

## INTRODUCTION TO THIS NOTE

This note sets out considerations around injunctive relief.

It is an information note only intended for clients considering applying for injunctive relief and is not intended to be taken as legal advice.

## INJUNCTIONS: AN INTRODUCTION

An injunction is defined in the glossary to the CPR as ‘a court order prohibiting a person from doing something or requiring a person to do something’. It is a tool used by the courts to prevent injustice.<sup>1</sup>

The court can grant an injunction: ‘in all cases in which it appears to the court to be just and convenient to do so’

### Types of Injunction are:

#### Prohibitory and mandatory injunctions

In terms of the nature of the remedy, injunctions are split into two types:

1. **prohibitory (or negative) injunctions**—these are intended to prevent a party from doing specified acts (for example, dealing with or disposing of property, or taking some step in breach of an agreement), and
2. **mandatory (or positive) injunctions** —these require a party to do a specified act (for example, delivering up goods, removing people or goods from land or making available documents)

There is also a third type known as Quia timet. This type of injunction relates to preventing a future wrong which the claimant believes is going to happen.

## INTERIM AND FINAL INJUNCTION: WHAT IS THE DIFFERENCE?

For an injunction to be an appropriate remedy, damages cannot be sufficient compensation. Often the types of cases will mean that an injunction is urgently needed to prevent the threat of damage from

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<sup>1</sup> The High Court’s power to grant injunctions is confirmed by section 37(1) of the Senior Courts Act 1981 (SCA 1981) and, in respect of the County Court, conferred by section 38(1) of the County Courts Act 1984.

taking place. Therefore the injunction process is broken down into two types: interim and final injunctions.

An interim injunction will injunct a party from doing a certain act until determination of the case at trial. Where the court recognises that there is a legitimate underlying dispute between the parties that can be the subject of a final determination at a trial, the court may grant an interim injunction to regulate the conduct of the parties so as to avoid a situation where the successful party has their victory at trial rendered meaningless because the damage that was threatened has already taken place. The order prevents the other party from doing the action threatened and protects the applicant whilst the case proceeds.

The final injunction is the return hearing on the interim injunction. At the interim injunction, the court will look to be satisfied on certain tests (see below) and will not hear the entire case at that hearing. At the final injunction hearing, the court will hear the entire case in order to make its decision on whether to end the interim injunction or extend it and make it final.

#### WHAT IS THE RISK? CROSS-UNDERTAKING IN DAMAGES

The court will require the applicant to give a cross-undertaking in damages in the event that it turns out that the interim injunction should not have been granted. This could be because the underlying claim be found in favour of the Defendant or if relevant information was not provided to the court during the application.

The cross-undertaking is to promise to pay the injunctioned party for any loss suffered as a result of the injunction. The amount of loss will depend on the merits of the case and we can discuss this with you.

The court is within its right to order an applicant to make a payment into court, if the potential loss is high or the applicant's ability to meet any order to pay damages is unclear.

#### WHAT TEST WILL THE COURT APPLY IN DECIDING TO MAKE AN ORDER FOR INJUNCTIVE RELIEF?

It will be necessary to prove that an injunction is the only way you can avoid the injury from happening. In many cases, the judge would also consider the likelihood of you winning the case. The judge is most likely to issue an injunction if he/she's convinced that the success rate of your lawsuit is higher.

## **The American Cyanamid Test:**

When considering whether to grant an injunction, the court will consider the merits of the case and ask the following questions:

### **1. Is there a Serious question to be tried?**

The court must first be satisfied that there is a serious question to be tried.

*"The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."* - PER LORD DIPLOCK, AMERICAN CYANAMID AT 407H

### **2. Are damages an adequate remedy for the Claimant?**

The court must consider *'if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them'*. - PER LORD DIPLOCK IN AMERICAN CYANAMID AT [408]

Sachs LJ formulated and explained the question of whether damages would be an adequate remedy in *Evans Marshall & Co. v Berto/a SA* [1973] 1 W.L.R. 349 as follows:

*"The standard question in relation to the grant of an injunction, "Are damages an adequate remedy?", might perhaps, in the light of the authorities of recent years, be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?""*

### **3. the alternative, would damages be an adequate remedy for Defendant?**

This question looks at whether in the event that the injunctive relief that is sought is granted and it later be found that it should not have been (for example if the Claimant loses at trial), would the Defendant be easily compensated for their losses caused by the injunction by way of damages?

For example, using our business trademark infringement case from above, where a Claimant seeks to prevent an infringing party from selling its goods using the Claimant's trademark, if an injunction was granted, it would protect the Claimant against the risk that the infringing party causes damage to its reputation. In the event that the Defendant was to win at trial, and it was decided that the Claimant had no right to be granted an injunction, then it would be quite easy for the Defendant to be compensated by damages (i.e. a calculation could be made of the number of likely sales x the amount of time the Defendant was prevented from selling).

On this point, another factor the court will look at is the financial position of the party seeking an injunction, to ensure that in the event that an injunction was found to be wrongly granted, the wronged party could be sure that the Claimant can afford to compensate it for their loss.

#### **4. Should an injunction be granted on the Balance of Convenience?**

This part of the test is to be considered in three stages:

- Will damages be an adequate remedy for the applicant if he succeeds at trial? If so, then interim injunctive relief will not normally be granted.
- If damages would not be an adequate remedy for the claimant, will the applicant's cross-undertaking in damages provide adequate protection for the respondent if the court were to grant interim injunctive relief which, following trial, proves to have been wrongly granted? If not, that points against the grant of interim relief.
- If there is doubt as to the adequacy of damages in applying the above tests, the court will consider the balance of convenience more generally. It will consider the particular factual circumstances in which the injunction is sought. These are sometimes referred to in case law as "special factors". Where such factors remain evenly balanced, it is prudent to preserve the "status quo".

#### **NEED TO KNOW MORE? AI LAW CAN HELP**

Our [dispute resolution team](#) at Ai Law has extensive experience in civil litigation matters. If you have a dispute, [contact us today](#) and we can review your matter and let you know your prospects and next steps to take. If irreparable harm has been caused or threatened to be caused by a party Ai Law can consider whether an injunction is an appropriate remedy, in the interim whilst the dispute is resolved, or with a view to obtaining a final injunction.

#### **OUR DETAILS**

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