

Full and Frank Disclosure – Whose Obligation?

The purpose of this evening's paper is to consider:

- a. the obligation to make full disclosure;
- b. the consequences of a failure to make full disclosure.

The obligation to make full and frank disclosure is found in the *Family Law Rules 2004*. (“*the Rules*”). The Rules commence by identifying the Main Purpose of the Rules:

“The main purpose of these Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case.”

(Rule 1.08)

To achieve the Main Purpose obligations are placed upon the parties and the **lawyers**.

Rule 1.08 provides:

“(1) Each party has a responsibility to promote and achieve the main purpose, including:

- (a) ensuring that any orders sought are reasonable in the circumstances of the case and that the court has the power to make those orders;*
- (b) **complying with the duty of disclosure (see rule 13.01);***
- (c) ensuring readiness for court events;*
- (d) providing realistic estimates of the length of hearings or trials;*
- (e) complying with time limits;*
- (f) giving notice, as soon as practicable, of an intention to apply for an adjournment or cancellation of a court event;*
- (g) assisting the just, timely and cost-effective disposal of cases;*
- (h) identifying the issues genuinely in dispute in a case;*
- (i) being satisfied that there is a reasonable basis for alleging, denying or not admitting a fact;*

- (j) *limiting evidence, including cross-examination, to that which is relevant and necessary;*
- (k) *being aware of, and abiding by, the requirements of any practice direction or guideline published by the court; and*
- (l) *complying with these Rules and any orders.*
- (2) ***A lawyer for a party has a responsibility to comply, as far as possible, with subrule (1).***

Note – The court recognises that a lawyer acts on a party’s instructions and may be unable to establish whether those instructions are correct.
- (3) *A lawyer attending a court event for a party must:*
 - (a) *be familiar with the case; and*
 - (b) *be authorised to deal with any issue likely to arise.”*

As you can see from the highlighted portions, the obligations rest not only upon the parties but also upon their lawyers.

General duty of disclosure

Returning to the duty of disclosure, Chapter 13 of the Rules deals with disclosure between the parties. The starting point is an obligation of general disclosure:

- “(1) Each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner.*
- (2) The duty of disclosure starts with the pre-action procedure for a case and continues until the case is finalised.”*

(see Rule 13.01)

It is worth remembering the general duty of disclosure is on going. Should there be a change in financial circumstances, should a document be discovered, during the course of the proceedings then the obligation to disclose is in force.

What Must Be Disclosed?

Broadly speaking, the rules identify three categories of disclosure:

- a. financial circumstances; (Division 13.1.2 of the Rules)

- b. production of documents; (Division 13.2.1 of the Rules)
- c. answering specific questions in certain circumstances (Part 13.3)

Financial Circumstances

Division 13.1.2 applies to “*parties to a financial case*”. A party to a financial case “*includes a payee or other respondent to an enforcement application*”.

The obligation of a party to a financial case is one of full and frank disclosure. Such disclosure includes:

- “(1) *A party to a financial case must make full and frank disclosure of the party’s financial circumstances, including:*
- (a) *the party’s earnings, including income that is paid or assigned to another party, person or legal entity;*
 - (b) *any vested or contingent interest in property;*
 - (c) *any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;*
 - (d) *any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;*
 - (e) *the party’s other financial resources;*
 - (f) *any trust:*
 - (i) *of which the party is the appointor or trustee;*
 - (ii) *of which the party, the party’s child, spouse or de facto spouse is an eligible beneficiary as to capital or income;*
 - (iii) *of which a corporation is an eligible beneficiary as to capital or income if the party, or the party’s child, spouse or de facto spouse is a shareholder or director of the corporation;*
 - (iv) *over which the party has any direct or indirect power or control;*
 - (v) *of which the party has the direct or indirect power to remove or appoint a trustee;*
 - (vi) *of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;*
 - (vii) *of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or*

- (viii) over which a corporation has a power mentioned in any of subparagraphs (iv) to (vii), if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation;*
 - (g) any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a legal entity mentioned in paragraph (c), a corporation or a trust mentioned in paragraph (f) that may affect, defeat or deplete a claim:*
 - (i) in the 12 months immediately before the separation of the parties; or*
 - (ii) since the final separation of the parties; and*
 - (h) liabilities and contingent liabilities.*
 - (2) Paragraph (1)(g) does not apply to a disposal of property made with the consent or knowledge of the other party or in the ordinary course of business.*
 - (3) In this rule:*
 - 'legal entity' means a corporation (other than a public company), trust, partnership, joint venture business or other commercial activity.'*
- (see Rule 13.04)*

The absolute nature of the obligation of disclosure was again expressed by the Full Court of the Family Court in *In the Marriage of Kannis*,¹ where the Court stated:

“Whether the non-disclosure is wilful or accidental, is a result of misfeasance, or malfeasance or nonfeasance, is beside the point. The duty to disclose is absolute. Where the Court is satisfied the whole truth has not come out it might readily conclude the asset pool is greater than demonstrated. In those circumstances it may be appropriate to err on the side of generosity to the party who might be otherwise be seen to be disadvantaged by the lack of complete candour. Chang and Su (2002) Fam CA 156 and Weir v Weir (1993) FLC 92-338; 16 Fam LR 154 applied.”

Expression is given to compliance with this obligation by the filing of a Financial Statement. Rule 13.05(1) requires the filing of a Financial Statement in a financial case, and Rule 13.05(2) provides for the filing of an affidavit in circumstances where the completion of a Financial Statement does not fully discharge the duty.

¹ (2003) 30 Fam LR 83.

Duty to Disclose Documents

Rule 13.07 identifies the duty of disclosure with respect to documents:

“The duty of disclosure applies to each document that:

- (a) is or has been in the possession, or under the control, of the party disclosing the document; and*
- (b) is relevant to an issue in the case.”*

The consequences of a failure to disclose relevant documents are most serious:

“If a party does not disclose a document as required under these Rules:

- (a) the party:*
 - (i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other party’s consent or the court’s permission;*
 - (ii) may be guilty of contempt for not disclosing the document; and*
 - (iii) may be ordered to pay costs; and*
- (b) the court may stay or dismiss all or part of the party’s case.”*

(see Rule 13.14)

With respect to an Application for Final Orders, Division 13.2.3 applies as follows:

“(1) This Division applies to all Initiating Applications (Family Law), except:

- (a) an application for an order that a marriage is a nullity or a declaration as to the validity of a marriage, divorce or annulment;*
- (b) a Maintenance Application;*
- (c) a child support application or appeal; or*
- (d) an Initiating Application (Family Law) seeking an interim, procedural, ancillary or other incidental order.*

(2) This Division does not affect:

- (a) the right of a party to inspect a document, if the party has a common interest in the document with the party who has possession or control of the document;*
- (b) another right of access to a document other than under this Division; or*
- (c) an agreement between the parties for disclosure by a procedure that is not described in this Division.”*

At various stages during proceedings the parties are required to swear/affirm their compliance with the duty to give full and frank disclosure, in a timely manner. At the commencement of proceedings, both the Initiating Application and the Response include a declaration of an awareness of their duty.

Prior to the first day before a judge,² each party must file a written notice that:

- “(1) (a) *the party:*
- (i) *has read Parts 13.1 and 13.2 of these Rules; and*
 - (ii) *is aware of the party’s duty to the court and each other party (including any independent children’s lawyer) to give full and frank disclosure of all information relevant to the issues in the case, in a timely manner;*
- (b) *undertaking to the court that, to the best of the party’s knowledge and ability, the party has complied with, and will continue to comply with, the duty of disclosure; and*
- (c) *acknowledging that a breach of the undertaking may be contempt of court.*
- (2) *A party commits an offence if the party makes a statement or signs an undertaking the party knows, or should reasonably have known, is false or misleading in a material particular.*

Penalty: 50 penalty units.

- (3) *If the court makes an order against a party under section 112AP of the Act in respect of a false or misleading statement mentioned in subrule (2), the party must not be charged with an offence against subrule (2) in respect of that statement.*
- (4) *A notice under subrule (1) must comply with subrule 24.01 (1) and be as follows:*

‘This Notice is filed in accordance with rule 13.15 of the Family Law Rules 2004.

I [insert name]:

- (a) *have read Parts 13.1 and 13.2 of the Family Law Rules 2004;*
- (b) *am aware of my duty to the court and to each other party (including any independent children’s lawyer) to give full and frank disclosure of all information relevant to the issues in the case, in a timely manner; and*

² at least 28 days before the first day before the Judge. (Rule 13.6)

(c) *undertake to the court that, to the best of my knowledge and ability, I have complied with, and will continue to comply with, my duty of disclosure.*

I understand the nature and terms of this undertaking and that if I breach the undertaking, I may be guilty of contempt of court.

.....
(signature of person making statement) (full name of person making statement)

.....
(date of signature)

.....
(signature of witness) (full name of witness)

.....
(date of signature)

A failure to comply with this Rule may lead to the following consequences:

“(1) If a step is taken after the time specified for taking the step by these Rules, the Regulations or a procedural order, the step is of no effect.

Note – A defaulter may apply to the court for relief from this rule (see rule 11.03).

(2) If a party does not comply with these Rules, the Regulations or a procedural order, the court may:

- (a) dismiss all or part of the case;*
- (b) aside a step taken or an order made;*
- (c) determine the case as if it were undefended;*
- (d) make any of the orders mentioned in rule 11.01;*
- (e) order costs;*
- (f) prohibit the party from taking a further step in the case until the occurrence of a specified "event"; or*

(g) *any other order the court considers necessary, having regard to the main purpose of these Rules (see rule 1.04).*”

(see Rule 11.02)

Remembering that Rules are the servant and not the master, in *Briese*,³ Smithers J stated:

“I believe that a person in the position of the husband in this case has a positive obligation to set out at an early stage his financial position in a clear and comprehensive manner. The Regulations, and now the Rules, are not intended as a vehicle to mask the true position, or as an aid to confusion, complexity or uncertainty. They are not intended as the outer limits of the obligation of financial disclosure, but as providing avenues towards disclosure. The need for each party to understand the financial position of the other party is at the very heart of cases concerning property and maintenance. Unless each party adopts a positive approach in this regard delays will ensue with the consequent escalation of legal, accounting and other expenses, always assuming that a party has the strength to continue the struggle for information and understanding.”

Consequences of Failure to Disclose

The weight of authority holds that a party should not be able to take advantage of his/her own non-disclosure. In *Weir*,⁴ the Court stated:

“It seems to us that once it has been established that there has been a deliberate non-disclosure ... then the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature.”

However, this robust approach is not to be applied without regard to the Court’s obligation under the provisions of the *Family Law Act*. In *Efthimiadis*,⁵ the Full Court stated:

“That case, together with the cases to which it referred, and the more recent decision of the Full Court in Weir (1993) FLC 92-338 emphasize the clear obligation of full and frank disclosure and the consequences in particular cases where that does not occur. They are not, however, in our view, authorities for the approach which his Honour adopted in this case, namely to dismiss the parties' applications out of hand on the facts here.”

³ *Briese and Briese* (1986) FLC 91-713.

⁴ *Weir v Weir* (1993) FLC 92-338 at 79,593.

⁵ *Efthimiadis and Efthimiadis* (1993) FLC 92-362.

Conclusion

It is not satisfactory to pay lip-service to the duty to make disclosure. It is an obligation which all consuming (subject to relevance), it creates obligations upon the lawyer as well as the party and a failure to comply could lead to a period in gaol.

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