot Investors Fund, Ltd. (In Official Liquidation) [2021] CICA (Civil) Appeal 8 of 2021, paragraph 25.*

[4] *Pursuant to GCR O.65, r.4*

[5] *Paragraph 155, Rassmuss Raier.*



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Guidance

This Article is for general guidance only and is not intended to be a substitute for specific legal advice. Advice should be sought about specific circumstances. This Article relates to Cayman Islands Law only as at 21 February 2024. No advice is given herein as to the laws of other jurisdictions.

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