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"THE ISSUE OF INTERLOCUTORY"

INJUNCTIONS

A COMPARATIVE STUDY"

Dissertation submitted in partial fulfilment of
the requirements of the LIB degree, University of
Nairobi.

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ABBREVIATIONS

- | | | |
|-----|------------|-----------------------------|
| 1. | All. E.R. | ALL ENGLAND LAW REPORTS |
| 2. | W.L.R. | WEEKLY LAW REPORTS |
| 3. | L.Q.R. | LAW QUATERLY REVIEW |
| 4. | E.A. | EAST AFRICAN LAW REPORTS |
| 5. | D.L.R. | DOMINION LAW REPORTS |
| 6. | N.S.W.L.R. | NEW SOUTH WALES LAW REPORTS |
| 7. | C.L.R. | COMMONWEALTH LAW REPORTS |
| 8. | Q.B. | QUEENS BENCH REPORTS |
| 10. | N.Z.L.R. | NEW ZEALAND LAW REPORTS |
| 11. | A.C. | APPEAL CASES |
| 12. | R.P.C. | REPORTS OF PATENT CASES |
| 13. | E.R. | ENGLISH REPORTS |
| 14. | Ch. d | CHANCERY DIVISION |

TABLE OF STATUTES

The judicature Act, 1873

The Judicature Act, 1925

THE ISSUE OF INTERLOCUTORY INJUNCTIONS

A COMPARATIVE STUDY

INTRODUCTION

One of the remedies available in equity is the injunction, which may take any of various forms available - which includes Prohibitory and Mandatory Injunctions, Perpetual and Interlocutory Injunctions, and Quia timet Injunctions. An injunction, generally is an order of the court directing a person or persons to refrain from doing some particular act and less often to do some particular act or thing.

It is an equitable remedy which originally could only be obtained in the court of Chancery or the court of Exchequer in equity. The power to grant injunctions was later extended to the Common Law Courts, which extension was highlighted by the provisions of the Judicature Act, 1873 and its successor, the Judicature Act, 1925² whose effect was the transfer to the High Court all the Jurisdiction, including Jurisdiction to grant injunctions. This had the further effect of merging common law to equity. In Kenya for example, injunctions are awarded by the High Court of Kenya which has original jurisdiction to hear any claims.

In this paper, I intend to dwell on the issue of Interlocutory Injunctions. In doing so, it is my intention, firstly to give a broad analysis of the principles which govern the issue of such injunctions. This will involve a highlighting of the various approaches adopted by various countries within the commonwealth but it will cover countries like America.

In giving an analysis of such approaches- I will of course make an attempt at pointing out their short comings, if any, and point out similarities that may exist between various approaches. Subsequently, I will go on and look at the aims of issuing interlocutory injunction how and whether such aims are achieved.

Special attention will be given to changes that came within the decision in American Cynamid - v - Ethicon.³ This will involve an evaluation of the decisions before the case i.e., Pre - 75 cases and a comparative study of this effects, by evaluating the Post - 75 decisions in the light of the decision. In carrying out this research, I will attempt a presentation of an approach which I think represents a more equitable view which should lead to a conclusion of the dissertation.

CHAPTER ONE

DEFINITION AND NATURE OF INTERLOCUTORY INJUNCTIONS :

An interlocutory injunction is generally a temporary measure framed by a court order so as to continue in force until the trial of the action with the object of preserving matters in "Statu -quo" in the meantime. It is issued to a plaintiff in order to protect a "Prima - facie" right until the existence or non-existence of such a right can be established in proceedings.

The principles governing the issue of interlocutory injunction must begin with a recognition of the discretionary nature of the interlocutory injunctions. Like all equitable remedies, the interlocutory injunction is not granted as a matter of course. This aspect has been recognised from as far back as 1750, when in Potter -v- Chapman¹ this principle was laid down. However, this discretion has not been left to hang in the air as an abstract notion to be enforced by the courts of equity whenever an application for an interlocutory injunction comes before a court. As it was said in Saunders -v- Smith² whether an Interlocutory Injunction should be granted depends upon a great variety of circumstances and it is utterly impossible to lay down any general rule upon the subject by which the discretion of the court ought to be regulated. What the courts have come up with are various circumstances which have to be taken into account as a matter of common recurrence in decided cases. These circumstances are rules governing the issue of interlocutory injunctions, while their acceptance or rejection, wholly or otherwise in various countries particularly after the decision in AMERICAN CYANAMID -v- ETHICON³ is what will form the comparative aspect of this research paper.

The circumstances or 'rules' that courts have developed are therefore subject to this discretionary element that courts maintain in awarding interlocutory injunctions. However, one may also note that this relationship cannot be seen as a one way affair because the form that the discretion takes will naturally be a result of circumstances of the case and not some abstract phenomena that the court will come up with. One cannot for example, expect a court to go out of its way and deny or award an order for an interlocutory injunction in total disregard of the circumstances of the case. It is in this regard that Buckley L.J. could confidently state that

"It is a matter of right (not discretion) that upon proper terms, the property shall be maintained in statu quo pending trial" If one were to insist on the exercise of total discretion in granting an interlocutory injunction, then it would be erroneous to talk of a right in regard to its award. What his lordship called upon "proper terms" may be said to be wide enough to embrace the circumstances that have been laid down by the courts as being paramount considerations in granting interlocutory injunctions, which may be seen as further recognition of the fact that the discretion bestowed upon the courts is not as abstract notion, but one that should be seen as emanating from the circumstances of each case.

In East Africa, the issue of Interlocutory Injunctions also follows similar approaches to those of the common law. In this first respect, it has been recognised in Sargent - v- Patel that

" The granting of such an order (Interlocutory Injunction) is a matter within the discretion of the court below", and that the supreme court will only interfere if it can be shown that the discretion has not been exercised Judicially⁵. This decision recognises that while a court has the discretion in awarding

or denying applications for Interlocutory Injunctions, such discretion has to be exercised Judicially. This aspect was also recognised by Madan J.A. in the case of Wairimu Mureithi -v- City Council of Nairobi where an application by the appellant, made under Order 39, Rule 1 and 2 of the Civil Procedure rules for the point of a temporary injunction to restrain the defendants, the agents and servants from demolishing a Kiosk built by appellant at Jericho Open Air Market failed, and it was noted that the discretionary element exercised by lower court was a judicial discretion and the appellate court would not interfere unless it was established that the discretion had not been Judicially exercised. These cases illustrate the discretionary nature of the remedy of Interlocutory Injunction.

In Australia, there are decisions that point to the fact that the issue of interlocutory injunctions is subject to the exercise of judicial discretion. In the relatively recent case of Shertcliff & Another - v- Engadine Acceptance Corp; Pty Ltd,⁷ it was held, iter-alia that the Judge in the lower court had miscarried in the exercise of its discretion and it therefore, fell to the appellate court to make its own determination as to a rehearing.⁸ One would interpret this to mean that the judge in the lower court had not exercised his discretion judicially hence the appellate judge's holding that his court would assume original discretionary jurisdiction in making a determination. Although the case of Hornsby Building Information Centre Proprietary Ltd & Another -v- Sydney Building Information Centre Ltd⁹ did not dwell on the aspect of the exercise of discretion substantively. Murphy J did observe in passing that an injunction pending determination should not be granted "routinely" - though he went on to state that the courts should not be inhibited from granting it where to do so is desirable for the public protection.¹⁰

This emphasis on the non-routine nature of the awarding of an interlocutory injunction brings in the discretionary element exercisable by the courts.

In summing up, I would refer to the case of Comet Radiovision Services Ltd - v- Farnell Tandberg Ltd and others where it was recognised that in exercising this discretion, a court has to take into account certain factors, such as the balance of convenience for both parties - which is arrived at from the circumstances of the case and it is a consideration of these factors, and their relative importance which forms the subject matter of the following chapters.

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FOOTNOTES

INTRODUCTION:

1. Equity and the Law of Trusts - Philip H. Pettit,
1966 Edition at P. 328.
2. Judicature Act. 1873 S. 16 - how replaced by Judicature Act.
1925, S. 18(2)

CHAPTER I

1. Potter -v- Chapman, (1750) Amb 98.
2. Per Cotterham L.C. Sander -v- Smith. 1838, 3 mya cr 711 at 728.
3. American Cyanamid -v- Ethicon, Supu.
4. Per Buckley h.j. in Jones -v- Pacaye Rubber and
Produce; (1911), 1 K.B, 455 at 458.
5. Per Sir Graham Paul, C.J. in Sargent -v- Patel
1949, 16 E. A. C. A., 63.
6. Wairimu Mureithi -v- City Council of Nairobi,
Civil case No. 55/1979; Madan J.A. at P. 35.
7. Shertcliff a Another -v- Engadine Acceptances Corp;
Pty Ltd. 1978, N. S. W. Law Reports 729 (C.A)
8. Shertcliff -v- Engadine (supra) - per Mohoney J.A. at
p. 734 - G.
9. Hornsby Building Inf. Centre Pty Ltd -v- Sydney Building
Information Centre Ltd, 1977 -78 Vol. 140, Part 2, C.L.R.
Pg. 216
10. Supra 9: Per Murphy J at P 232
11. Comet Radiovision Services Ltd -v- Farnell Tandberg Ltd
and others (1973) 3 AU E.R. 230

CHAPTER TWO

In the first chapter, I dwelt on the aspect of discretion and its relation to Interlocutory Injunctions. In this second chapter, I will deal with the particular guidance notes of the courts in dividing an application for an Interlocutory Injunction, particularly in the light of the decision in American Cyanamid v Ethicon Ltd¹ which arguably had the effect of introducing a new approach to the grant of interlocutory injunctions. Its approach will also form the gist for the comparative analysis which will involve an indication of its substance, its applicability, a look into its application by other courts in various parts of the world, I will also attempt a reconciliation of the approach its purposes with the formal guidelines used by the courts.

At common law, the general principle, at least up to 1975 was that where the plaintiff asks the court to protect by Interlocutory Injunction some right which he asserts, he must show at least a prima-facie case in support of his title thereto. The plaintiff will not get an injunction unless the court is satisfied that he will probably succeed at the trial, which principle is based on a presumption that the facts and evidence will be the same at the trial as it is at the time of the application. This rule can be traced to as far back as 1884 when in the case of Griffin -v- Blake² the court found that in an application for an Interlocutory Injunction by a firm of solicitors to restrain the defendants from carrying on their work in adjoining block for the noise it caused, it was held that on the evidence available, the plaintiff has established a prima - facie case and the court could then proceed and consider the other aspects which relate to the issue of the injunction.

It must be noted that in seeking an interlocutory injunction, a planintiff has to establish a valid legal or equitable right.

The only time he may protect a right which only affects him as a member of the general public is by the use of a relator action, which is obtainable through the Attorney General.

The requirement for a plaintiff to make out a prima-facie case has been carried on not only at Common Law, but also in other countries of the world - including Australia, Canada and East Africa. Thus in Hubbard -v- Vosper, on application for an interlocutory injunction to restrain the defendant from publishing certain material on grounds of copyright infringement and divergence of confidential material, it was held in dismissing the proposition that a plaintiff who has an arguable case is entitled to an injunction that the right course is for a judge to look at the whole case, having regard to the plaintiffs claim and the case for the defence.³ In suggesting this approach as opposed to the approach which was to be laid down by Lord Diplock some few years later.

In Cavendish House (Chatenham) Ltd - v - Cavendish Woodhouse Ltd⁴ one of the Judges stated

"therefore you start with a prima - facie case. That of course is the essential prelude to the granting of an Interlocutory Injunction"

The prima facie case approach has therefore had a long history until the House of Lords came up with the 'Cyanamid approach'.

In American Cyanamid - v - Ethicon Ltd the facts were that the appellants were seeking to restrain the respondents from producing synthetic absorbable Surgical Sutures in infringement of their patent. Both companies were American owned - Ethicon Ltd having occupied the dominant position in the market for absorbable Surgical Sutures with a product made from Catgut.

American Cyanamide had made a 15% market penetration when Ethicon proposed to introduce a new artificial suture. In the court of first instance, Graham J. granted the injunction but his decision was reversed by the court of Appeal on the grounds that the plaintiff had not made out a prima-facie case. The Injunction was restored by the House of Lords on Appeal.

Lord Diplock's Judgement which carried the main thrusts of the decision was to crush the main notion entertained by the Court of Appeal that before any question of balance of convenience arose, the applicant had to prove that he was likely, on the balance of probabilities to succeed at the final trial.

The objects of an Interlocutory Injunction were therefore interpreted as being to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial.

Thus, the benefit and burden of the remedy was to be looked at in the light of this expedient form. It was seen to be some form of incomplete justice to preclude a plaintiff from relief and hence risk the impairment of his alleged right simply because he was in breach of the technical rule about having to satisfy the court at the interlocutory proceeding, that he had a greater than 50% chance of ultimate success at the trial.

Further, it was urged that since the purpose of interlocutory relief was to minimise the occasioning of irreparable harm on the plaintiff's right, then it was enough if he could satisfy the court that there was a serious issue to be tried. Through these propositions, the court was laying down an approach which required a lesser standard of proof on the plaintiff because it is obviously much easier to show that there is a serious question to be tried than to satisfy the requirement for a prima-facie case.

This consequence will be discussed later.

After a plaintiff has shown that there is a serious question to be tried, then the next consideration should be related to the payment of damages and their adequacy. If damages can adequately compensate the plaintiffs harm and the defendant is capable of paying such damages, then an injunction should not be granted. This proposal has attracted some criticism in that it goes against the discretionary nature of the remedy of Injunction, but we shall come to such criticism later. Where damages are inadequate, then the court should next consider the issue of an undertaking as to damage. If such an undertaking by the plaintiff would do justice to the defendant and the plaintiff is capable of paying the undertaking, then it should make the case for an interlocutory injunction stronger. In cases where the award of damages would seem to be equally justifiable as the undertaking as to damages, then the court should resort to a balance of convenience which would be arrived at on the circumstances of the case.

It was foreseen that there would arise cases in which such circumstances as would help in striking a balance of convenience would be even - for which the court suggested that since it is better to delay the introduction of a new enterprise than to disrupt an existing one, then the better view would be for a preservation of the status - quo and therefore for the award of an interlocutory injunction.

It was further noted that the balance of convenience should turn on the extent of uncompensatable damages to each party. The court finally did take note of the fact that in individual cases, there may be special factors to be considered.

What one may observe about his Lordships judgement at this stage is that it was in fact an echoing of Lord Cottenham - L.C. Judgement in Great Western Railway Co - v - Oxford Railway Co.⁶ where he said that

"The court will not interfere if it thinks there is no real question between the parties - but seeing there is a substantial question to be decided it will preserve the property until such a question can be regularly disposed of".

In the present case, the status - quo favoured the plaintiff because the defendants products was yet on the market and hence its preservation by a restoration of the interlocutory injunction. Thus, the holding in this case brought some change in the general approach as to the issue of interlocutory injunctions at common law.

However, an analysis of the consequences of the decision will reveal that novel as the approach may look in as far as it differed - or seemed to differ from the traditional prima-facie case approach, its effects have not in practice been so significant. Not only has it been criticised by some scholars and not applied in various courts by distinction, but in some countries it has not altered the traditional approach in any way.

To begin with Lord Diplock's judgement would seem to relegate factors of the plaintiffs prospects of success which feature prominently in a prima-facie case approach to that of a consideration for a balance of convenience.

By making the requirement that of a serious question and laying more emphasis in the consideration for a balance of convenience, the strength of a plaintiff case was now subject to the balance of convenience test.

It should however, be noted that his Lordship did not altogether fail to recognise that the remedy of interlocutory injunction was a

flexible remedy and one may at this point note that the temptation to treat a single judgement of the House of Lords as if it were a statute should be avoided.

Furthermore, while the decision would seem calculated to increase the availability of relief which would go to maintain the status -quo except in frivolous and vexatious cases or where there would be particular hardship to the defendant, it is significant to remember that it is human nature to decide which party has the stronger case in a dispute. Judges are human beings and it would be foolhardy to expect that a judge, faced with a case whose prima-facie outlook for outweighs any considerations for a balance of convenience would still insist on ignoring the traditional prima-facie approach in preference for the balance of convenience approach as formulated in the Cyanamid case.

Dissatisfaction with the decision has manifested itself in a decisions. In Fellowes -v- Fisher⁷ Lord Denning expressed his dislike for the Cyanamide decision and preference for the earlier H.L. decision in J.T. Stratford Son Ltd - v- Lindley⁸. His Lordship found the two cases irreconcilable and urged that when Lord Diplock referred to individual cases having some scope for special factors, he may have been leaving some room for the following of earlier authorities which would mean that it was still open for the court to examine the relative strength of each party's case. It should also be noted that the absence of an interlocutory injunction lies in its expedient nature. The prima-facie case gave the courts an opportunity to make the two Litigants aware of the relative strengths of each others cases.

It was in this respect that his Lordship contended that a plaintiff has to show a good chance of winning at the trial, a contention critics of the Cyanamid approach have supported by arguing that the latter may lead to an over burdening of the courts with injunction

applications because it will be much easier to get an Interlocutory Injunction at the Interlocutory or motion proceedings under the Cyanamid approach.

Further criticism has been made against Lord Diplock approach in Cyanamide in that this lordship contended that to attempt to decide which party was likely to win at the final trial would in some instances lead to embarrassment if the final hearing turned out against the plaintiff. He thought the judges involved would not take it very comfortably where such situations did arise, contending that the aim of the interlocutory proceedings was to maintain the status - quo, pending final determination. In fact, Lord Diplock saw the prima-facie approach as an inclination towards administering "rough and ready justice". But one has to remember that in some cases, there may be no conflicting evidence between the plaintiff and defendant's case. As Stamp L.J. noted in reserving his opinion as to the applicability of Cyanamid - in Hubbard -v- Pitt⁹, he could not see the applicability of the decision where there is no relevant conflict of evidence and no difficult question of law.

Although Cyanamid has applied, this statement is significant in that it indicates that situations can and do arise in which the defendants and plaintiff case do not conflict as in the case where the issue was basically a question of law. In such cases, one would doubt the applicability of the Cyanamid approach.

The approach has also not found favour in various other decisions where it has been distinguished.

T.A. Blanco White, sitting as Commissioner in an interlocutory application filed by Catnic Components Ltd. noted in discussing the balance of convenience that the Cyanamid case was of " a special situation of a powerful defendant, almost a monopolist in its field and a plaintiff using the patent into the monopoly."¹⁰

The case was also distinguished by the court of Appeal in
Bryanston Finance Ltd. -v- de Vires (No.2) ¹¹ where it was said
that Lord Diplock's approach was meant for wide application
but that where the interlocutory hearing is in effect the final
trial of the action, the court must resort to the old prima-facie
approach and consider the relative strength of each party's case.
Lord Diplock's concern was mainly hinged on prejudging of matters
at the interim stage

whereas in a case like this one, the grant or refusal of an
Injunction would in effect be the final Judgement. The case involved
a petition by a member of a company seeking an investigation of
company affairs with a view to having it wound up. The company
sought an Interlocutory Injunction to restrain the member from
petition. The court ruled that the company having failed to make
out a sufficient prima-facie case to justify the granting of the
injunction, then the member was entitled to his application
for a petition, which was his legal right.

However, the Cyanamid case has not altogether been without a
following. It was applied in Standex International Ltd -v- Blades ¹²
and also in two cases reported in the Times Newspaper ¹³ where
interlocutory injunctions was refused which may be a pointer to
the fact that the fears expressed by critics of the cyanamid
approach for making interlocutory relief easily available are not
as deep as they may appear.

One may therefore argue that the courts have as yet to decide
on any one of the two approaches as the guiding decision for
interlocutory applications. However, we find that in some countries,
there are clear biases for one or other of the two ¹⁴ while in
some places, Courts have apted for a mixture of some attempt
at reconciling the two approaches.

In East Africa, the position has been one that clearly favours
a following of the prima facie approach.

In Abel Salim Others -v- Okongo Others,¹⁶ the appellants, inter-alia made an application for an interlocutory injunction to restrain the first and second respondents from parting with possession of some business premises and to restrain the third respondent from occupying or dealing in anyway with the premises.

In dismissing the appeal Mustafa J.A. stated inter-alia, that the House of Lords decision in American Cyanamid had not altered the situation in East Africa. This position had been clearly spelt out in the case of East Africa Industries Ltd -v- Trufoods Ltd¹⁷ where in an application for an Interlocutory Injunction to restrain the respondent company from passing off a product in the market as if it was the appellants products. It was stated inter-alia, that in seeking an interlocutory injunction, a plaintiff had to show a prima-facie case with a probability of success.

This position has been emphasised further in the more recent case of Taws Ltd -v- Akbar Khan,¹⁸ where the plaintiff applied for an interlocutory injunction to resrtain the defendant from committing a breach of some agreements with regard to restraint on trade after the defendant had terminated his services as an employee of the plaintiffs some years earlier.

In dismissing the application, Sachdeva J. Said

"It is for the party seeking an Injunction to satisfy the court that th necessary circumstances for its grant exist" a statement which tends to favour the prima-facie requirement on the part of the plaintiff.

This becomes even more emphatic when one notes that his honour did not feel bound by the House of Lords decision in the Cyanamid case.

The East Africa position may be said to be in favour with the old prima-facie case and like the cases that have been referred to indicate. the position is not likely to change

We may turn to Australia where one may argue that the position while derived from the prima-facie case approach has recently taken up some facets of the Cyanamid approach. Generally, the Australian position has been broadly laid out in the case of Beecham Group Ltd -v- Bristol Laboratories Pty Ltd.²⁰ where the High Court, in a claim where the plaintiff claimed that its patent rights over a semi-synthetic penicillin preparation called Ampicillin were infringed by the defendants introduction of a preparation known as Hetacillin. Though the defendants products was composed of a different chemical structure, it broke down to form ampicillin when utilised.

After emphasizing the discretionary nature of any award of relief, in such a case where the plaintiff was applying for an interlocutory injunction to restrain the defendants from marketing their product, the court ruled that the first consideration is for a prima - facie case. Thus, if the evidence remains as it is at interlocutory proceedings, there is a probability at the trial that the plaintiff will get relief.

But in defining a probability of success, Kitto J. Said

"that does not mean that he must show that it is more likely than not that he will succeed. It is enough that he show a sufficient likelihood of success to justify, in the circumstances the preservation of property"²¹ or the status - quo.

This approach, while deriving from a prima - facie case approach may be seen as going towards a requirement of below 50% success, thus incorporating some marginal facets of the Cyanamid approach. This is made clear by taking note of the courts recognition of Lord Diplocks assertion that the court is in no position to resolve the issues between the parties not to undertake a preliminary trial and give or deny interlocutory relief upon a forecast as to the ultimate results of the case.²²

As if to remind the parties in this case of the plaintiffs burden in establishing a prima - facie case, the court went on to say that although the statu-quo has to be preserved, it noted that the plaintiff in this case had shown

"so substantially a probability of succeeding in the action that it is entitled to have the status - quo preserved"²³
This statement would seem to indicate that sufficient evidence is required from the plaintiff as opposed to Lord Diplocks protection of any threatened right so long as the plaintiff has an arguable case - which apparently requires a low level of evidence from the plaintiff.

This approach has also been followed in De - Mestre -v- A.D. Hunter²⁴, another Australian case. The High Court here concluded that

"The phrase "Prima - facie case" does not mean that the court has to be satisfied - if no further evidence is adduced - that the plaintiff will definitely succeed at the trial - it only means that there is a probability that the plaintiff will succeed.
The Court however, did note the need for flexibility because of variances in the circumstances of cases in regard to their evidential substance.

The Australian position, while seemingly balanced does tend to favour prima - facie approach. - for as recently as 1976, Helsham J sitting in the supreme court in the case of Regional Land holdings Ltd -v- Moscow Narodry Bank Ltd²⁵ refused interlocutory relief on the ground that the plaintiff had not established a prima - facie case. In this case, a cross examination took place on the affidavits by both parties and his Honour considered the plaintiffs' case

with considerable thoroughness" thus making a determination at interlocutory stage -

In a more recent decision, Shertcliff and another -v- Engadine Acceptances Corporation Pty Ltd.²⁶ a court of Appeal in an application for a repeal of an injunction to restrain a mortgagee from exercising the power of sale given by a registered mortgage ruled inter-alia that a plaintiff has to make out a prima-facie case in the sense that if the evidence remains as it is, there is a probability at the trial of the action that the plaintiff will be entitled to relief. Such probability - and its required strength will depend on the nature of the rights which the plaintiff asserts and the practical consequences likely to flow from the order which he seeks. The court in ignoring the Cyanamid decision ruled that the verbal formulae adopted in other cases may be disregarded. The court applied the Beecham decision and said that the degree of probability of success required is simply that which the court thinks sufficient in the particular case to warrant a preservation of the status - quo.

This was of course an echoing of the discretionary nature of the relief of Interlocutory Injunction.

One cannot help noting that the position in New Zealand has not been as insensitive to Lord Diplocks approach - a comparison of two decisions before the Cyanamid case and later will suffice. In Flett - v- Northern Transport Drivers Industrial Union of Workers and Anderson²⁷ an interlocutory Injunction was granted to the plaintiff on establishing a prima - facie case in his affidavit evidence. In the more recent case of Grazing and Export Co. Ltd - v- Anderson and Another²⁸ an application for an interlocutory injunction was granted on the balance of convenience and the Cyanamid approach was applied. In fact, no mention was made to The Australian decisions.

This would seem to suggest that in New Zealand, the Cyanamid approach has not been taken with as much disfavour as it has experienced in Australia. Though one may feel some inadequacy because of their number, the fact that on one hand we have a completely different approach adopted and another approach adopted on the other may be persuasive enough to show the embracing of the Cyanamid approach in New Zealand.

I may now conclude this chapter by saying that what I have presented is only a comparative analysis of the approaches adopted in sample regions in regard to the issue of interlocutory injunctions. In the next chapter, I will embark on the other considerations that the court takes up, either in the prima - facie case approach or the Cyanamid approach.

Chapter Two Footnotes

1. American Cyanamid -v- Ethicon Ltd, 1925 A.C. 396
2. Graffin - v- Blake 1884 27 Clid, 644
3. Hubbard -v- Vosper 1922, 2 w.n.r. 389 per Lord Denning M.R. at page 396
4. Cavendish House (Chatenham) Ltd - v- Cavendish Woodhouse Ltd, 1970 R.P.C., 234
5. American Cyanamid -v- Ethicon (Supra) - per Lord Diplock at 406.
6. Great Western Railway Co. -v- Oxford Railway Company; (1848), 41 E.R. per Lord Cottenham L.C. at page 1076:
7. Fellowes -v- Fisher, 1976 IQB. 122
8. J.T. Stratford & Sons Ltd -v- Lindley, 1965 A.C. 269.
9. Hubbard -v- Pitt, 1976, 1 Q B 142 per stamp L.J.
10. Catnick Components Ltd - v- Another, 1975 F.S.R. 529
11. Bryanson Finance Ltd - v - de Vires (No. 2) - 1976 1 Au. E.R. 25.
12. Standex International -v- Blades, 1976 F.S.R. 114 - per Buckely L.J.
13. Protter Ballotini Ltd -v- Western Baker - Times, February 28, 1976 and another case of February 18 1976 in the same newspaper.
14. Kenya is a good example.
15. Australia is a good example.
16. Abel Salim & Others -v- Okongo & Others, Civil Appeal No. 44 1975
17. East Africa Industries -v- Trufoods Ltd, (1972) E.A. 402

18. Taw Ltd -v- Akbar Khan, Civil case No. 1915/75
19. Taws Ltd - v- Akbar Khan (Supra) - per Sachedeva J. at page 3.
20. Beecham Group Ltd - v- Bristol Laboratories Pty Ltd, 1968, 118, C.L.R., 618
21. Note 20; per Kitto J. at page 620
22. Note at page 622
23. Note 20 at page 625
24. De - Mestre -v- A.D. Hunter, (1952) 77 W.N. (N.S.W.) 143.
25. Regional Landholdings Ltd -v- Moscow Narodory Bank, Supreme Court of Australia, 20/8/1976
26. Shercliff & Another - v- Engadine Acceptances Corp. Pty Ltd, 1978, INSW Law Reports 728.
27. Flett -v- Northern Transport Drivers Industrial Union of Workers and Anderson, 1970, N.2.L.R. 1050.
28. Grazing and Export Co. Ltd -v- Anderson and another, 1976. I.N.2 L.R., 187.

CHAPTER THREE
OTHER CONSIDERATIONS

In the previous Chapters, I dwell at length on the major aspects that a Court will take into consideration in determining whether to award or deny interlocutory relief in form of an injunction. I now wish to dwell on the other considerations which a Court will usually take into account in such applications.

The issue of interlocutory injunctions is equitable and the jurisdiction of a Court in awarding it is therefore equitable. It is therefore a matter that is subject to equitable principles. The plaintiff who makes an application for interlocutory relief therefore has to come with clean hands for he who comes to equity must do so with clean hands. This has long been recognised since Turner L.J. stated so in Great Western Railway Co. -v- Exford, Worcester and Wolverhampton Railway Co. As Lord Eldon observed in Blakemore -v- Glamorganshire Canal Navigation,²

"Many cases have occurred in which injunctions are applied for, and are granted or refused not upon the ground of the right possessed by the parties, but upon the ground of their conduct before they applied to the Court for the injunction to preserve and protect that right".

Thus, the Court will not go any further if the maxim requiring "clean hands" of both parties is violated. It was under this principle that the court in Measures Bros Ltd -v- Measures³ denied the Plaintiff, who was in default upon a contract the right to enforce any of the terms of the contract through interlocutory relief.

In discussing the other considerations which a Court will take into account, it is useful to note that while the requirements for a 'prima-facie' case will mainly apply to those cases where the violation of a Plaintiff's right is not disputed by the defendant, we do have instances where the violation of such rights may be in dispute or the defendant refuting the existence of the Plaintiff's right in the first place.

In such cases, Courts will normally base their determination on the balance of convenience to the parties which will be deduced from various considerations.

The first consideration will be the nature of the damage which the Plaintiff or defendant is likely to suffer as a result of awarding or denying the injunction.

In order to persuade the Court that he deserves interlocutory relief, the Plaintiff must be able to show that the inconvenience that he will suffer if the injunction is refused is greater than the inconvenience that the defendant will suffer if the injunction is granted. This principle has been recognised in Hivac Ltd. - v - Park Royal Scientific Instruments³ and various other cases. The onus is on the Plaintiff to show that the inconvenience that he would suffer exceeds that of the defendant - which principle was stated in Child - v - Douglas.

The harm that the Plaintiff expects to suffer or has suffered should be of an irreparable nature. Where the damage can be made good by pecuniary means, then an injunction will not be granted. Thus, in London - North Western Rail Co. - v - Lancashire and Yorkshire Rail Co., where the defendants had blocked up a mode of access to a rival station, the Court took the view that the inevitable diversion of traffic could not be measured or estimated and was a case of irreparable damage. In Woolerton and Wilson Ltd -v- Richard Costain Ltd., the Court issued an injunction to restrain a Company from declaring a dividend because the damage would be irreparable if money was paid, out.

In Wairimu Muriithi -v- City Council of Nairobi (supra) an injunction was refused party on the ground that the damage which the Plaintiff would suffer was capable of being made good by the defendants in monetary terms. The requirements for irreparable damage was also recognised in American Cyanamid -v- Ethicon Ltd⁸ where Lord Diplock stated that,

"the object of the interlocutory injunction is to protect the Plaintiff against injury which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial If damages in the measure recoverable at the common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however, strong the Plaintiff's claim appeared to be at that stage".

Thus, the Court will treat with great significance the requirements for irreparable damage, otherwise the Plaintiff's case will fail if the resulting damage can be remedied in pecuniary terms.

The other consideration that goes along with this is the requirement for an undertaking as to damages - or as is more commonly referred to, the "usual undertakings". In this matter, the Plaintiff undertakes that he will abide by any order as to damages which the Court may make if it should eventually turn out that he was not entitled to the interlocutory injunction and the defendant has suffered damage thereby.

The argument has been put forward that once the interlocutory application has been dismissed, the Court have no jurisdiction over the parties and therefore the undertaking as to damages could not be enforced.

This argument was however put to rest in Newby - v- Harrison.⁹

It has also been recognised that the undertaking will be binding even if the Plaintiff discontinues his action.

Usually the defendant will also make a cross-undertaking based on the terms of the application and the Plaintiff's claims. Though he is not required to make such an undertaking by law, a defendant will be inclined to do so as a matter of expediency or in order to stall the awarding of an injunction against him. In some instances, Courts may insinuate, by inclination that they are more hesitant to award an injunction if a cross-undertaking is made. However, such an undertaking, whether from the defendant or the Plaintiff has to be

sufficient. This was considered by Madan J. A. in Wairimu -v- City Council of Nairobi (supra) where in summing up, he stated that,

"in this case there is no question that the defendant would be in a financial position to pay any damages that may be awarded to the plaintiff if her action succeeds".

which was in reference to the defendant cross-undertaking to damages.

Where the Court has some doubt as to the ability of the party who takes cut line undertaking to make it good after the trial, it may order him to deposit some form of security e.g. there have been instances where Courts have ordered that a party deposit some money with the other party's solicitor. In Harman Pictures N.V. -v- Osborne,¹⁰ the Court took such action as to ensure that some security was provided against an undertaking. This is supposed to ensure that such undertakings are honoured and avoid instances where a party makes such an undertaking but later disputes it, thereby prolonging litigation.

In equity, it is a general principle that delay and acquiescence defeat equity. This principle also applies to applications for interlocutory relief. Acquiescence has not been precisely defined but its meaning may be inferred from various statements by Jurists. In Leeds (Duke) -v- Earl Amherst,¹¹ Lord Cottenham observed,

"If a party, having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection while the act is still in progress, he cannot afterwards complain".

Romilly M.R. also observed in Rochdale Canal Co. -v- King¹² that,

"If one man stand by and encourage another, though passively to lay out money under an erroneous opinion of title or under expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the Court will not permit any subsequent interference with it by he who formally promoted and encouraged those acts of which he now complain".

Thus, where a plaintiff is aware of a nuisance and goes on to the nuisance while it exists or puts up with a nuisance for a long time before

he complains, he will be guilty of acquiescence and cannot be evaded by equity. In Mogul Steamship Co. -v- McGregor Gow and Co.,¹³ where the plaintiff sought an injunction to restrain the defendant from prejudicing their shipping operations from China, it was observed that since the plaintiff knew of the defendants activities even before the inception of their Company, they had brought themselves to the nuisance and were not entitled to interlocutory relief.

The reluctance of the Court to award interlocutory relief will normally be more pronounced where the defendant has suffered considerable change of position. The plaintiff has to assert his right otherwise the mere notice of claim without corresponding acts to manifest such claim, will not keep it alive. This principles are laid down in Ernest -v- Vivian¹⁴ and Clegg -v- Edmonson respectively.

However, where the defendant has acted in full knowledge of the plaintiff's right or where he goes on to violate the plaintiff's rights even after notice of objection and that action would be taken for such violation, then he cannot be allowed to plead acquiescence. So much for acquiescence.

Back to the undertakings as to damages, one may refer to the case of Royal Insurance Co. Ltd., -v- G.S. Assurance Investment Co. Ltd and Growth and Secured Life Assurance Co. Ltd¹⁵ where an injunction was awarded mainly on the grounds that the defendant could not adequately compensate the plaintiff in damages, if the injunction was refused. In determining whether an undertaking is to be awarded, it should be noted that some cases may involve matters which cannot be expressed in monetary terms without undue and substantial difficulty. It will therefore be very difficult for a Court to estimate such damages which therefore means that a Court will find it fairer not to confine the plaintiff to remedy in damages. Such cases as may involve loss of goodwill, trade reputation may fall into such a category. This means that the Court cannot justifiably require the plaintiff to settle for an undertaking by the

defendant and will therefore be inclined to grant the plaintiff an injunction. This was the main consideration by Sachs L.J. in Evans Marshall and Co. -v- Bertolla S.A.¹⁶ when he ruled out an offer for an undertaking as to damages.

Finally, one should note that where the dispute at interlocutory application is one that is a matter of law as opposed to a matter of fact, the Court, may, with the consent of both parties treat the application at motion stage as the final trial. This helps to minimise litigation and unnecessary expenses. This procedure is only suited to disputes of matters of law otherwise where matters of fact are disputed, one would require more than the affidavits available at the motion stage to make a ruling - hence the necessity of going on to the trial in such cases.

I have tried to consider the more significant considerations that Courts apply to interlocutory injunctions in this Chapter. Having established a general framework on interlocutory injunction I shall, in the next chapter, make my suggestions and conclusions.

FOOTNOTES - CHAPTER THREE

1. Great Western Railway Co. -v- Oxford, Worcester and Wolverhampton Rail Co., (1853) 3 De G.M. Q G, 341 at 359.
2. Blakemore -v- Glamorganshire Canal Navigation.
3. Measures Bros Ltd. -v- Measures, (1910) 2 CH, 248.
4. Hivac Ltd -v- Park Royal Scientific Instruments, (1946) Ch, 169.
5. Child -v- Douglas, (1854) 5 DE G.M. QG, 739 at 741 - 742.
6. London and N.W. Rail Co. -v- Lancashire and Yorkshire Rail Co., (1867), L.R. 4 eq, 174.
7. Woolerton and Wilson Ltd -v- Richard Costain Ltd (1970), 1 A UE.R, 483.
8. American Cyanamid -v- Ethicon Ltd (supra)
9. Newby -v- Harrison, 1861, 3DeG, F.Q.J, 287.
10. Harman Pictures N.V. -v- Osborne (1967) 2All E.R, 324.
11. Leeds (duke) -v- Earl Amherst, (1846) 2 Ph 117 at 123.
12. Rochdale Canal Co. -v- King, (1853) 16 Beav, 630 - 633 - 634.
13. Mogul Steamship Co.-v- M'Gregor, Gow and Co., (1881).
15 Q.B.D, 476 at 486.
14. Ernest -v- Vivian, 1863, 33 L.J. Ch, 513 at 518.
15. Royal Insurance Co. Ltd -v- G.J. Assurance Invest. Co. Ltd & Growth and Secured Life Assurance Co. Ltd. 1972, 111loyds L.R, 267.
16. Evans Marshall & Co. -v- Bertova S.A., (1973) 1 W.L.R. 349.

RECOMMENDATIONS AND CONCLUSION

After an examination of the various aspects that Courts look into in deciding on an application for interlocutory relief, one now comes to observations, Court reactions and a conclusion in the general subject of interlocutory injunctions.

As a starting point, one may note that the equitable nature of interlocutory relief and the application of equitable principles to such applications has not been disputed by any Court. The consideration relating to the nature of damage likely to emanate from the breach complained of is also invariably applied. What remains in dispute and therefore is debatable is the 'approach' or 'standard' applied by a Court in such applications; i. e. the Prima-facie case approach, the balance of convenience have been followed by different Courts; which one is a Court to apply in any application. The recommendations and conclusion of this dissertation mainly revolve upon this aspect.

Different countries have opted for different approaches. None of the approaches has therefore found universal acclaim. As one writer has noted, the present "dizzying" diversity" of formulations for the remedy of interlocutory relief is deplorable. It is also taking note of an observation by Baker J. in Greenwich -v- Murray & Another² when he stated that,

"the authorities as to when an interim injunction should be issued are in a state of disarray".

In yet another leading Journal, it has been said of English Courts that they,

"have been experiencing indigestion over the rules for interlocutory
injunctions".³

Most notable perhaps has been the observations of three scholars, in a joint work where they have despairingly stated that,

"the truth of the matter is that no real principles can be laid down."⁴

These observations are a pointer to the fact that the standards or approaches adopted by Courts has not been uniformly formulated as illustrations from various countries will show.

It is fitting to begin by showing the English judicial reaction to Lord Diplock's suggestions in American Cyanamid -v- Ethicon.⁵ In Fellowes -v- Fisher,⁶ we find Lord Denning conveniently going round the cyanamid approach by relying on the fact that in formulating the balance of convenience test, Lord Diplock did not give sufficient weight to the possibility that the strength of the respective parties cases could, and probably would become a factor in assessing the balance of convenience. While, Lord Diplock did observe that the term 'prima-facie' case was an elusive concept, this did not render it ineligible for consideration as what he referred to as,

"many other special factors to be taken into consideration in the particular circumstances of each case."

In Lewis -v- Heffer,⁸ we find that while much of the holding turned on a balance of convenience, Geoffrey Lane L.J. went further and claimed that the Cyanamid rules could apply in commercial situations where phenomena such as loss and misfortune could be monetarised. But he was sceptical about the applicability of the same rules in a situation such as a political phenomena where monetary consideration were not in issue. It has also been suggested that there may be cases where the litigants have their conveniences and inconveniences balanced and therefore, one would take up the strength of each party's case as a turning point.

This divergencies from the Cyanamid approach indicate that even in England, none of the two approaches has as yet gained an upper hand over the other.

In America (U. S.), the position has not been altered by the formulation in the Cyanamid case. The holdings in Virginia Petroleum Jobbers Association -v- F.P.C.¹⁰ still holds sway. In this decision, the Court held that in interlocutory applications, the Court has to consider;

whether the petitioner has made a strong case showing that he is likely to prevail on the merits of his appeal, whether he is going to suffer irreparable damage, whether the issue of such an injunction would occasion harm to the other parties interested in the proceedings and whether it would be in the public interests to accept his application.

The basic turning point revolves around the amount of uncompensatable damages otherwise the Cyanamid approach has not found favour in America.

In Australia, as was indicated earlier, their position has been spelt out in Beecham Group Ltd - v- Bristol Laboratories Party Ltd.¹¹ The Court did note the ambiguity in a term like "prima-facie case" and we went on to observe that claims upon which interlocutory applications are based will vary in their juridic ratings and to require them to meet a given 'standard' - or to consider them against a given approach would not seem realistic. The Court, however, went on to state that while such a standard may not be applicable to various claims, it does not follow that any existing standard has to be eradicated as the Cyanamid philosophy would suggest.

The Court laid down that a Court has to be satisfied that a case is more than frivolous and qualifies for equitable intervention before bringing in the other considerations. It firmly insisted that the Beecham decision reflected the Australian approach. This was to be manifested in the case of Shertcliff -v- Engadine Acceptances Corp. Party Ltd¹² where the Cyanamid approach was rejected and the Beecham case forwarded.

The Canadian position may perhaps, be branded as the more 'open' of the various Court reactions to the Cyanamid approach. Even before the Cyanamid formulation emerged, the Canadian position, based on Lerner J's decision in Terra-Communications-v- Communicomp Data Ltd.¹³ The considerations in an application for interlocutory relief were whether the party making the application could pay damages to the other party, whether a strong prima-facie has been made out and whether the resulting damage would be irreparable if the injunction was denied.

The defendants interests were to receive as much consideration as those of the plaintiff and where a legal right was not clear, the matter was to turn on relevant convenience and inconvenience for both parties.

In such an approach, one notes that there is no rigid insistence on any one approach.

This characteristic of the Canadian Courts is later manifested in the holding in Yule Inc. -v- Atlantic Pizza Delight Franchise, (1968)¹⁴ Ltd where the Court proceeded on the footing that it was free to select which approach it felt as being appropriate to the case in question.

In East Africa, the Courts have not taken the Cyanamid approach with favour. The position laid down in East Africa Industries -v- Trufood Ltd¹⁵ still, invariably holds sway. The Courts approach here was inclined towards the 'prima-facie' case approach and the position has been upheld in later decisions such as Wairimu Muriithi -v- City Council of Nairobi¹⁶ and Taws Ltd -v- Akbar Khan.¹⁷

However, one still encounters divergent views as in Devani -v- Bhadresa and Another¹⁸ indicates. In this case, the Court ruled that where there is a substantial question to be investigated, the judge has a discretion and must consider the balance of convenience otherwise, only where there is a clear breach of covenant must an interlocutory injunction issue. This decision, one would tend to lean on the Cyanamid approach but to talk of a 'clear breach' would seem to bring in the question of the strength of each party's case thereby introducing an element of the 'prima-facie case' approach.

Thus, one may observe that the principles governing the issue of interlocutory injunctions may be clear -but then the rules that Courts apply in such applications have not been agreed upon. A common standard has not really been taken up and used by all Courts.

While such a situation in such an affair may stand out glaringly, one may on the other hand ask themselves if it is desirable to have a given standard. This may be more so in view of the fact that in different countries, similar legal and equitable claims and rights may have varied implications. This is because of differences in development levels and all the implications which follow from such a situation. Thus, while in a case like that of East Africa Industries - v- Trufoods Ltd ¹⁹ the Court had to dwell on issues such as the sophistication of Kenya Shoppers, we would hardly expect such considerations in a similar claim - say in a country like the U.S.A. where literacy levels are higher. Patent claims will also have different legal consequences from - say an application to restrain a party from cutting down a particular tree for its cultural value. This variances in claims point towards the unsuitability of a standard mode of rules governing the application for interlocutory injunctions. It is against such a background that one would recommend the position taken up in the Canadian case of Yule Inc. -v- Atlantic Pizza Delight Franchise ²⁰ - where the Court should feel free to adopt any one approach; i. e. the position taken up by the Court will be determined by the nature of the case and the circumstances surrounding it. The suitable approach would of course have to be determined only after the Court has found that the application is more than just a frivolous matter.

While allowing for flexibility, this approach would also eliminate the need for a hard set standard and consequently, allow for the differing circumstances of different countries to govern the issues in question.

Such an approach would also be subject to the equitable principles governing the issue of interlocutory injunctions and therefore maintain its equitable nature. It would represent, one would say a cross between the Australian and Canadian ideas.

FOOTNOTES: RECOMMENDATIONS AND CONCLUSIONS

1. Leubsdorf; The Standard for preliminary injunctions, 1978, 91 Harvard Law Review, 525, at 525.
2. Greenwich - v- Murray; Unreported, Supreme Court of New Zealand; Wellington; 2nd December, 1977 A. No. 507/77 per Barker J.
3. Baker; The future of equity; 1973, L.Q.R. 529 at 537.
4. Meagher, Gummow and Lehane; Equity Doctrines and Remedies, 1975 ed; at 493.
5. American Cyanamid -v- Ethicon, 1975 2W.L.R., 316.
6. Fellowes - v- Fisher, (supra)
7. American Cyanamid -v- Ethicon Ltd, (1975) 2 W.L.R., 316 at 324.
8. Lewis - v- Heffer (1978) L.W.L.R., 1061
9. Lewis - v- Heffer - per Geoffrey Lane L.J.
10. Virginia Petroleum Jobbers Association -v- F.P.C., 259, f. 2 d, 921, D.C. Circ., 1958.
11. Beecham Group Ltd. -v- Bristol Laboratories Pty Ltd, (supra)
12. Shercliff - v- Engadine Acceptance Corp Pty Ltd (supra)
13. Terra-Communications - v- Communi. Comp. Data Ltd, (1973) 41, D.L.R., 3d, 350.
14. Yule Inc. - v- Atlantic Pizza Delight Franchise (1968) Ltd, 1978, 17 O.R., (3d), 505.
15. East Africa Industries - v- Trufoods Ltd (supra)
16. Wairimu Muriithi - v- City Council of Nairobi (supra)
17. Taws Ltd - v- Akbar Khan (supra)
18. Devani -v- Bhadresa & Another (1972) E.A. 22 (C.A.)
19. East Africa Industries - v- Trufoods Ltd (supra)
20. Yule Inc. - v- Atlantic Pizza Delight (1968) Ltd. (supra).