

EX PARTE INJUNCTIONS - THE OBLIGATIONS OF THE APPLICANT

The principles to be observed in granting or refusing an application for an interlocutory injunction are well established. In this regard the National Court has drawn upon the law and practice of the United Kingdom: see for example, Mt. Hagen Airport Hotel Pty Ltd v. Gibbes [1976] P.N.G.L.R. 216; Employers Federation of PNG v. PNG Waterside Workers Union (unreported judgment no. N393 of 11 October, 1982 Kapi D.C.J.). However, so far as I am aware, the National Court has not specifically dealt with the principles applicable when an application for an interlocutory injunction is made ex parte.

The first point is that an ex parte injunction should be confined to exceptional circumstances involving real urgency. As Lord Langdale M.R. said over a century ago in Earl of Mexborough v. Bower (1843) 7 Beav. 127, 131, such an order is "the exercise of a very extraordinary jurisdiction, the effect of which, in every case in which it is asked, is most alarming". More recently in Ansah v. Ansah [1977] Fam 138, Ormrod L.J. at p. 142 described ex parte orders as "anomalies in our system of justice which generally demands service or notice of the proposed proceedings on the opposite party". These pronouncements are consistent with Section 59 of the Constitution which recognises that the minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly.

Where an injunction is required urgently and it is impracticable to affect formal service of a notice of motion

and supporting affidavits informal notice may be acceptable: Pickwick International Inc. (G.B.) Ltd v. Multiple Sound Distributors Ltd [1972] 1 W.L.R. 1213; Bond Brewing Holdings Ltd v. National Australia Bank (1990) 1 A.C.S.R. 445, 459. Where the other party can be contacted by fax or telephone some sort of notice is almost always possible and should be given unless, perhaps, there is a real risk that notice may precipitate the very mischief sought to be prevented before an injunction can be obtained. However the circumstances should be very special to justify an applicant proceeding without giving notice of any kind: Spry, Equitable Remedies, 4th Ed. (1990) p. 501; Bates v. Lord Hailsham [1972] 1 W.L.R. 1373, 1380.

An applicant should find it very difficult to persuade a court to proceed ex parte where the other party is known to be legally represented.

To ensure to the satisfaction of the court that ex parte injunctions are confined to their proper circumstances a written application should be supported by an affidavit or affidavits covering the following matters:

(1) The steps which have been taken to inform the other party or legal representative of that party of the intention to seek the order or the reasons why it has not been possible to take any such steps or otherwise why such steps have not been taken.

(2) Details of any previous proceedings between the parties and of any previous negotiations or contacts between the parties or their legal advisors relevant to the application.

(3) The nature and imminence of the risk to the applicant,

to property interests or to a third party.

(4) The reasons which require the court to act without notice and why an order shortening the time for service would not be practicable.

(5) The consequence of adjourning the hearing of the application until such time as the other party can be notified and have an opportunity to be heard.

An applicant who does proceed ex parte bears a substantial burden. The principles were examined by Isaacs J. in Thomas A. Edison Limited v. Bullock (1912) 15 C.L.R. 679. It is the duty of the applicant to bring to the notice of the court all facts relevant to the determination of the question to be decided. The utmost good faith is required. The party asking the court to act in the absence of the other party fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to the application. Unless that is done, the implied condition upon which the court acts has not been fulfilled and the injunction must almost invariably be dissolved: see also Re South Downs Packers Pty Ltd [1984] 2 Qd.R. 559.

There is authority that the duty to disclose all material facts may not be restricted to facts actually known. In Brink's Mat Ltd v. Elcombe [1988] 1 W.L.R. 1350 Ralph Gibson L.J. said at p. 1356 "the applicant must make proper enquiries" and that the duty of disclosure applies not only to material facts known to the applicant "but also to any additional facts which he would have known if he had made such enquiries."

If the application is successful, the order which is made should ensure that any party affected is made aware of its precise terms and is given the right to be heard at the earliest opportunity on whether the injunction should be dissolved. The applicant for an ex parte injunction should therefore ensure that:

(a) The order is clear and precise in its terms (compare Bishop v. Bishop Brothers Engineering Pty Limited (unreported judgment of 15 December, 1989, Supreme Court, page 7)).

(b) The order makes provision for service upon the respondent within the shortest possible time.

(c) The order provides for the further hearing of the matter on a fixed date.

(d) The order states that the other party has liberty to apply to the court to discharge, vary or modify the order on or before any date fixed for the further hearing of the matter.

(e) The order includes the usual undertaking as to damages.

The last-mentioned requirement, the usual undertaking as to damages, is the price that must be paid by almost every applicant for an interlocutory injunction, whether or not it is granted ex parte. The courts have come to recognize that as the injunction is only interlocutory it may at a later stage appear that the applicant should in fairness compensate the party enjoined for the harm he has suffered. Every applicant granted such an injunction ought "in the absence of most exceptional circumstances" to be required to give an appropriate undertaking: Spry, Equitable Remedies, 4th ed. (1990) p. 473.

The undertaking is often expressed by the use of the words "usual undertaking as to damages": e.g. Mt Hagen Airport Hotel Pty Ltd v. Gibbes [1976] P.N.G.L.R. 216, 227; compare Mauga Logging Company Pty Ltd v. South Pacific Oil Palm Developments Pty Ltd (No. 1) [1977] P.N.G.L.R. 80, 85. It is generally accepted that those words are a shorthand manner of stating the following:

The applicant undertakes to the court that he will pay to any party restrained or affected by this injunction any damages which such party may sustain by reason of the injunction and which the court may think he ought to pay.

Until there is a P.N.G. decision on the subject I hope that the above provides some guidance to practitioners considering an ex parte application for an interlocutory injunction.

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