

## **CPD Session: Injunctions**

**Resource Person: Judge Fekna**

**Date: 24.11.2017**

**Time:14:00-16:15**

On an introductory note, injunctions are among the most common applications in court.

### **A. Basic Definition**

The general rule is that every citizen is entitled to do such acts as the law allows him to do or which are in keeping with his rights.

However, there are also actions which may be unlawful or causing prejudice to others and the remedy to prevent the unlawful/prejudicial acts is injunction.

A distinction must be highlighted between license and freedom. License entitles a person to do whatever they want even if it causes prejudice to another whereas freedom carries with it a concept of limitation. And injunctions are rooted in the concept of freedom.

The inaction of a person may also amount to being unlawful/prejudicial to others when they are actually under a duty to perform the acts but refrain from doing so. The remedy is to require the person to perform the act by way of a judicial order.

Injunctions are remedies in the form of judicial orders that impose on people to do something or to prevent people from doing something.

### **Jurisdiction**

Injunctions are applied for and granted by the Judge in Chambers because applications for injunctions may have to be dealt with & the appropriate order issued at very short notice. In practice, it is not uncommon for the Judge in Chambers to

issue an injunction on the very same day the application is made.

The judge in chambers has the appropriate set up to deal with urgent & very fast matters and hence why applications for injunctions fall within the province of the Judge in Chambers.

Injunction is a prerogative writ. Judge in Chambers acting pursuant to his inherent power as a common law Judge.

## **B. Classification**

(i) By reference to the nature of the obligation imposed on a party: nature of obligation may be (a) imposing on party to do specific act, that is, mandatory/positive injunction. (b) refrain from doing specific acts, that is, prohibitive/negative injunction.

(ii) Time period for which order is issued.

Note: the manner in drafting and the manner in which the Judge will deal with mandatory injunctions and prohibitive injunctions will differ.

### **Mandatory Injunctions:**

An interim ex parte (behind the back of the Respondent) measure is rarely applied for and seldom granted.

Whereas in the prohibitive nature of injunction, applications are quite common and are granted depending on its drafting of the affidavit and its supporting documents.

However mandatory injunctions may be granted at interlocutory stage. Mandatory injunctions (Ex parte) are more drastic in their effect and if granted as an interim measure against a Respondent, it may have an undesirable effect if action of applicant is unfounded.

This is why the Judge in Chambers prefers to hear more evidence in the form of affidavits emanating from both parties at interlocutory stage to give an informed decision.

-Time period for which order remains in force:

(a) **Temporary injunction** is a provisional measure. An ex parte interim order usually is for a couple of days normally. It is done where order to stop an event from happening has to be issued immediately even before other party is served with summons.

(b) **Interlocutory injunctions** are generally issued after having heard both parties. Such relief is issued pending the determination of a main case where issues separating the parties will be determined with finality by competent Court.

With regards to temporary and interlocutory injunctions: the Judge in Chambers decides on affidavit evidence which is taken at face value and the affidavit evidence is not tested through cross examinations.

(c) **Perpetual Injunctions**: It refers to final judgment and are only granted after a trial on merits by competent Court (trial court). This means that the evidence is properly rested through cross examination as opposed to an interim order ordered by the Judge in Chambers based on affidavit evidence which is taken at face value.

However, there are exceptions and there may be cases where temporary injunctions are issued by a Judge in Chambers who deals with the matter at hand with finality and hence in such instances, injunctions take the nature of permanent injunctions which settle the matter once and for all.

## C. Scope

Injunctions can be applied for in a large number of different cases, for instance:

- (i) Real Property (trespass, encroachment, illegal building, occupation)
- (ii) Prevent environmental harm (nuisance, noise)
- (iii) Dispute between landlord & tenants
- (iv) Employment and industrial relations (to prevent ex-employees from breaching clauses of confidentiality & non disclosure)
- (v) Prevent infringement of Intellectual Property (patents/trademarks/copyright)
- (vi) Commercial matters
- (vii) Companies matters ( prevent presentation of winding up petition)
- (viii) matrimonial & domestic disputes: eg: mandatory injunctions- for one spouse to leave main residence.
- (ix) to prevent discrimination
- (x) in field of public law (prevent ultra vires acts)- mostly about actions about to take place and not yet. If it happened already, the remedy would be judicial review.
- (xi) in litigation (protect from vexatious litigation).

The scope can be 2-fold:

- (i) Stop an action which has already started or in the process of being executed.
- (ii) to be issued as an anticipatory protective measure: it is opened to a party to apply for an injunction based on real apprehensions that he may have that an action prejudicial to him is going to take place in the future.

- Redland Bricks Ltd v Morris [1970] A.C.652: Quia timet action: an action for an injunction based on apprehensions.

In Attorney-General for Canada v Ritchie Contracting Supply Co [1919] A.C 999, the Court held that “no one can obtain a quia-timet order by merely saying ‘I fear’”.

### Conditions to be met for quia-timet:

(i) Harm should be in the near future

- that impugned action will happen in a real time frame.

(ii) Real apprehension

- not merely speculative or fanciful. Evidence to be placed before the Judge in Chambers from which inference that the apprehensions are based on real possibility of harm being caused to applicant.

(iii) Calculated action by other party:

- applicant must aver that what is going on has been deliberately calculated by other party to infringe his rights.

- (iv) Prove: some kind of proof. Mere allegations not enough.

### **D. Means of enforcement**

Injunction granted by the Judge in Chambers is useless if a party can flout it.

The Judge in Chambers may grant an injunction to order the Commissioner of Police, upon payment of appropriate fees, to help applicant to implement the order.

There are very restricted cases where such measure is practical.

Moreover parties & Judges are often reluctant to involve the police in what most of the time are civil matters.

Injunction carries with it the sanction of 'contempt of court' if disobeyed. It is opened to the applicant to enter a contempt of court case against other party if the injunction order is flouted.

This puts a mental pressure on someone having a contempt of court case on him and facing a jail sentence. And a party can ask for damages if the injunction order is flouted.

According to decided case law when an interim order not followed, this is in itself enough to turn it into interlocutory.

### **Practical Implication**

Attorney-General v Punch Ltd [2003] 1 A.C 1046 “if an injunction is to be granted at all, it must be in terms so plain that *even a person who is running can read & understand*’.

The terms of the injunction must be clearly stated.

Very often, the Judge in Chambers will grant the injunction in terms set out in the application by the attorney because the Judge does not want to risk going outside the limits of the application, hence the drafting of the application is very important.

However, the Judge has the discretion to restrict/limit the application.

When drafting the application, it should be:

- (a) in plain English
- (b) in such a manner as it covers all the possible actions he wishes to prevent or to be done
- (c) does not leave any grey areas or doubts as to the scope & application of injunction.

### **E. Duration**

The order shall last for the time period specified in the order itself or remains in force until it is discharged either by the Judge in Chambers himself or by the competent Court at a later stage.

Normally the Judge in Chambers discharges the interim order when dealing with the application at interlocutory stage.

M v Home Office [1994] 1 A.C 377: injunction remains in force (a) no matter how long the litigation of the main case takes and (b) even if the order should not have been made in the first place.

## **F. Parties**

Injunction are usually granted against a named defendant.

The practice in Mauritius is for party applying for the injunction to:

- (i) name of the Respondent in the application
- (ii) often request an Interim Order be granted ex-parte (behind the back of the Respondent) pending service of summons on the latter.

If the Judge in Chambers refuses to grant an Interim Order ex-parte, summons to be issues on opposing party immediately since all his particulars are available.

The usual practice is that summons in returnable within a few days.

### Opposing party not named:

In certain circumstances, applications may be made where the respondent is not named.

#### **(1) Applications Contra Mundum**

Injunction issued against society at large, that is, against the whole world.

The effect of the order: anybody/everybody is prevented from doing the action prescribed in the order.

If anybody (even if not named) flouts the order, the latter will be liable for contempt of court proceedings.

Such an order must be published in the newspaper so that people do not pretend ignorance. However this kind of order is very rarely made.

Venables v News Group Newspapers Ltd [2001] Fam 430

X(a woman formerly known as Mary Bell) v SO [2003] 2. F.C.R 686

(2) Applications against unknown parties

The Judge has a discretion in such cases.

In Bloomsbury Publishing Group Ltd and JK.Rowling v News Group Newspapers Ltd [2003] 1.W.L.R 1633: The real thief was unknown however the Court granted the injunction.