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COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

INJUNCTIONS

The court can issue an injunction to order a party to refrain from doing a particular action (a prohibitory injunction) or requiring them to do a specified action (mandatory injunction). Serious consequences result from the breach of an injunction with the court having wide-ranging powers to enforce compliance and to punish a breach. This can include committal to prison, the seizing of assets and fines. Injunctions can either be “final” given at trial or - much more commonly- interim injunctions given urgently before a trial has taken place.

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CIRCUMSTANCES FOR AN INTERIM INJUNCTION

Interim injunctions are normally needed to resolve urgent matters which cannot await the delay of a full trial. Some examples are:

- preserve or prevent the loss of an asset (freezing injunction);
- obtain the delivery up of property;
- search a property for evidence (search order);
- protect confidentiality in business or personal information;
- protect trade secrets and prevent employees from breaching restrictive covenants; or
- restrain parallel legal proceedings in a foreign jurisdiction (anti-suit injunction).

Typically, the application for an injunction is made at the same time, or shortly after, a claim has been issued. In urgent cases, an application can be made before a claim is issued but the court will require the party to issue a claim without delay.

REQUIREMENTS FOR AN INJUNCTION

Injunctions are a discretionary remedy, which the court may grant when it appears to the court to be just and convenient to do so (Section 37 Senior Courts Act 1981).

In considering this, the court will have reference to the usual equitable principles including whether the claimant has unduly delayed in making the application and if the party applying for the injunction has "clean hands".

INTERIM INJUNCTIONS

In determining whether to grant an interim injunction the court will routinely apply the principles established in the case of *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396.

- (a) Stage 1: Is there a serious issue to be tried? The claim must have a real prospect of success and not be frivolous or vexatious.
- (b) Stage 2: Would the claimant be adequately compensated instead by an award of damages at trial?
- (c) Stage 3: Where does the balance of convenience lie? The court will weigh the respective inconvenience or loss to each party of granting an injunction.

CROSS-UNDERTAKING IN DAMAGES

The court will expect the party applying for the interim injunction to give the respondent a cross-undertaking to pay damages to compensate them for any harm suffered by the granting of the injunction if it is subsequently shown that the injunction should not have been granted. Often the court will require evidence that the party applying for the injunction has the means to pay such damages.

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PROCEDURE

Evidence at injunction hearings is usually by witness statements from the parties to which they exhibit their evidence in support.

ON NOTICE OR WITHOUT NOTICE (EX PARTE)

An application for an injunction can either be:

- “on notice” to the other party; or
- “without notice” and so without them being present at the immediate hearing.

“Without notice” applications are generally made where there is real urgency and so no time to provide notice, or where giving notice would defeat the purpose of the injunction for instance by enabling a wrongdoer to dispose of assets. Full and frank disclosure must be given when an application is made without notice because the other party is not present and the judge is being asked to rely on the applicant’s witness statement alone. A fair presentation has to be made to the judge of the material facts and law relevant to the application (*Sidhu v Memory Corporation plc* [2000] EWCA Civ 9) even if not favourable to the applicant’s case. If that is not done the injunction may be set aside and an order for costs and damages made against the applicant. If the court grants the application without notice it will almost certainly at the same time fix an early date for a further hearing so that the opposing party can put their case.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide-range of disputes topics but are not a substitute for specific legal advice. For further guidance on the topic please contact Nichola Leach at nichola.leach@collyerbristow.com or on +44 (0) 7793 168795 or contact any member of the commercial disputes team.



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