

Restraining Injunctions

Introduction

During the course of a dispute, it may be expedient for a party to seek an interim remedy in the form of an injunction. Interim injunctions are by their nature ancillary to the main dispute, but may be essential in circumstances where a party wishes to preserve the status quo until the dispute has been settled, or finally determined by the court.

Restraining injunctions are a form of interim court order. They are often sought where the other party, if unrestrained, may cause irreparable or immeasurable damage by continuing in the conduct which has led to the dispute. Such injunctions may become permanent if the claimant is successful at trial.

In commercial disputes a court can make orders to restrain, for example:-

- the publication of obvious and defamatory lies;
- the infringement of copyright, trademark or other intellectual property rights;
- the wrongful use of confidential information and trade secrets;
- an ongoing breach of contract;
- activities which constitute a nuisance;
- dealings with particular customers or suppliers.

Breach of the injunction can amount to a contempt of court, punishable by a fine and/or imprisonment.

In an emergency, an injunction can be obtained very quickly without giving notice to the other party. Urgency arises most often where the other party would take advantage if given notice of the application or where further damage would result from any delay in making the application. Freezing injunctions are often made in this way.

General Rules

The usual purpose of an injunction will be to preserve the status quo until the parties' rights have been determined. In general terms, when exercising its discretion, the court will need to be persuaded that there is good reason why the defendant's rights should be restricted before the court knows whether the applicant will succeed at trial.

The applicant does not have to prove its underlying claim at

the injunction hearing, but it must show that it has a good arguable case. The court will not pre-judge the litigation, but must be persuaded that there is a serious question to be considered. If this is established then the court has discretion whether to grant the order.

Balance Of Convenience

Once satisfied that the underlying claim should be taken seriously, the court will exercise its discretion, according to what it regards as "the balance of convenience". The court will weigh the likely inconvenience or damage which would be suffered by the applicant if an injunction is not granted, against the likely inconvenience or cost for the defendant if an injunction is granted. The court cannot assume that one or other party will ultimately win the case; it is therefore effectively balancing the risks of injustice.

A key factor in the court's balancing exercise is whether any potential injustice could be adequately compensated by damages. If the adverse effect of the injunction on the respondent is measurable in financial terms then the court will be more content to restrict the respondent's rights by granting the injunction. (The court will, however, require an undertaking from the applicant to pay financial compensation together with evidence of its ability to pay if it transpires the injunction was wrongly granted – see "Undertaking as to damages"). Conversely, if the applicant's inconvenience in failing to obtain an injunction could be adequately compensated by damages, then the court will be more likely to refuse the injunction.

Financial compensation is unlikely to be a sufficient remedy for an injustice if:-

- the other party is unlikely to be able to pay for any damage that arises; or
- if compensation would be very difficult to assess (for example, if the injustice would result in damage to business reputation); or
- if the effect of the injustice would be irreparable (for example, deprivation of the right to vote at a meeting).

Procedure

Usually an application for an injunction is made by giving the other party notice of the application. However, if there

is a real emergency, or if it is necessary to do so in the interests of justice, an application for an injunction is made initially without notice to the other side. Any order made at the without notice hearing will only take effect for a few days until the return hearing at which the court will hear argument and evidence from both sides.

All applications for injunctions must be supported by evidence – either an affidavit (if the application is for a freezing injunction) or a witness statement, setting out the facts relied upon and attaching all relevant documents. If an application is made without notice to the other party, then prejudicial facts must also be disclosed – see below "Duty of full and frank disclosure". All key documents should be included in the evidence.

The affidavit or statement will be sworn or signed (as the case may be) by the applicant, or an officer of the applicant company – it will not be sworn or signed by the solicitors. The evidence will usually have to be prepared quickly. Great care must be taken, therefore, to avoid mistakes. The usual result of such a mistake is that the injunction will be discharged and costs, and even damages, awarded against the applicant.

If an injunction is obtained or contested with the help of untrue evidence, then the person who swore the affidavit or signed the statement could be charged with the criminal offence of perjury.

Duty of Full and Frank disclosure: Applications Without Notice

Where an urgent injunction is sought without notice to the respondent, the court places a great deal of trust in the applicant to tell the full story, not just the facts that support his case. The applicant must be extremely careful to avoid misleading the court, whether by omission or otherwise and to disclose all of the material relevant facts, whether helpful or harmful to the application.

The duty of the disclosure applies to material facts actually known to the applicant and to any additional facts which should have been known if proper inquiries had been made. Furthermore, the applicant has a duty to correct any misinformation or omission as soon as it becomes apparent, and to disclose any material change of circumstance which becomes apparent before the contested hearing. The duty of disclosure is ongoing.

The consequence of failing to disclose a material fact may be that the injunction, if granted, will be set aside and the claimant will have to pay any costs incurred by the other side, together with any loss suffered by the defendant as a result of the injunction. This may be the consequence even if the omitted fact would not have affected the court's view of the merits of the application.

The duty of disclosure will increase the legal costs but it must be taken seriously.

Undertakings as to Damages

Injunctions represent serious restrictions on the rights of the other party. They are usually ordered before the full merits of the parties' cases have been fully considered at trial, and the court will be concerned that it may ultimately be shown, when more facts emerge, that the injunction should not have been granted.

Because of the risk of this injustice, the court is very strict about the terms upon which injunctions are granted. In particular, the applicant will be required to give an undertaking to compensate the defendant for any loss caused by the injunction being wrongly granted. This "undertaking as to damages" can usually be enforced against the applicant if it is shown subsequently that the injunction should not have been granted or if the applicant fails to establish its rights at the trial. The applicant will usually have to provide evidence that it can comply with the undertaking if it is enforced.

Undertakings as to Costs

Some injunctions, in particular freezing injunctions, require the applicant to give an undertaking to the court to compensate for any costs incurred by any third party affected by the terms of the injunction, for example, banks who have to comply with the terms of a freezing injunction.

The court may require security to be given in support of any undertaking, and the duty to make full and frank disclosure (see above) extends to facts which materially affect the value of the security given for the undertaking.

Delay

Any delay in making an application will reduce the likelihood of obtaining an injunction. The longer the applicant has managed without an injunction the less likely the court is to be convinced of the need to restrain the other party by way of injunction. An injunction is unlikely to be granted if there has been any delay which cannot be satisfactorily explained.

Contempt Of Court

A party who deliberately disobeys an injunction will be in contempt of court. Similarly, a third party with notice of the injunction who assists a party to disobey it may also be in contempt. The injunction will usually contain a "penal notice" which means that failure to obey its terms could result in committal proceedings leading to imprisonment for contempt. Committal proceedings are serious and not to be undertaken lightly. The court has jurisdiction to order a fine in the alternative, or make further order for the disobedient party to carry out any act at its own expense.

Committal proceedings for contempt of court are the only remedy available for breach of an injunction. A contempt of court does not of itself allow a party to seek damages for any loss arising from breach of the injunction, although there may be a right to damages if liability is established in the main proceedings.

In addition to the undertakings as to damages and costs, the applicant will normally have given undertakings to the Court to comply with certain procedural matters, for example, an undertaking to issue and serve proceedings. Failure to comply with any one of the undertakings included in the injunction is not only a contempt of court, but also risks the injunction being discharged.

Costs

Injunctions are, by their nature, urgent and time –consuming, even in clear cut cases. Preparation, witness and document examination, service, further hearings and enforcement are all an essential part of the process. The costs therefore of making an application for an injunction can be high, although a large amount of the work will have been necessary for the litigation whether or not an injunction is applied for.

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Should you have any questions please contact Julie Herriott (julie.herriott@pinsentmasons.com), or your usual Pinsent Masons adviser who will be able to assist you further.

This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.

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