

Practice Note on Injunction Applications

An Injunction is an Order of the Court that either requires a party to do something (a Mandatory Injunction) or to refrain from doing something (a Prohibitory Injunction).

To obtain an Injunction, the Claimant must have a substantive cause of action, i.e. a legal claim against the Defendant. It is not possible to apply to the Court simply for an Injunction.

Before an application for an Injunction is made, a Claim Letter should be sent to the Defendant setting out the facts and circumstances on which the application will be based, seeking undertakings (i.e. promises to do or not to do certain things) and/or information from the Defendant and identifying the damage that the Defendant is causing to the Claimant. If the Defendant does not comply with the terms of the Claim Letter within the specified deadline (which will vary from case to case, depending on the urgency), then the Claimant should apply for an Injunction promptly, as any delay might prejudice the application.

Applications for an Injunction are by their nature labour-intensive and time consuming and the cost of applying for an Injunction is, therefore, significant.

Considerations before applying for an Injunction

An Injunction is an Order or relief which the Court will grant in certain circumstances, which is ancillary or linked to a substantive claim. The purpose of applying for an Injunction is to prevent damage being caused to the Claimant, pending the outcome of the substantive claim. For example, the Claimant may obtain an Injunction to prevent the Defendant from trespassing on land or, alternatively, requiring the Defendant to deliver up confidential information which he/she has wrongfully retained at the termination of his/her employment.

Injunctions are discretionary remedies and, as a result, there is no automatic entitlement to an Injunction.

The Court will usually grant an Injunction where it appears to be just and convenient to do so and will take into consideration the following:-

- Whether there is a serious question to be tried;
- Whether damages would be an adequate remedy;
- What would be the balance of convenience for each of the parties if an Injunction were granted; and
- Whether there are any special factors.

Effectively, the Court will try to balance the rights of both parties and, in general, will grant an Injunction in circumstances where doing so would cause less prejudice than letting the Defendant by its actions continue to (or begin to) interfere with the Claimant's rights.

Cross-Undertaking in Damages

In most cases where an Injunction is granted, the Court will require the party that applies for the Injunction to give what is known as a cross-undertaking in damages to the Court. This is because, if an application is successful, the Injunction may restrain the Defendant from carrying out a particular activity. Injunction applications are made at the outset of a case, when the Court may not necessarily have in front of it all the relevant facts and evidence which may be available at the trial of the action. In addition, it is not appropriate for the Court to carry out a detailed consideration

of the law at the interim stage.

As a result, there is a risk that the Court will decide at the end of the trial (which may be many months after the Injunction has been granted) that the Injunction should not, in fact, have been granted. That does not mean that it was not appropriate to apply for the Injunction at the outset. However, the Defendant may have suffered some loss and damage to its business as a result of the Injunction. The Court therefore has a mechanism known as the cross-undertaking in damages which amounts to a promise by the Claimant to compensate the Defendant for any loss or damage it has suffered for the period that the Injunction is in place. A cross-undertaking is given to the Court and the Claimant's Witness Statement in support of the application for an Injunction should provide evidence to show that the Claimant will be able to pay any damages that may be awarded under the cross-undertaking.

In the event that, after a trial, the Court finds that the Injunction was wrongly granted, the Defendant can then ask the Court to order an enquiry as to what loss and damage it has suffered and the Court will set directions for the hearing of that enquiry.

Legal Procedure for an Injunction

As we have said above, it is not possible to apply to the Court simply for an Injunction and, instead, the Claimant must have a substantive cause of action against the Defendant. As such, in the event that no proceedings have been commenced prior to seeking an Injunction, it is necessary for the Claimant to commence a claim. That can be done at the same time as applying for the Injunction.

In order to commence a claim in the High Court, it is necessary to produce two documents being:-

- (i) Claim Form; and
- (ii) Particulars of Claim.

The Claim Form sets out the parties to the proceedings and gives brief details of the nature of the claim and the relief sought. The Particulars of Claim sets out in more detail the facts or allegations which make up the Claimant's claim against the Defendant.

To make an application for an Injunction there are three further documents that need to be prepared which are:-

- (ii) A Notice of Application;
- (iii) Draft Order; and
- (iv) Witness Statement(s) in support of the application.

The Witness Statement in support of the application will set out the factual background to the matter, explain the present position and highlight the concerns that the Claimant has in relation to the actions of the Defendant. It will also describe the damage that the Defendant's actions have or will cause to the Claimant or its business. In some cases, more than one Witness Statement may be produced, for example, where third parties are able to provide evidence to support the Claimant's application. The Witness Statement(s) must contain all material facts of which the Court should be made aware and should address all of the factors that the Court is required to take into account when considering an application for an Injunction (see below).

Once the Claim Form and the Application Notice have been issued at the Court, all the papers will be served on the Defendant or any solicitors nominated to act on the Defendant's behalf. The hearing date for the Injunction will be within a few days of the application being issued. The proceedings will usually be issued in the High Court of Justice in London and the Injunction application will be heard by a Judge. If the matter is extremely urgent then the Court may be asked to deal with the Injunction application without notice to the Defendant but this is rarely appropriate.

Usually, the Defendant will be given notice of the hearing date, and will have an opportunity to serve evidence to say why the Injunction ought not to be granted prior to the hearing. The Claimant then has an opportunity to reply to any evidence which the Defendant serves before the hearing.

The Defendant may offer to give the Claimant undertakings and, if they are acceptable, these can be included in an Order of the Court. The Defendant will be in contempt of Court if the undertakings are broken.

If the Defendant refuses to provide undertakings prior to the first hearing and the Claimant's application is successful, the Court will usually grant a temporary Injunction. The Court will then set a timetable, giving dates by which the parties have to serve any further evidence on which they wish to rely at the substantive hearing, which may take place within three to six months. The temporary or interim Injunction will remain in place pending a full hearing at which the Court will consider all of the evidence and decide whether or not the Injunction should continue and for how long.

The Defendant may ask the Court to give it more time to consider the Application. In that event, the Court may, at the first hearing, fix a date for a second hearing at which the Court will consider the Injunction Application. If so, the Claimant should ask the Court to grant a temporary Injunction in the interim.

Often, when a temporary or interim Injunction is granted, the proceedings will be compromised, usually by the Defendant giving undertakings to the Court on terms agreed between the parties.

An Order for an Injunction will be endorsed with a Penal Notice - this is a warning that if the Defendant does not comply with the Order, it may be held in contempt of Court and imprisoned or fined, or its assets may be seized. The Order must be served personally if the Injunction is to be capable of enforcement by committal proceedings.

Taylor Walton LLP

Updated March 2016

This note is a general guide only and should not be relied on as a substitute for specific legal advice

Effective Solutions for Businesses

**TAYLOR
WALTON**
SOLICITORS