

# Injunctions

## The top 10 cases of 2014

OLSWANG



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## The Injunctions Blog

We have launched a blog to report on the developments in the law as it relates to injunctions. We will post on the blog a report of every significant case concerning injunctions in England and Wales as well as reports of other legal developments in this area and similar news and developments from other jurisdictions around the world.

Users can sign up for email alerts for posts on the blog. The blog is available at: [www.theinjunctionsblog.com](http://www.theinjunctionsblog.com)

# Introduction

An injunction is civil litigation at its most dramatic. Applications for injunctions are often made with intense urgency and with much riding on their outcome. Sometimes the effective outcome of the litigation can depend entirely on whether an injunction is granted.

But despite their central place within civil litigation and their long lineage, in recent years the underlying law relating to injunctions has been subject to a surprising amount of reinterpretation by the judiciary. This has led to an expansion in the preparedness of the courts to issue injunctions and new and useful forms of injunction being developed.

Injunctions are now among the most important and interesting developing areas of English law. They arise across almost all forms of litigation and the basic principles concerning injunctions apply equally to all these areas. Consequently, mastery of the potential and scope of injunctions in the new climate can make the difference between a successful and unsuccessful litigation strategy.

For that reason, we believe that it is appropriate to bring some focus to the development of the law regarding injunctions. To this end, we have launched a blog, The Injunctions Blog, in which we will seek to post every judgment and other development (such as proposed or actual legislative change) which concerns the granting of an injunction.

At the same time, we issue this briefing, setting out what we considered to be the top ten injunction cases of 2014. We believe that these cases reflect the important developments in this area.

Also in this note we:

- consider specifically the application of injunctions in employment, real estate law, competition law, fraud, intellectual property, media law and regulatory/public law proceedings;
- review the common procedural issues which arise when seeking an interim injunction;
- reflect the view from abroad in France, Germany and Singapore on the application of injunctions in those jurisdictions;
- include a more detailed analysis of the decision of Mr Justice Arnold in [Cartier International AG and others v British Sky Broadcasting Ltd and others](#), arguably the landmark injunction judgment of 2014; and
- provide a glossary of terms arising in connection with injunctions.

We hope that you find this a useful and interesting initiative. If you have any queries in relation to this initiative or in respect of injunctions generally, please speak to any of our injunctions team listed on the back cover.

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# Top ten injunction cases of 2014

**Case 1 – *Cartier International AG and others v British Sky Broadcasting Ltd and others* [2014] EWHC 3354 (Ch):** Whether the court has power to grant website-blocking orders against internet service providers in respect of trade mark infringement and finding that the court has “unlimited” jurisdiction to grant injunctions and should grant such orders. The judgment is [here](#) and the blog post [here](#). See also page 18.

**Case 2 – *OPO v MLA and another* [2014] EWCA Civ 1277:** An interim injunction was granted by the Court of Appeal to restrain the publication of a book to the world at large under the principle in *Wilkinson v Downton* on the basis that the publication might cause severe psychological injury to the author’s son. This is the first time that the principle in *Wilkinson v Downton* had been used to obtain injunctive relief. The case will be heard by the Supreme Court early in 2015. The judgment is [here](#) and the blog post [here](#).

**Case 3 – *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2014] EWHC 3250 (Comm):** A worldwide freezing injunction in support of sums awarded by a London arbitration tribunal was continued by the Commercial Court despite “serious and numerous” breaches of the claimant’s duty to give full and frank disclosure. The judgment is [here](#) and the blog post [here](#).

**Case 4 – *Huawei Technologies Co. Ltd v ZTE Corp, ZTE Deutschland GmbH* (Case C-170/13):** An Advocate General’s opinion on whether a patent holder who has informed a standardisation body that he is willing to grant any third party a licence on fair, reasonable and non-discriminatory terms abuses his dominant market position if he brings an action for an injunction against a patent infringer who has declared he is willing to negotiate a licence. The opinion also considers the required conduct for a patent infringer to be considered a willing licensee. The opinion is [here](#) and the blog post [here](#).

**Case 5 – *Les Laboratoires Servier and another v Apotex Inc and others* [2014] UKSC 55:** Whether the defence of illegality bars the recovery of damages under a cross-undertaking, in the context of a patent dispute. The Supreme Court held that the infringement of the patent did not constitute “turpitude” (an illegal act which engages the interest of the public) and so did not engage the defence of illegality. Apotex was, therefore, entitled to damages. The judgment is [here](#) and the blog post [here](#).

# Top ten injunction cases of 2014

**Case 6 – *Hone and others v Abbey Forwarding Ltd and another* [2014] EWCA Civ 711:** The approach to the assessment of damages under a cross-undertaking in damages given on the grant of a freezing injunction. The Court of Appeal confirmed that normal contractual principles (such as causation, remoteness, foreseeability and mitigation) will be applied by analogy. The judgment is [here](#) and the blog post [here](#).

**Case 7 – *AB v CD* [2014] EWCA Civ 229:** Whether a party that applies for an interim injunction to prevent a breach of contract may argue that damages will not constitute an adequate remedy where there are contractual terms which exclude or limit liability for loss that would be caused by such a breach. The Court of Appeal held that it can. The decision suggests that the court will be more likely to grant interim injunctions in circumstances where damages are excluded or limited by the relevant contractual provisions. The judgment is [here](#) and the blog post [here](#).

**Case 8 – *Bank St Petersburg OJSC and another v Vitaly Arkhangelsky and others* [2014] EWCA Civ 593:** A rare anti-enforcement injunction granted by the Court of Appeal to enjoin a party from enforcing a foreign judgment, albeit on an interim basis. In the circumstances, it was appropriate to grant an interim injunction to preserve the status quo and prevent the claimant from subverting the English proceedings by enforcing the foreign judgment. The judgment is [here](#) and the blog post [here](#).

**Case 9 – *Coventry (t/a RDC Promotions) and others v Lawrence and another* [2014] UKSC 13:** The Supreme Court discussed the award of damages in lieu of an injunction in nuisance claims, and called for a more flexible approach by the lower courts than has previously been taken. The judgment is [here](#) and the blog post [here](#).

**Case 10 – *Credit Suisse Trust v Banca Monte Dei Pasche Di Siena and another* [2014] EWHC 1447 (Ch):** Whether the court has jurisdiction to grant a Norwich Pharmacal order against a party outside the jurisdiction if they have a branch within it. The judge held that since this case concerned fraud there was nothing preventing him from granting the orders simply because the information sought was held by a branch of a bank which was abroad. The judgment is [here](#) and the blog post [here](#).

# Injunctions in practice – Employment Law

Injunctions in the employment arena have a long history based on the seeking of interim relief to restrain industrial action. However, lately most case law developments have been in the employee competition context where interim relief may be sought to enforce the express terms of the employment contract (usually the restrictive covenants, but more recently also the notice period by way of garden leave), restrain an unlawful advantage gained by an employee as a result of a breach of contract or other duty (“springboard relief”), restrain a breach of confidence, or obtain delivery up of property or information belonging to the employer. Often an application will seek all of these forms of relief.

The tests applied in this context are generally consistent with the “normal” tests relating to an application for interim relief – that there is a serious issue to be tried, that damages are not an adequate remedy and where the balance of convenience lies. In the employee competition context, most often an employee who is alleged to be in breach will be under pressure to give undertakings to the court in the form of an order pending an expedited trial of the matter.<sup>1</sup>

Injunctions in the employee competition world seem to be closely linked to the economy. So, when the economy is stagnant or in decline, and employees are a liability being cut in redundancy exercises, understandably interest in employee competition litigation is less. The economy improves when employee competition litigation is more prevalent.

Another reason for greater activity is the increasing realisation by employers that breaches relating to data, whether it be their confidential information or clients’ or individuals’ data must be taken seriously which has led to a number of reported cases relating to the retrieval of such data from former employees. This, combined with the recent case law which has held that data is not property means that this an interesting developing area.<sup>2</sup>

Other trends are really cautionary tales for the employer. Applications without notice are becoming increasingly rare<sup>3</sup>. Also, whilst for a while it was thought that less than perfect drafting of a restrictive covenant would not necessarily be a bar to enforcement, this is no longer necessarily the case (at least at the stage of a final injunction) after the Court of Appeal decision in [Prophet plc v Huggett](#) [2014] EWHC 615 (Ch).

Finally, a new area for the use of injunctive relief in the employment context is the enforcement of disciplinary procedure, particularly where that procedure is contractual. The decision of the Supreme Court in [West London Mental Health v Chhabra](#) [2013] UKSC 80 supports the intervention of the court where the irregularities are serious, but not where there are minor irregularities. It remains to be seen how case law which follows this decision develops.

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<sup>1</sup> *Lawrence David v Ashton* [1989] ICR 123

<sup>2</sup> *Your Response Limited v Datateam Business Media Limited* [2014] EWCA Civ 281

<sup>3</sup> *CEF Holdings Ltd v Munday* [2012] EWHC 1524 (QB)

# Injunctions in practice – Real Estate Law

Almost everyone, be it corporate entities or individuals, has an interest or right in real estate. Injunctions can often be the most effective method of protecting or enforcing those rights and interests.

Typically in Real Estate disputes injunctions are used to prevent an interference with rights or to compel performance of obligations. Injunctions can be an urgent, powerful and valuable tool in any Real Estate dispute. The threat alone can be a formidable tactic and successfully place a party under intense pressure to focus on remedying the breach and resolving the dispute.

Developer clients often require injunctions to enforce contractual obligations. For example, a developer may seek an injunction compelling adjoining property owners to grant it licences allowing it to oversail their land so that the development can be completed. At the other extreme, they may face the threat of injunctions from adjoining property owners, or even their own tenants, arguing that noise and dust created by construction works are causing a nuisance and/or in breach of their obligation as landlords to allow quiet enjoyment. Developers who have entered into agreements to sell properties but whose purchasers have failed to complete the purchase have also turned to the court for orders compelling the purchasers to complete.

Rights to light have been a burning issue for developers, who can be held to ransom by neighbours who seek to enforce such rights through, on occasion, the partial destruction of a development. The recent case of [Coventry \(t/a RDC Promotions\) and others v Lawrence and another](#) [2014] UKSC 13 may have given developers some comfort as it introduced more flexibility to the court to award damages in lieu of injunctions, but the recommendations of the [Law Commission in its recent Report on Rights to Light](#), if adopted, could give developers far more certainty as to any claims for rights of light.

Landlord and tenant clients often seek advice on their possible remedies where the other party is in breach of a covenant or condition contained in a lease. In the past years we have advised both sides of the argument on “keep open” clauses (in one case acting for a notable London restaurant in relation to its landlord’s threat to apply to the court for specific performance of a keep open clause in its lease). A landlord whose tenant is in arrears will often serve letters before action on their tenant and possibly a statutory demand. We have found in some cases the tenant has used the threat of an injunction to seek assurances that the landlord will not wind up the company.

In other Real Estate disputes, injunctions have been used to prevent defendants based out of the jurisdiction and embroiled in proceedings from dissipating their assets. Injunctions can also be used in real estate disputes to preserve the status quo. For example, we have acted for a client who was poised to file an application with the court for an order restricting the Land Registry from registering an entry, in this case a unilateral notice. Other similar orders which could be sought include an order preventing the sale of a property, perhaps until a dispute relating to the property is resolved or to prevent the owner from dissipating the asset.

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# Injunctions in practice – Competition Law

An interim injunction application is often a critical stage in a dispute based on competition law.

Commonly, the need for interim action arises where an undertaking has a dominant position in a market and takes action which will damage (and often threaten the viability of) another's business. This can include stopping the supply of a vital component, imposing onerous new terms, or refusing to license intellectual property essential to produce a certain product, perhaps with the dominant undertaking deliberately targeting a competitor or a customer of the undertaking's competitor.

The remedy in such circumstances is based on Article 102 of the Treaty on the Functioning of the EU (or its national law equivalents). Article 102 can be complex to apply. A claimant needs to prove that the defendant has a dominant position in a market, which will involve detailed economic evidence on the relevant markets affected by the defendant's conduct and its position in those markets. The claimant will also need to show that the undertaking has a competition law duty to supply the product.

In the past, at an interim stage the courts put a significant emphasis on the claimant showing dominance and abuse, which was often burdensome in the expedited nature of such applications. Moreover, the traditional competition law remedy of complaining to a regulator was of limited effect, as regulators rarely exercised their powers to order interim measures equivalent to an injunction (though UK rules were changed last year to make it easier to obtain interim measures orders).

As courts have become more used to handling competition claims, however, they have become more willing to accept that there is an arguable case on both dominance and abuse, provided the case is well pleaded. A fairly recent example of this was [Dahabshiil Transfer Services Limited v Barclays Bank](#) [2013] EWHC 3379 (Ch).

Dahabshiil operated a money transfer business, focussing on Somalia, and was dependent on Barclays for banking services. Citing money laundering concerns, Barclays terminated its relationship with Dahabshiil. Dahabshiil sought an interim injunction to require Barclays to reinstate services.

The court found that there was a triable issue on whether Barclays was dominant in a market narrowly defined as the provision of a mechanism to transfer money from one country to another, where Barclays had 70% of UK-based customers. It also found that cutting off supplies to an existing customer may be an abuse and that any objective justification Barclays might argue for doing so in this case would have to be fully examined at trial. Accordingly, Barclays was ordered to resume dealing with Dahabshiil. Dahabshiil both survived as a business and was put in a much stronger position to resolve the issue before full trial, given the costs to Barclays of proceeding and the risk of a final finding of dominance.

An interim injunction is therefore an essential tool for using competition law to protect your business from the actions of dominant suppliers, customers or competitors, and is increasingly used in the English courts.

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# Injunctions in practice – Fraud

English freezing and disclosure orders are a magnet for claimants. They directly assist in the tracing and holding of stolen property and separately force disclosure of assets and information so that a claimant knows where it can enforce any judgment it might obtain. And the orders have teeth. Claimants, and the court, are becoming increasingly adept at fashioning case specific remedies which lead to real enforcement of orders, for example orders to transfer contested funds to safe accounts or receivership orders. Alternatively, where there is a clear breach of an order it is increasingly common to begin contempt of court proceedings which can lead to unlimited fines and up to two years imprisonment. In the right case that can concentrate the mind.

The attractiveness of the regime for claimants is therefore not in question. It does tilt the scales – the theory being the tilt is back to equality between the parties, but there are respectable arguments that the push back is too far the other way and puts the claimant far ahead of the fight.

The regime has been developing since the seventies. It is now sophisticated and mature. Freezing injunctions are granted every day in the High Court. The judiciary (particularly in the Commercial Court) is expert in the field. So what have been the trends and what might happen next? Is it possible to discern a trend from the reported cases in The Injunctions Blog for 2014?

Given the attractiveness of the English regime it is not surprising that international claimants want to join in. That has led to cases testing its geographical boundaries. Often the technical battleground is the service out provisions contained in the court rules: can the freeze jurisdiction be extended to foreign defendants with foreign assets? Other cases involve the wish to extend the instances where the court will provide worldwide relief. As a general proposition the courts are saying that worldwide relief will be available where England is the court for the underlying proceedings, but not where it is providing assistance to other courts.

The boundaries are being pushed in other directions also. It is basic law school knowledge that a claimant needs a good arguable case. Historically that question has more often than not turned on the facts; but in recent years it is possible to discern a trend of injunctions being granted in cases with more elaborate legal theories. As these theories are challenged at the return date stage, it is possible to see more freezes being overturned than had previously been the case.

The big trend in recent years has been claimants reaching for criminal findings of contempt of court. Indeed it is tempting to suggest that, improperly, some claimants are setting their stall to arrive at this conclusion: either to impose maximum pain on defendants or to short circuit the trial process. But there are limits. Hamblen J's substantial costs order against the claimant in [\*PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov and others\* \[2014\] EWHC 4370](#) might, it is to be hoped, give pause for claimants automatically reaching for contempt.

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# Injunctions in practice – Intellectual Property

The infringement of an intellectual property (IP) right can cause irreparable damage extending over and above financial loss. The loss of exclusivity and erosion of value in an IP asset such as a trade mark, a copyright work or a patent can also often be unquantifiable. Accordingly the claimant's primary objective in many IP cases will be to stop an infringing activity, rather than seek financial compensation which may prove inadequate. Injunctive relief is generally granted where infringement (or threatened infringement) of a valid IP right is established. Injunctions can be a particularly powerful remedy where they are available on a pan-European basis, in cases involving an IP right registered throughout the European Community.

Injunctive relief for IP infringement has been harmonised across the EU by the IP Enforcement Directive (Directive 2004/48). Relief on a temporary basis (pending full examination of the issues) or permanently must now be made available as a potential remedy in every EU member state. However harmonisation does not extend to breaches of the order, when local member state law applies.

Temporary injunctive relief is available in circumstances where significant and lasting damage (which is unlikely to be fully compensated) is likely to be inflicted quickly. The IP Enforcement Directive provides a mechanism to be implemented by each member state to ensure that there is effective but proportionate interlocutory relief including the ability to award temporary seizure of movable infringing items or award damages against a party who wrongly obtains a temporary injunction.

The usual form of order in the case of a registered IP right (such as a trade mark, patent or registered design) is to prohibit the defendant from infringing the right in question, identified by its registration number. The order does not usually stipulate which acts would be considered infringing and it is the defendant's responsibility to ensure the injunction is not breached. However, the court has discretion to draft the order in bespoke terms where a general restraint would be inappropriate.

In cases involving an unregistered IP right (such as a passing off action, a copyright infringement claim or unregistered design right), the form of injunction will vary considerably depending on the nature of the right and the defendant's activities. Where the claimant's rights are not readily identifiable by reference to a registration, the scope of the prohibited acts can be more difficult to set out. In such cases, the injunction may need to be qualified to exclude potentially lawful activities. The court may also make mandatory injunctions, such as ordering a defendant to change his trading name.

The IP Enforcement Directive enshrines the principle that the adjudicating court should consider the need for proportionality between the seriousness of the infringement and the remedies ordered, as well as the interests of third parties. This means that a court may refuse the grant of an injunction altogether even where a valid IP right has been infringed for example in a patent infringement case where a compulsory licence may be a more proportionate remedy.

The IP Enforcement Directive also provides rights holders with the ability in any member state to obtain an order against intermediaries, such as internet service providers whose services are being used to infringe IP rights (see for example the [Cartier](#) case, page 2).

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# Injunctions in practice – Media Law

In order to review injunctions in a UK media law context in 2014 one must first go back in time – to early 2011 and the furore about “super-injunctions” (a particular type of privacy injunction containing a prohibition on reporting even the fact of the relevant proceedings). This is crucial to understanding the current position regarding media injunctions in the UK. Soon after, the UK courts issued [Guidance in relation to applications for interim non-disclosure orders](#). The Guidance made it clear that:

1. The general rule is that hearings are carried out, and judgments and orders are made, publicly. Derogations to the principle of openness can only be justified in truly exceptional cases and it will only be in the very rarest of cases that a super-injunction will be justifiable on the grounds of strict necessity, i.e. anti-tipping off situations;
2. Applicants must give advance notice of the application to the respondents to the proceedings and to any non-parties who are to be served with the order, in particular the media organisations who the applicant will also be seeking to bind by the order; and
3. The court will actively manage the case following the granting of any injunction, and the applicant must keep the respondent and any non-parties subject to the order informed of any developments in the proceedings which affect the status of the order.

Taken together, the Guidance (which has been followed by the UK courts ever since) means that:

1. The fact of the injunction application must generally be notified in advance to the media (who may well choose to appear at the hearing), the hearing will generally be held in public and the judgment will generally be made available publicly. In the age of social media, therefore, even a successful applicant may not be able to keep the relevant information truly private.
2. Even if the applicant obtains an injunction, and otherwise manages to keep the relevant information private, the court will require that the applicant progresses his or her case. This means that significant legal costs will inevitably be incurred and, more importantly, that at some point a final order would be made – meaning that, in contrast to the interim injunction, it would only be binding on the respondent and not all other parties served with the order.

In light of the above and the rise of social media, it is not surprising that applications for privacy injunctions have almost disappeared in the UK. According to Ministry of Justice statistics, for the period from January to June 2014 not one application for an injunction prohibiting the publication of private information was made at the Royal Courts of Justice. As far as we are aware, only two applications for privacy injunctions were made in the period July to December 2014, in [AMM v News UK](#) [2014] EWHC 4063 (QB) (the first privacy injunction granted against the media since January 2013) and in [OPO v MLA and STL](#) [2014] EWCA Civ 1277 (on appeal to the Supreme Court in January 2015).

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# Injunctions in practice – Public Law

The speed with which the Administrative Court deals with cases is notoriously unpredictable and can be slow. An interim injunction (potentially in conjunction with an expedited timetable) offers the opportunity to ensure that proceedings challenging the decision of a public body or regulator do not become irrelevant because that decision has been implemented in the meantime.

The starting point for interim injunctions is the same in public law cases as it is in private law cases. The court will consider the strength of the case, if damages will be an adequate remedy and where the balance of convenience lies, including any special factors.

In judicial review proceedings a party will generally, as a first step, be required to obtain the permission of the court to bring the proceedings. One might expect that if permission is granted the party pursuing the claim is well placed to obtain interim relief, already having established that the claim is arguable. However, a party seeking interim relief in public law proceedings can expect to face some difficulties (and in fact may seek relief before an application for permission is made).

Damages are not relevant in the vast majority of judicial review cases, with claimants seeking alternative remedies such as a quashing order or a declaration that a decision is unlawful. This intensifies the focus on the balance of convenience test.

There is a strong presumption against interim relief in public law cases because it is in the public interest that the decisions of public bodies are respected, unless they are set aside following full consideration. This public interest and the interest of the general public in the specific decision may weigh in the balance of convenience.

Moreover, even without the public interest aspect, a consideration of the loss to each party, should interim relief be granted (or not), and the claim ultimately decided the other way may be heavily weighted in the public body's favour. This is particularly the case where the decision that is being challenged relates to a larger group of individuals or entities. The impact of implementation of the decision may be a few thousand pounds for the claimant, but the impact of holding off implementation of the decision may run to millions of pounds for the defendant public body. From a practical perspective, the requirement to provide a cross-undertaking in damages in support of an interim injunction may also be prohibitive in such cases.

Nevertheless, the flexibility of the interim relief test means that it is still a possibility in judicial review proceedings. A recent case has demonstrated that it is open to the court to consider the merits of the claim beyond determining that the claim has a real prospect of success, where it has the necessary information and evidence to do so. A more detailed examination of whether an injunction in the same terms should be granted on a final basis may assist the court to determine that it is just and convenient to grant it on an interim basis.

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# Applying for an interim injunction

An interim injunction may be sought at very short notice. A mastery of the procedure is essential. In overview, this is as follows:

## Where to go

First of all you will need a judge. High Court masters have no powers to grant injunctions (although they can grant orders for specific disclosure and *Norwich Pharmacal* disclosure orders). Usually, one will make an appointment for a hearing before a judge. However, in cases of extreme urgency (for example an injunction against a newspaper going to press that evening), an application can be made over the telephone. The court will have a “duty judge” available each evening and over the weekend to hear out of hours applications.

## What you will need

Typically, for a hearing you will need a witness statement (or in the case of applications for freezing injunctions or search orders, an affidavit) setting out the facts relied upon for the application and a draft order. If the claim has not been issued yet, there should be a draft claim form prepared and the applicant will have to give an undertaking to issue at the earliest convenient moment. If there is time, there should be a skeleton argument supporting the application.

In reality, depending on the urgency, all or any of these can be dispensed with and in cases of real expediency, an injunction may be issued on the basis of a telephone call alone with no supporting documentation.

The other thing you are likely to need is the other side. Only in cases of extreme urgency should an application proceed without notice to the party being enjoined<sup>4</sup>. If an application is made without notice, there is a duty of full and frank disclosure on the party making the application. That means that the applicant should disclose to the court everything that would be material to the case in order for the court to determine whether or not to grant the order sought<sup>5</sup>.

## What you will need to show

A party seeking an interim injunction will have to show that:

- it has an arguable case;
- damages are not an adequate remedy; and
- the balance of convenience lies in grant the injunction<sup>6</sup>.

<sup>4</sup> A principle given statutory underpinning in freedom of expression cases under section 12(2) of the Human Rights Act 1998.

<sup>5</sup> See Ralph Gibson LJ in *Brinks Mat v Elcombe* [1988] 1 WLR 1350 at 1356-7.

<sup>6</sup> [American Cyanamid Co v Ethicon Limited](#) [1975] AC 396.

Where the injunction affects freedom of expression (for example an injunction restraining the publication of material in a newspaper), in addition the applicant must show that he or she is “likely” to succeed in his or her claim at trial<sup>7</sup>.

There are other requirements which apply to specific types of injunction. For example, where a freezing injunction is sought, the applicant must show evidence demonstrating a risk of dissipation of assets by the respondent.

### **Cross-undertaking in damages**

The party seeking the injunction is likely also to have to give a cross-undertaking in damages, that is, undertake to the court that it will make good to the other side any loss arising from the grant of the injunction if it ultimately transpires that its case is badly founded and the injunction should not have been granted. The cross-undertaking may also give rise to issues as to whether the party has the resources to meet any payment which may be required under it and may require fortification (for example the deposit of funds by the applicant to be held by the applicant’s solicitor).

### **The order**

An interim order may have the effect of binding a third party who has notice of it, the so-called *contra mundum* effect.

In order to convict a party for contempt, the form of the injunction should include a penal notice setting out the potential consequences of breach and in general there must have been personal service of the injunction on the respondent

### **The return date**

Very often an injunction will be granted for a short period (for example seven days) and then there will be a further hearing (on the “return date”) which will consider the merits of the application in greater detail. While any omissions in the applicant’s evidence may be excused for the first application (on the ground that the applicant is likely to have had little time to prepare) the court is likely to be much less forgiving on the return date. If the application has been made without notice, then the respondent will have the opportunity to attend court and make submissions for the first time on the return date.

### **Equitable relief**

It should be remembered that an injunction is an equitable relief. This means, at least in theory, that a party seeking an injunction must comply with the usual basic equitable requirements, for example coming with clean hands and that there be no delay (laches). In reality, these days, equitable requirements rarely feature significantly in interim applications, although there is still potential for them to catch out unwary litigants.

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<sup>7</sup> Under section 12(3) of the Human Rights Act 1998. For what this actually means, see [Cream Holdings v Banerjee](#) [2005] 1 AC 253.

# Injunctions in other jurisdictions – France

In French courts, injunctions are available before commercial and civil courts within the confines of each court's jurisdiction. The French Code of Civil Procedure provides the following.

The President of the High Court or the President of the Commercial Court can grant injunctions including protective measures or measures to restore the parties to their previous state, where they are satisfied that (a) there is sufficient emergency, for example to avoid an imminent damage or to abate a manifestly illegal nuisance, and (b) the strength of the applicant's case merits the grant of an injunction. In respect of both questions, the judge has a very broad discretion.

Ex parte orders may be awarded where the applicant has good reason for not summoning the opposing party. For example, interim injunctions may be granted ex parte in order to obtain a payment order.

Another frequently useful interim injunction comparable to the disclosure procedure in English law (which is not standard in French proceedings), is requiring a party to provide documents in response to preparatory inquiries. For example, disclosure orders against internet service providers may be granted ex parte if the data may lead to the identification of a hacker in the case of a security incident within a company.

In France, injunctions are used particularly commonly in employment law matters. Employers, employees, trade unions and staff representatives can use injunctions requiring or prohibiting a party from specific conduct, whether in the Industrial Tribunal or the Tribunal de Grande Instance.

The can arise where:

- there is urgency and the claim is not seriously challengeable;
- interim measures are necessary either to prevent immediate damage or to stop unlawful behaviour (for example, the dismissal of a protected employee in breach of procedural requirements, such as the lack of prior authorisation from the French Labour Administration, constitutes unlawful behaviour) where the judge can order the reinstatement of the protected employee regardless of the reasoning behind the decision of the employer to dismiss; or
- financial provisions are to be awarded to the applicant or where the existence of the obligation is not challenged. For example, judges may order the cessation of competing activity committed by an ex-employee bound by an uncontested non-compete clause.

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# Injunctions in other jurisdictions – Germany

Injunctions are an important remedy that are available in most areas of German law, from general civil law, over more specialized legal regimes such as patent law, to public law. In some areas of law, for example in the case of unfair business practices, (preliminary) injunctions have become by far the most important legal remedy. The reach of, and requirements and procedural framework for, such injunctions can vary from one legal regime to the other. Procurement law, for example, provides for a very specific set of rules, deadlines, and procedural requirements regarding third party injunctions that are aimed at preventing the acceptance of another party's tender.

A majority of injunctive relief cases in German civil law proceedings seek to terminate ongoing infringements. Although they can also require the addressee to take certain acts if there is a clear and specific claim for such an action, injunctions are in most cases result orientated. While the claimant can ask that an infringing situation be brought to an end, it regularly remains for the defendant to decide exactly how this result can be achieved. Specific performance, in contrast, can (and must) be requested if there is only one way of bringing an end to the illegal situation (e.g. a request against another company to contract if continued refusal would constitute the abuse of a dominant position). If a party violates an injunction granted by the court, the court can impose a fine, or, if such fine is not paid, order the arrest of the party for contempt of court.

Very often injunctions are sought in preliminary proceedings. Preliminary injunctions require an urgency of the matter. It is established case law that, to demonstrate this urgency, the action must be brought expeditiously after the events giving cause for such action have happened (regularly within one to two months, depending on the court district). Preliminary proceedings will be adjudicated by the trial court, but the proceedings are summary and the taking of evidence is restricted. Preliminary injunctions can be granted without oral hearing if there is a particular, heightened urgency, or if a hearing would defy the purpose of the preliminary measure. In this case, the defendant can object to an unfavourable decision and enforce that an oral hearing will be held.

The interim nature of the proceedings dictates that the award granted by the court must not make trial obsolete. The award will therefore remain preliminary and must not create irreversible results. The court's decision to grant or refuse a preliminary injunction can be appealed. If main proceedings demonstrate that the preliminary injunction should not have been granted, the applicant can become liable for damages. Under certain, rather strict conditions, preliminary proceedings also permit creditors to apply for freezing orders over the assets of their debtors, if they can demonstrate a claim and the risk that, without such preliminary measures, the future enforcement of a judgment will become significantly impeded.

An area of German law in which injunctions have been and continue to be the subject of extended debate is the liability of internet service providers (ISPs). ISPs, as intermediaries, are often not aware of the specific infringements committed with the help of their services. Accordingly, they will often not be directly liable for these acts. However, German courts have established a secondary liability of ISPs (as so called *Störer*) to reflect that they contribute directly to such infringements and also have the ability to end it. However, this area of law is still very much in flux.

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# Injunctions in other jurisdictions – Singapore

Injunctions are available in Singapore court proceedings as well as in aid of Singapore or even foreign seated arbitrations. An injunction may be issued by the State Courts as well as the Supreme Court of Singapore.

Interim injunctions are also available. The Singapore legal system has its roots in the English legal system and the test for the issuing of an interim injunction remains the *American Cyanamid* test<sup>8</sup>.

Special considerations apply where the injunction is sought against parties and state parties in a foreign state. The Singapore courts will not issue an injunction which would entail “an unacceptable degree of supervision in a foreign land” and/or “affect the operations of [foreign] governmental entities and agencies”<sup>9</sup>. In the case of a mandatory injunction, the Singapore courts would not ordinarily require parties to a complex contract to continue working together once it has been shown that parties had suffered a serious breakdown of mutual trust and confidence such that there was no longer any willingness to cooperate.

An interim injunction may be sought on an ex parte basis on the basis of urgency. The Practice Directions of the Supreme Court of Singapore expressly provide that any party applying ex parte for an injunction (including a freezing injunction) must give notice of the application to the other concerned parties prior to the hearing. However, such notice need not be provided if such notice would defeat the purpose of the application. The applicant to an ex parte injunction must provide full and frank disclosure to the court of all material facts within its knowledge.

A party seeking an interim injunction must provide an undertaking as to damages to be paid to the defendants if the injunction is subsequently discharged or found to have been wrongly issued. In certain cases, the defendants may apply to the Singapore courts for the plaintiff to fortify its undertaking as to damages by providing security for an amount to be determined by the Singapore courts. These defendants must show “a real risk of loss” if the injunction is discharged or if it is determined that the injunction was wrongly granted. In the main, the Singapore courts’ consideration is that the plaintiff’s undertaking “cannot be illusory”. The court has to ascertain whether there are sufficient assets either within or outside the jurisdiction that would be readily available to satisfy any liability under the undertaking itself. Accordingly, the fortification of undertakings is “usually, albeit not invariably, granted where foreign plaintiffs are involved”<sup>10</sup>.

A breach of an injunction may render the defaulting party liable to penal sanction. However, any application for an order of committal must be made with prior leave of the court in accordance with the Singapore Rules of Court. Where a defaulting party has been found guilty of contempt of court, a custodial sentence is “not the starting point for contempt of court proceedings, but normally a measure of last resort”<sup>11</sup>.

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<sup>8</sup> See [Maldives Airports Co Ltd and another v GMR Male International Airport Pte Ltd](#) [2013] SGCA 16 at [54].

<sup>9</sup> See [Maldives Airports](#) at [70] and [71].

<sup>10</sup> See [CHS CPO GmbH \(in bankruptcy\) and another v Vikas Goel and others](#) [2005] 3 SLR 202 at [89].

<sup>11</sup> See [Maruti Shipping Pte Ltd v Tay Sien Djim and others](#) [2014] SGHC 227 at [124].

# The decision in *Cartier International AC and others v British Sky Broadcasting Ltd and others*

The decision of Mr Justice Arnold is one of the most interesting judgments regarding the issue of an injunction for some time. This is not so much because of the specific determination on the facts of the case and the relief sought, important as they were, but because of the more general review of the jurisdiction of the court to grant injunctive relief.

In the case, a consortium of owners of trademarks in luxury goods sought injunctions requiring various internet service providers to block access on the part of ordinary internet users in the UK to certain specified internet sites which - the claimants claimed - flagrantly infringed their trademarks.

The difficulty for the claimants was that while UK domestic legislation allowed for the grant of such a blocking injunction where copyright was being infringed (and indeed a number of such blocking injunctions had been granted), there was no similar provision where the intellectual property right in question was a trademark. This is despite the fact that the European Enforcement Directive requires blocking injunctions to be available in trademark cases.

Given the clear absence of any statutory basis for granting a blocking injunction in these circumstances, the judge was required to consider in some detail the general jurisdictional basis on which the courts can grant injunctions. This in turn required reviewing the origins of the source of the power to grant injunctions back to the Court of Chancery prior to the Judicature Acts of 1873 and 1875. He concluded<sup>12</sup> firstly that “it is necessary to distinguish between the jurisdiction of the court ... and the practice of the court not to do so except in a certain way and under certain circumstances” and that as regards the former question<sup>13</sup> “The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited”.

The judge also endorsed the following principles for granting of injunctions. An injunction could be issued:

- for the protection of any legal right (save where precluded by an applicable statutory provision), although this must ordinarily be a *present* right of the claimant as opposed to a right that he merely expects to acquire in the future. The grant of injunction under this category need not be limited to be against the infringers of the right in question;
- in the enforcement of any equitable right (provided that injunctions of the relevant kind were formally granted by the courts of equity);
- pursuant to the natural power to grant injunctions conferred in respect of a particular subject matter, for example family law;
- to protect a legal privilege or freedom such as to prevent harassment<sup>14</sup> or where the continuation of foreign proceedings would be unconscionable; and
- on miscellaneous grounds, to restraint unconscionable conduct (such as a freezing order).

<sup>12</sup> Based significantly on the analysis of Lord Scott in [Fourie v Le Roux \[2007\] UKHL 1](#).

<sup>13</sup> Quoting from *Spry, Equitable Remedies* (5th ed).

<sup>14</sup> Although harassment is now subject to a statutory regime under the Protection from Harassment Act 1997.

On this basis the judge granted the blocking injunctions sought.

The judgment is striking since it appears to release the courts from having to tie injunctive relief to any limiting factor such as a cause of action. Courts have an “unlimited” jurisdiction to grant injunctions. In recent years, the courts have been inventive in developing injunctive relief to meet the demands of the modern world, going beyond restraining breaches of causes of action by defendants, for example with publicity orders<sup>15</sup> and *contra mundum* relief<sup>16</sup>. There is now the jurisdictional basis for the courts to go further and apply injunctions on ever more imaginative terms.

The judgment is also striking – and perhaps controversial – in that it in effect directly enforces a European directive, without the intervening effect of any domestic statute. Previously it was understood that such directives do not have direct effect. In this way, the decision could be seen to usurp the role of Parliament.

The case is going to appeal and there may be some reformulation of this analysis by the Court of Appeal. However, this looks a convincing judgment, based on clear authority and it seems unlikely that it will be significantly overturned.

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<sup>15</sup> See *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWCA Civ 1339.

<sup>16</sup> Where the injunction is effective against all parties who have notice of it. See *AG v Times Newspapers Ltd* [1992] 1 AC 191.

# Glossary of injunction terms

These are terms commonly used in connection with injunctions.

**American Cyanamid principles** – the House of Lords case of [American Cyanamid v Ethicon Limited \[1975\] AC 396](#) in which Lord Diplock established the principles for the granting of an interim injunction; namely that the applicant has to show (a) that it has an arguable case; (b) that on the balance of convenience an interim injunction should be granted; and (c) that damages would not be an adequate remedy. The applicant is likely to be required to give a **cross-undertaking** (see below).

**Anti-suit injunction** – an order which prevents a party from commencing or continuing with proceedings in a foreign jurisdiction or with arbitration proceedings. Anti-suit injunctions are commonly used in cross-border litigation and/or in circumstances where proceedings have been commenced in breach of an arbitration agreement.

**Anton Piller order** – see **search and seizure order** (below).

**Astro Exito injunction** – an interim mandatory injunction to enforce specific performance of contractual provisions (see *Astro Exito Navegacion SA v Southland Enterprise Co Ltd* [1983] 2 AC 787).

**Blocking injunction** – an order obtained against an internet service provider requiring it to block access to specified online material or a specific webpage or website. Such orders are typically sought by rights holders against ISPs in order to prevent access to websites containing copyrighted material.

**Chabra jurisdiction** – in certain circumstances, the courts have jurisdiction to grant freezing injunctions against third parties (against whom the claimant has no cause of action), who appear to hold assets on behalf of the defendant. The jurisdiction to grant this type of order was established in the case of *TSB Private Bank International v Chabra* [1992] 1 WLR 231.

**Contempt of court/Committal** – in the context of injunctions, where a party who is bound by the terms of a court order acts in breach of those terms, they may be held to be in contempt of court (commonly referred to simply as “held in contempt”). A respondent in contempt of court (or in the case of a corporate respondent, an officer or director of the company) may be committed to prison by way of a committal order, either upon a committal application by the applicant or upon the court’s own initiative.

**Contra mundum** – an order that is binding against any third party which has notice of it, regardless of whether they are a named respondent. Injunctions *contra mundum* (“against the world”) may be awarded to restrain the publication of private or confidential information, where the publication of the information by anyone would defeat the purpose of the injunction (see *AG v Newspaper Publishing plc* [1988] Ch 333).

**Cross-undertaking** – when seeking an injunction, an applicant may be required to give an undertaking to the court to pay to the respondent any damages that the court later considers appropriate to compensate the respondent for any loss caused as a result of the injunction being imposed.

**Delivery up** – an order requiring a party to provide to the applicant specified documents or materials. Such orders are commonly sought in copyright cases where a defendant is required to deliver up all materials in its possession that infringe the claimant’s copyright.

**Freezing order** – an order prohibiting a party from disposing of or dealing with its assets. Freezing orders are typically sought by claimants in cases where there is a real risk of the assets being dissipated and it is necessary to preserve the defendant’s assets until judgment can be enforced. Formerly known as a *Mareva* order.

**Interim/Interlocutory** – relief which is sought by a party whilst the proceedings are ongoing in order to preserve the position before trial, at which point final relief may be ordered. See also **contra mundum** (above) and **return day** (below).

**Mandatory injunction** – an order requiring a party to carry out a specific act. A common example of a mandatory injunction is an order for **delivery up** (see above).

**Norwich Pharmacal** – a specific type of injunction established by the House of Lords in [Norwich Pharmacal Co and others v Commissioners of Customs & Excise \[1973\] UKHL 6](#). A *Norwich Pharmacal* order requires a respondent which has been involved or “mixed up” in the wrongdoing to disclose information which will enable the claimant to identify the proper defendant to the claim, frequently now used for example against internet intermediaries to allow claimants to identify anonymous internet users.

**On notice** – where the respondent against which an application for interim relief is made is informed of the application beforehand. This is the standard basis on which applications are sought so as to allow the respondent to make submissions. See also **without notice** (below).

**Publicity order** – an order requiring a party to publicise a prescribed statement and/or details relating to the outcome of the case.

**Penal notice** – a form of words on the face of the order itself warning the respondent that failure to comply with its terms may place them in **contempt of court** (see above).

**Prohibitory injunction** – an order which requires that a party *refrain* from performing a specific act (to be distinguished from a blocking injunction, which is a form of prohibitory injunction). An obvious example would be an order preventing a party from disclosing confidential or private information.

**Search and seizure order** – an order requiring a defendant to allow the claimant’s representatives to search for (and if necessary, copy and remove) relevant documents or material held at the defendant’s premises. Also referred to as an **Anton Piller order**.

**Springboard injunction** – an injunction which prevents a former employee from gaining an unfair commercial advantage after having obtained the employer’s confidential information. Such an order may be necessary where confidential information has already been used by the employee and is no longer confidential, and as such it is not possible for the employer to obtain a confidentiality injunction.

**Structural injunction** – an injunction available in certain common law jurisdictions (such as the United States and India) to provide a complex programme of remedies to enforce fundamental rights (see for example [Rizzo v Goode 423 U.S. 362 \(1976\)](#) in the US Supreme Court or [MC Mehta v Union of India 1987 SCR \(1\) 819](#) in the Indian Supreme Court).

**Return date** – Where an injunction is granted at an interim stage, the court will typically set a return date at a fixed point in the future in order to reconsider whether it is necessary to continue, vary or discharge the order.

**Without Notice** – Where an order is sought in the absence of the respondent (also referred to as **ex parte**). This may be necessary, for example, where an application is urgent, the identity of the respondent is unknown or there is a risk in notifying the respondent in advance for example with a freezing injunction. See also **on notice** (above).

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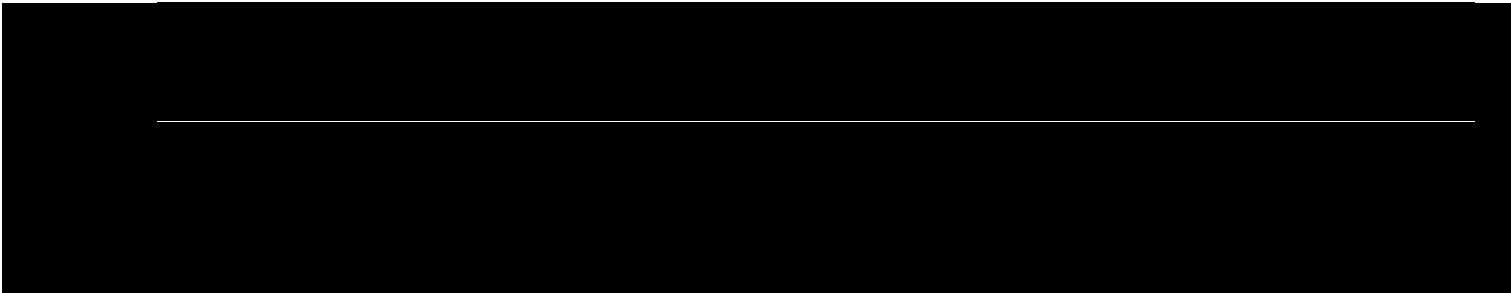
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