Welcome to the St John's Buildings Commercial Newsletter.

In this edition we have articles from three experienced members of the St John's Buildings team, tackling subjects including the duty of disclosure and fair presentation, banning orders and equitable maxims.

For those of you who are less familiar with the SJB Commercial team, we are a group of 25 expert barristers, ranging in experience from KC through to our pupil barristers.

Members are highly regarded within their individual practice fields and regularly act for high profile large multinationals and high net worth individuals as well as small businesses and individuals alike. The team are sympathetic to clients who seek practical solutions to their problems and match their legal skills and experience to defined objectives.

SJB has five chambers from which our team primarily operates, covering cases all over the country and beyond. We are clerked by an exceptional team of clerks, led by Senior Clerk Chris Shaw.

I hope that you enjoy the content of this Newsletter and invite you to submit any ideas you have for topics you would particularly like us to address in our next edition. Contact details are available on the back page.

Best regards,

Pépin Aslett
Head of the Business and Property Team

‘YOU SHOULD’VE SAID!’: THE DUTY OF DISCLOSURE AND FAIR PRESENTATION

BY PÉPIN ASLETT

YEAR OF CALL: 1996

A party who makes an application to the court without notice to their opponents has a high-hurdle in relation to presenting a balanced view to the court bearing in mind the absence of the other side. The application may be an application for an injunction, to serve out of the jurisdiction or any other application permitted by the CPR or necessary because of secrecy for example. Any material matters relevant to the court’s decision should be disclosed. This includes issues that are detrimental to the applicant and includes both known facts and facts that could be ascertained through proper enquiries.

Very often there is no bright-line between issues that are material and those which are not, meaning that a judgment call has to be made. This is made all the more difficult because if there are grounds to apply without notice, this usually means that there is a degree of urgency in preparing and drafting an application. It should be remembered that the requirements to make disclosure and give a fair presentation in respect of a ‘short-notice’ hearing covers any application brought before the court otherwise than on three clear days’ notice, and even includes a situation where an opponent does attend a hearing and is heard without having been given the requisite notice.

The obligation, historically coined a duty of full and frank disclosure, has evolved over time to now represent a duty firstly to disclose information; and, secondly, to give a fair presentation of matters. In other words, just disclosing information hidden in voluminous bundles placed before a judge at short notice is not enough. Judges may simply be unable to read every page of a bundle in advance of a hearing arranged at short notice and it is not good enough to simply say it was ‘before the court’. That principle brings in an advocate’s duty to assist the court generally.

The Court of Appeal in Brink’s-Mat Ltd v Elcombe and Ors [1988] 3 All ER 188 set out the original principles and highlighted that if there has been any material non-disclosure, an applicant can be deprived of the benefit of obtaining an order without notice. Where there has been non-disclosure, the court however does retain a discretion as to how to deal with the matter. The question of whether the non-disclosure was innocent or culpable is often relevant and materiality is to be assessed by the court and not by an applicant’s legal team. However, the duty does not extend to a detailed analysis of every single point that can possibly be made.

The modern formulation of the principle now resides in the judgment of Carr J in Tugushev v Orlov and Ors (No. 2) [2019] EWHC 2031 at [7], where 13 principles are set out. These include highlighting that the duty is a ‘high duty’ with the court needing to be able to rely on a party and have complete confidence in them putting forward a case that is not only in their own interests. Full disclosure has to be linked to fair presentation, but a sense of proportion must be retained with the central issue on any challenge being whether the court was effectively misled in a material way.

It has more recently been held that the question is not whether the applicant’s evidence ‘could have been better’, but whether any fact or matter has not been brought to the court’s attention. The court will retain an overall sense of proportion in its later consideration of the issues where complaint is made: Derma Med Ltd v Dr Zack Ally [2024] EWCA Civ 175. Therefore, there may well be failures that can be shown later, but the question is whether overall, the evidence as presented was balanced.

The Court of Appeal in Mex Group Worldwide Ltd v Ford [2024] EWCA Civ 959 has recently reaffirmed the duties owed and provided important guidance to respondents who later seek to discharge orders on the basis of non-disclosure or non-fair presentation. Whereas the starting point may well be that if failings are found, the order granted without notice may be discharged and not re-granted, the Court of Appeal emphasised that the central point remains that any failings have to be material and any assessment of any alleged failures proportionate. It was emphasised that the court is bound to look at the matter in terms of the interests of justice.

The duty on applicants has led to respondents somewhat seeking to have their cake and eat it, and there is continued criticism in the authorities of ‘scattergun’ applications by respondents to discharge, relying on multiple points said to amount to non-disclosure or a lack of fair presentation.

For example, in Mex there were numerous allegations made not all of which were justified, and Coulson LJ described the respondent’s approach as ‘trench warfare of the most attritional kind’.

He held that even in substantial cases, allegations of bad presentation will essentially stand or fall on ‘big ticket’ allegations of failures. That is contrasted with a forensic ‘benefit of hindsight’ analysis by a respondent of every single point that could have been better made. Respondents were encouraged to focus on alleged failures of disclosure which are ‘clear-cut and obviously important’, Males J warning that good points may get lost in an avalanche of trivia.

A further point worthy of mention is that although the duty relates to disclosure of facts, where a factual issue is disputed the courts have been resolutely clear that there should be no mini-trial or trial within a trial, particularly if it is an issue in the action. As pointed out by the Court of Appeal in Astor Asset Management 3 Ltd v Pliego [2025] EWCA Civ 1060, there is a difference between the existence of an allegation or defence being brought to the court’s attention, which may be material itself (for example, having to tell the court about a possible defence) and attempts to demonstrate non-disclosure by resolving a dispute.

Finally, a court faced with material non-disclosure or lack of fair presentation may, in an appropriate case discharge the original order and re-grant it on different terms and may even mark any breach in terms of costs. The court has a wide discretion aligned to the interests of justice, which makes advising on such applications difficult.

The area remains a complex one to navigate. Applicants are well advised to proceed by way of a proportionate and balanced disclosure and fair presentation of material facts and law almost by way of playing Devil’s advocate. The duty has evolved from one of merely giving full and frank disclosure to a duty to present a fair picture to the judge. In reality, the recent guidance from the Court of Appeal that any later challenge should be constrained to the proportionate big-ticket points that an absent party would be likely to raise and not to a highly technical criticism of multiple cumulative points being missed, provides guidance to both applicants and respondents moving forward.

Pépin Aslett
Barrister
September 2026

A LOOK AT BANNING ORDERS UNDER THE HOUSING AND PLANNING ACT 2016

BY CHRISTOPHER MOSS

YEAR OF CALL: 2002

A Banning Order is an order which prevents a person or corporate body from doing any combination of the following activities (s14(1) Housing and Planning Act 2016):
- Renting out residential accommodation.
- Performing letting agency work.
- Performing property management work.
- Holding a House in Multiple Occupation (HMO) or selective license.

It can also ban a person from (i) acting as an officer of or (ii) directly or indirectly taking part in or being concerned in the management of any corporate body which carries out those activities (s18).

Banning orders are draconian in nature and have the potential to severely affect a landlord's business and livelihood. They are also a very powerful tool for Local Authorities seeking to deal with the worst type of offenders.

As you would expect given the powerful nature of such orders, they have been dealt with by the tribunals in a manner which is very stringent in how cases should be presented before a tribunal.

The following decision is of note:
London Borough of Barking and Dagenham v NTM Limited (formerly All Seasons Lettings and Management Limited) LON/00BB/HBA/2022/0004 – decision dated 20th December 2023 (Coram: Deputy Regional Judge N Carr, Regional Surveyor Ms H C Bowers BSc & Ms R Kershaw BSc).

In this matter an application for a banning order under the Housing and Planning Act 2016 ("the 2016 act") s.15(1) failed due to the Notice of Intention ("NOI") served by the applicant housing authority being invalid due to its failure to cite sufficiently the reasons for the application being made.

A LOOK AT BANNING ORDERS UNDER THE HOUSING AND PLANNING ACT 2016 (CONTINUED)

The London Borough of Barking and Dagenham ("the council") brought an application to the First Tier Tribunal for a banning order to be made in respect of a private sector landlord and property management business; NTM Limited (formerly All Seasons Lettings and Management) ("the respondent").

The council served an NOI on 23 August 2022 pursuant to s.15 of the Act. This notice cited two convictions contrary to Housing Act 2004 s.95 with total fines of £4,200.
The NOI did not give any other explanation for the proposed banning order application and did not give any analysis of the two offences or their circumstances. The Respondent sent written representations dated 16 September 2022 to the council addressing the circumstances of the convictions and making general representations as to why a banning order should not be made. The council rejected the representations and on 21 November 2022 made an application to the tribunal for a banning order.

The tribunal found that the NOI served by the council was invalid and did not comply with the requirements of 2016 Act s.15(3)(a).

The tribunal first considered what was the purpose of the NOI required by s.15. It found (at para. 91 of its decision) that the reasons an NOI has to set out "why" a banning order is being sought are, firstly, to enable a person against whom an order is sought to know what they are alleged to have done and to have the opportunity to either correct their conduct or to persuade the council that the conduct is not so serious as to justify a banning order AND, secondly, to enable a council to think carefully about any decision to press on with the banning order application with all of the attendant expense involved.

In the present case the NOI served by the council failed to explain "why" the council considered the two convictions serious enough to justify a banning order. This was despite the government guidance containing, at paragraph 3.3, a list of particular factors that a council should take into account before deciding whether to apply for a banning order; none of those factors was addressed in the NOI.
The tribunal therefore dismissed the council's application for a banning order on the basis that the NOI was invalid.

The most important issue in the decision was the total lack of any detail regarding "why" the council considered a banning order to be appropriate. The following passages in the decision explain this:

Para. 95: "…The Notice of Intent is an important step to enable a person against whom it is proposed to apply for a banning order to firstly set out any reason it considers that the LHA has not made the right assessment, or to tell the LHA about any improvement that have made in their business practices that might result in a banning order application no longer being justified on the LHA's own analysis, or to convince the LHA that the desired result (such as improved housing standards) is in the process of being achieved or potentially more generally to give that person an opportunity to address the conduct complained of such that by the time of the hearing of any such application it has taken steps to put in place proper systems for better housing management such that a banning order is no longer appropriate."

Para. 96: "…The fact of conviction is less likely to be relevant to the LHA's assessment of whether a banning order should be sought than the circumstances of the conviction."

Para. 98: "In this case the Notice of Intent contains a statement of the banning order offences of which the respondent was convicted. It gives no reasons why those offences are considered serious, makes no mention of inclusion on the Rogue Landlord database, and sets out no analysis of the competing effect of the making of a banning order on anyone, as paragraph 3.3 of the Guidance sets out the LHA should take into account."

What is clear from this authority is that if a banning order is to be made by a local authority it must be done properly in accordance with the statute and following the guidance. Sufficient detail must be provided. From a Local Authority's perspective these matters are specialist and niche applications, and the Notice of Intention should be properly drafted. Additionally, the process that has led to the application for such a draconian measure will have to be transparently explained. The devil is in the detail and if an application is made for a banning order, it is crucial that is done properly or the case will likely fail before the tribunal.

From a Landlord's perspective it may be possible to submit detailed technical arguments as to the Local Authority's failings in the way they have brought the case and/or drafted the application and notice of intention.

In the recent case of Rotherham Metropolitan Borough Council v Zayn Properties Limited MAN/00CF/HBA/2025/0006, I acted for the Landlord in a claim made by the Local Authority for a banning order against him and his company.

A LOOK AT BANNING ORDERS UNDER THE HOUSING AND PLANNING ACT 2016 (CONTINUED)

I submitted that the NOI was defective and further that the Local Authority had undertaken the procedure incorrectly. I submitted that there was no indication that due consideration was given to factors which the tribunal must consider in making a banning order under section 16 (4) of the HPA 2016. I submitted as follows in respect of each heading of guidance:

-Seriousness of offence
In the scheme of qualifying offences the offences were minor.
-Previous convictions
There were no previous qualifying convictions.
-Harm caused to tenant
No harm had been caused to the tenant.
-Punishment of the offender
The Council's own guidance indicated that it should be remembered this is a severe sanction aimed at the worst offenders. It should be remembered qualifying offences include drugs offences, fraud and illegal eviction, violent and sexual offences. Any analysis would have revealed that the respondent cannot be described a "worst offender."

The other factors a tribunal will consider are:
-Deterrence from repeating offence
-Deterrence of others

In this matter the reasoning given in the NOI was as follows "You were convicted of these offences before Sheffield Magistrates Court on 18 December 2024." I contended that this was not a sufficient explanation of the reason for applying for a banning order, and did not enable the Respondents to make meaningful representations to the Council prior to the application being lodged with the tribunal.

Consequently, I said, the Applicant had not complied with section 15 of the 2016 Act and the tribunal had no jurisdiction to make a banning order, since the condition in section 16(2) had not been met.

The tribunal found that the Applicant did not comply with the procedural requirements of section 15 of the 2016 Act because the NOI served on the Respondents failed to explain why a banning order application was being contemplated by the Applicant. Sections 15 and 16(2) having not been complied with, the Tribunal has no jurisdiction to hear the banning order application. The tribunal also found on the evidence that a banning order was inappropriate in all the circumstances.

A LOOK AT BANNING ORDERS UNDER THE HOUSING AND PLANNING ACT 2016 (CONTINUED)

Local Authorities must resist the urge to lump together any and all allegations against a landlord on the basis that there is an inference he or she is a “bad egg”. Applications must be focused, properly explained and proper reasoning must be given for the application both in terms of evidence and within the Notice of Intention. It should be remembered that these orders are very severe and are intended for the worst offenders and rogue landlords within the housing sector. It is essential particularly to ensure that the Notice of Intention to apply for a banning order specifically sets out the detailed reasoning as to why such an order is applied for and is necessary against the specific criteria as set out in the Housing and Planning Act 2016. As is the case with many of these matters, the devil is in the detail.

Christopher Moss continues to give specialist advice in this area and is available to assist in the bringing of and/or defending banning orders.

Christopher Moss
Barrister
September 2026

THE CLEAN HANDS DOCTRINE WHEN SEEKING ‘EQUITABLE RELIEF’

BY ADIL NAVAID

YEAR OF CALL: 2021

I remember learning about equitable maxims back at university and thinking how nice it was that there were “soft rules” about how equity operates. Afterall, these maxims are *general* rules and that’s the way it was described to me; they’re almost like a guideline. In fact, the Supreme Court referred to them as “a summary statement of a broad theme which underlies equitable concepts and principles”; *Futter and another v HMRC; Pitt and another v HMRC* [2013] UKSC 26, Lord Walker, at [136].

However, it’s worth remembering that these general rules are based in jurisprudence, they almost certainly have some practical application and that its worth having them in the back of your mind whenever approaching a case involving equitable relief.

I recently acted in a case where a father was suing a daughter for recognition of his beneficial interest in five properties that the daughter owned; one was her home and the other four were properties that she rented out. I represented the daughter.

It was the father’s case that pursuant to an express trust (with an alternative case for constructive trust) he owned 50% of the interest in the properties. The problem for my client was that there were in fact five separate declarations of trust showing that the father had provided large sums towards the purchase of each property. Each declaration was signed by both parties.

My client argued that she was induced to enter into them by undue influence. However, her primary position was that the sums advanced by the father were all gifts. And the twist was that despite the existence of a declaration of trust for each property, there also existed a gift declaration for each property. The two are mutually exclusive and cannot exist at the same time.

To the father’s “credit”, he was rather blasé about the fact that he had signed and submitted gift declarations to obtain a mortgage; this is a fraudulent act after all. What is clear is that the father had signed gift declarations whilst advancing the sums confirming that he had no share in the properties, only to then have a “deed in the

THE CLEAN HANDS DOCTRINE WHEN SEEKING ‘EQUITABLE RELIEF’ (CONTINUED)

drawer” with the daughter’s signature saying that he was entitled to 50% of the relevant property.

Herein comes our equitable maxim. “They who come into equity must come with clean hands”.

In the first instance, this is very similar to another maxim; “they who seek equity must do equity”. The difference is that the clean hands maxim relates to past conduct whereas the latter relates to future conduct. So in this case, it was all about coming to the court with clean hands.

The general rule is, like with all maxims, a little misleading. In reality, it is far narrower in approach than the phrase suggests. Useful guidance is given in the judgment in Fiona Trust & Holding Corporation and others v Privalov and others [2008] EWHC 1748 (Comm):

- The conduct of the party must be shown to be, in some way, immoral and deliberate;
- Not all misconduct deprives an applicant of equitable relief;
- Some misconduct may be too trivial for it to import this consequence; and
- The gravity and effect of the misconduct is to be assessed cumulatively.

In our case, the father’s conduct was essentially fraudulent and so we were not concerned with the gravity of the conduct and whether it would suffice the test; it patently would. There were two other relevant considerations, however.

The first is that there must be a sufficient factual matrix between the relief sought and the conduct complained of. In Canary Riverside Estate Management Ltd v Coates [2021] EWHC 1505 (Ch) (08 June 2021), the court considered the "sufficiently close connection" test between the misconduct and the relief sought. It considered that the authorities did not suggest that there had to be a "causal connection", or that there was any sort of necessary causation. In the court's view, if there was a causal connection then that would presumably be a sufficient connection to be able to invoke the defence. However, if there was something less, a court of equity would look at a number of factors to determine if there was a "sufficiently close connection" between the misconduct and the relief sought, such that the relief should be denied (paragraphs 116- 119).

Putting this in the context of a property case, fraud or illegality will prevent a claimant from enforcing an equitable interest in property if the fraud or illegality is relied upon or pleaded but not if the claimant can establish the interest without relying on his own illegality; Tinsley v Milligan [1993] All ER 65, as well as O'Kelly v Davies [2014] EWCA Civ 1606.

The second factor that is relevant is that if both parties are fraudsters, then the court may well do equity; Kazakhstan Kagazy plc and others v Zhunus and others [2016] EWCA Civ 1036.

When I argued this in my skeleton argument, my opponent suggested that the clean hands doctrine will not work because the daughter was involved in the fraud. After all, she signed the declaration of trust knowing that the lender believed the father to have advanced the sums as gifts. She was involved at face value.

This was, admittedly, a problem. This is again a reason why cases such as this often never make it to trial; the parties are too concerned with self-preservation and want to avoid self-incrimination. But here we were, at a four-day trial, with these issues before the court.

Fortunately, the matter settled on the first day. This is frustrating from a legal standpoint given that I never got a determination from the judge as to the clean hands point I had prepared. My retort to my opponent was as follows:

- Firstly, the father was the party seeking relief and his fraudulent activities were directly linked to him establishing his cause of action. The daughter was not seeking any relief.
- Secondly, the daughter at all times maintains that she believed the sums to be gifts and that she was “forced” to sign the declarations due to undue influence, and further that her father had told her to ignore the declarations and maintained that it was for his personal tax calculations.

Now, it is not lost on me that the first argument is relatively weak. Whilst the daughter was not seeking relief, there’s no suggestion in the authorities that that is a bar to the rule that the court will do equity between two fraudsters.

This is why the second argument was more important. Ultimately, we would need to have a factual determination as to the daughter’s element of the fraud and whether she was right in her undue influence defence and/or her belief in the sums being gifts due to what she was told. However, even then I had my doubts that this would work.

THE CLEAN HANDS DOCTRINE WHEN SEEKING 'EQUITABLE RELIEF' (CONTINUED)

For example, if the daughter believed that the sums were gifts and she told the court that her father had told her to ignore the declarations because they were for his tax avoidance, then the court would still be entitled to find that she was willingly assisting with tax avoidance. That may be enough for the court to still do equity.

Ultimately, these considerations aided in getting the matter settled. But it was only through raising the stakes with an equitable maxim that we were able to reach settlement. It raised enough uncertainty (along with other lines of attack) that the parties managed to meet in the middle. It was a useful reminder that the usual TOLATA defences sometimes are better paired with a more holistic approach, just to complicate matters a bit more.

Finally, given that the matter was never determined at court, you can make your own minds up as to how far we would have gotten with the maxim. Do you think the Claimant would have been barred? Or was the daughter sufficiently involved in the fraud enough that the court would do equity, anyway? Feel free to reach out if you have any views.

Adil Navaid
Barrister
September 2026

THE TEAM

"St John's Buildings hosts several strong barristers with considerable commercial litigation experience."

"They have a good range of counsel and great clerks. Chambers and the barristers themselves are well organised, helpful and proactive."

– Legal 500

"I have always experienced extremely good service and responsiveness from the clerks. They accommodate any requests and changes needed."

"The whole team is outstanding."

"The clerks are excellent and go above and beyond – nothing is too much trouble."
– Chambers UK Bar

CONTACT DETAILS

Chris Shaw
Phone: 0161 214 1584
Email: chris.shaw@stjohnsbuildings.co.uk

Xanthé Young
Phone: 0161 214 1544
Email: xanthe.young@stjohnsbuildings.co.uk

Sara Herceg-Millington
Phone: 0161 214 1513
Email: sara.herceg@stjohnsbuildings.co.uk

Alex Jones
Phone: 0161 214 1542
Email: alex.jones@stjohnsbuildings.co.uk

Adam Parker
Phone: 0161 214 1524
Email: adam.parker@stjohnsbuildings.co.uk