

3B. Injunctions

NOTE: establish specific performance first, then establish an injunction (specific performance of a contract to buy serves the basis for granting an injunction – to protect the goods from being sold to someone else, so specific performance can be granted)

1. Does the court have jurisdiction?
2. What type of injunction are we seeking?
 - a. Quia timet injunction?
 - b. Interlocutory (interim) injunction?
 - c. Search Order: Anton Pillar order?
 - d. Freeze Assets: Mareva order?
 - e. Mandatory Injunction?
 - f. Final/Perpetual Injunction?

Introduction

P may attempt to seek an injunction, which is an order made by the court either restraining or requiring performance of a specific act in order to protect P's legal or equitable right from being infringed (*ABC v Lenah Game Meats*).

1. Does the plaintiff have a legal or equitable right?

On the facts, P has a [legal/equitable/neither] right because XXX

- **Legal right**

- Breach of contract
- Trespass (tort)

- **Equitable right**

- Breach of confidence, trust or fiduciary duty
- Equitable estoppel

- **No legal or equitable right:**

- *Day v Brownrigg* – **No legal/equitable right to the name of her house** ('Ashford lodge' – name for 60 years already), so could not get an injunction to prevent neighbour from naming their house Ashford lodge too
- *ABC v Lenah Game Meats*
 - No legal cause of action (trespass), since ABC was not the trespasser
 - No equitable cause of action (breach of confidence), since information was not confidential
 - **Mere unconscionability and injustice does not amount to a legal or equitable right** – there was insufficient precision as to the unconscionability to lead to a cause of action
 - Did not argue for a possible tort of privacy
- *Smethurst v Commissioner of Police* – trespass by police (search warrant invalid) – police took information from news reporter phone using their USB

- Legal cause of action = **trespass but the tort (trespass) was already completed**, there was no risk of continuing trespass – her legal rights would not likely be infringed in the future
- She did not argue breach of confidence (equitable cause of action) for strategic purpose as employer was a news corporation.
- Did not argue for a possible tort of privacy

2. What type of injunction is being sought?

1. Final (Perpetual) Injunction

Final injunction = injunction that is given at the end of the trial; one which settles dispute finally (but does not necessarily lasts forever – injunction could be limited for just a limited amount of time)

1. Does damages need to be an inadequate remedy for the injunction to be granted?

a. Exclusive Jurisdiction – **NO** (protects equitable right)

- i. Since **P** is seeking an injunction to protect an **equitable right**, the injunction would be granted in equity's **exclusive jurisdiction**, so there is no need to establish that damages would be an inadequate remedy (since common law damages are not available for equitable wrongs)

b. Auxiliary Jurisdiction – **YES** (protects common law and statutory rights)

- i. Since **P** is seeking an injunction to protect a **common law (or statutory) right**, the injunction would be granted in equity's **auxiliary jurisdiction**, which requires the plaintiff to establish an action under common law, and that common law damages are inadequate (*Redland Bricks*)

ii. An action under common law:

1. Examples: breach of contract, proprietary right, statute right.
2. The right need not be proprietary:
 - a. Injunctions can be awarded in the auxiliary jurisdiction even for non-proprietary (i.e., personal) rights (*Cardile*, [30])

iii. Common law damages are inadequate

1. **NO** – injunction not granted
2. **YES** – injunction can be granted – but court retains direction
 - a. Damages would be inadequate if irreparable injury will occur if the injunction is not issued
 - b. **Examples:**
 - i. Restraint of trade in the contract was to obtain the exclusivity of talent – which cannot be monetarily compensated. Therefore, injunction granted, producer cannot work for another channel *Curro*

- ii. Damages may be inadequate if damages are difficult to assess or if they involve a speculative ascertainment of the value of a loss of a chance (*Cardile*)
- iii. Contract to make special chairs for RPA hospital – tort of conversion (defendant refused to pay for them after they were made) – damages inadequate, since the chairs had little value chairs had been specifically designed for that hall, they did not have much value on the market (not as high as the contract price) *Aristoc Industries*
 - 1. P was subcontracted to make the chairs for Head Contractor. Head Contractor went insolvent and assigned the building contract to D. D refused to pay P for the chairs as contract binds the Head Contractor. P cannot sue the Head Contractor as they are insolvent
- iv. Damages inadequate due to danger to the plaintiff (from having a crane over her house) *Graham*

iv. Discretion to refuse injunction

- 1. An injunction, being an equitable remedy, is discretionary.
- 2. Courts may refuse to grant an injunction if:
 - a. **It is inequitable to do so**
 - i. *Redland Bricks* → the defendant acted reasonably in seeking expert advice to maintain support for P's land, so it was inequitable to require the defendant to fix (restorative injunction))
 - b. **It will cause hardship to the defendant, but not if the hardship was brought about by the defendant**
 - i. *Graham* – defendant deliberately trespassed over plaintiff's land by placing the crane over her house, so the hardship for the defendant in now having to remove the crane was brought about by their own conduct)

c. **Statutory (common law) jurisdiction – NO (dependant on an ability to sue for common law damages)**

- i. A statute confers the court power to grant an injunction → gave common law courts power which they did not have (common law courts could not grant injunctions before)
- ii. This jurisdiction is dependent on an ability to sue for common law damages → it is not a question about whether damages are inadequate (since statute does not require it)
- iii. Cannot be used *quia timet* as this is where equity gives an injunction in respect of something that hasn't happened and thus there is no CL right under the statutory jurisdiction since the wrong hasn't occurred.

2. Interim (Interlocutory) Injunction

An interlocutory injunction may be granted by the court before a trial is finalised to maintain the status quo. The high court has affirmed two requirements in *Beecham* and *Tooheys* for an application for an interim injunction, where P must establish a **prima facie case** and the **balance of convenience** between the parties must be considered.

1. Plaintiff must establish a prima facie case

- a. First, in establishing a prima facie case, **plaintiff** must show a **sufficient likelihood of success at trial** to justify preserving the status quo *O'Neill*
- b. The **strength of probability depends on the nature of the rights** asserted, the **likely consequences of the injunction**, other considerations (injustice if grant injunction) (*Australian Broadcasting Corp v O'Neill*)
 - i. Defamation vs Freedom of Speech: P claimed defamation (legal right) and wanted to stop ABC from broadcasting, which would interfere with free speech.
 1. Considering we are dealing with speech and practical consequences of the injunction would be to interfere with free speech, it needs to be shown that there's a stronger likelihood of success before we will stop the broadcast than if it was some other type of right involved.

2. Balance of convenience between the parties must be considered

i. Considerations:

1. If it is a **mandatory injunction** → higher risk of injustice [GO TO MANDATORY INJUNCTION]
2. Would the **plaintiff suffer irreparable injury/inconvenience** if the injunction were **refused**?
 - a. Example: If P argues that D is digging minerals and interfering with P's land and an injunction is not granted, and P ends up winning, Court will not order D to stuff minerals back in ground
3. What injury would the **defendant suffer** if it is **granted**?
 - a. Example: If court gives P a prohibitory injunction, it stops D from [extracting minerals], but if D wins at trial, then they were stopped from doing that in that period of time, which would result in unfairness.
4. Are **damages adequate remedy** if an injunction is or is not granted? *O'Neill*
 - a. If there is irreparable harm then damages not adequate *Tooheys*

ii. Has P given an **undertaking to pay damages if they lose**?

1. Because injunctions are equitable, terms can be imposed on it – in the context of interim relief, there is a risk that if the relief is granted, the plaintiff might lose.

2. Usually, the plaintiff will have to provide an undertaking as to damages if they lose, which weighs in the balance of convenience by giving the Court more comfort that D's interests are protected if P is granted an injunction and loses. *Cambridge Credit*
 - a. To enforce the undertaking, defendant must show that the granting of the interlocutory injunction was the cause, and not merely a cause, of the loss *Ansett*
3. Not Relevant if P is Bankrupt: The court cannot take into account P's undertaking as to damages as P is already insolvent *Cambridge Credit*

iii. [Public Interest] 3rd Party interests can be considered

1. In weighing up the balance of convenience the court may, in the appropriate circumstances, take into account the **effect of its decision on the interests of the public and third parties** *Castlemaine Tooheys*
 - a. Un-Refillable Bottles vs Environment: Legislation was being created to encourage the use of refillable bottles rather than non-refillable ones. Castlemain Tooheys sought an injunction to stop the SA govt from bringing legislation into force on the basis of discrimination as refillable bottles would be more expensive.
 - i. Court will take into account that the legislation - if they refuse the injunction - will have benefits for the environment (less landfill etc) and less broken glass from bottles around on the streets leads to health and safety benefits for people
 - ii. Benefits to the public in the legislation that weigh in the balance of convenience. In the end, the Court refused the injunction *Castlemaine Tooheys*
 - b. Freedom of Speech: Injunction to not air documentary not granted *ABC v O'Neill*

3. Mandatory Injunction

• Interlocutory Stage

- At the interlocutory stage, the court's view of mandatory injunctions is that they involve a **higher risk of injustice**, particularly **to the Defendant** than negative or prohibitive injunctions do as they require **positive action** from the Defendant – requires more than just preserving status quo (*Businessworld Computers; Shepherd Homes*)
- However, this does not create an independent rule for mandatory interlocutory injunctions – it is only a factor considered in the *Beecham* enquiry (*Films Rover*)

• Final Stage

- *NOTE: P must win for a final mandatory injunction to be granted*
- At the final/perpetual stage, for the grant of mandatory injunctions, the Court considers:

- Firstly, whether the defendant's cost of complying with the injunction will be **out of all proportionate** to the benefit which the plaintiff is going to get? – balancing the interest of the defendant and plaintiff (*Redland*):
 - Cost of mandatory injunction vs value of land: D dug into their own land and undermined the support (easement of support) of P's land, causing damage to P's strawberry farm.

Redland

 - Court looked at:
 - Value of P's land - \$12,000
 - Harm to P's land caused by undermining - \$1,500
 - Cost of reinstatement works - \$30,000 (more than 2x value of P's land)
 - Court said that even though the D has acted wrongfully and caused harm to P, the cost of the mandatory injunction is out of all proportion to the benefit that the P will get and therefore we refuse it.
- Second, the **stance/attitude of the D** during their conduct should be considered.
 - Compare cases:
 - **Cavalier/Uncaring Attitude**: Builder knew that the crane was going to trespass into P's airspace and did not care, which is why the court was not worried about hardship to the defendant *Graham v Morris*
 - **Reasonable Attitude**: D knew they had to maintain support for P's land → sought expert advice and had followed it → this reasonable attitude helped D avoid mandatory injunction even though P was left with damaged property

Redland Bricks

 - Cf. *Graham v Morris* If D had acted with wanton disregard like the builder in Graham, then it affects how worried the court is about disproportionality *Redland Bricks*
 - The expert advice turned out to be wrong but D had sought it, paid for it and followed it even though they had still committed the tort.

4. Quia timet Injunction

- **Quia timet injunctions are granted in 2 types of cases** (*Redlands Bricks* per Upjohn J):
 - (1) No harm has occurred but it is threatened or intended; OR
 - (2) Harm has been done by the earlier actions of the defendant and the plaintiff has been compensated but the plaintiff fears that future wrongs may be committed by the defendant OR
 - That earlier conduct may cause future damage (*Redlands Bricks*)
- **P needs to show a very strong probability that there will be grave damage in the future** *Redlands Bricks*

- Mandatory Final Injunction on Quia Timet Basis: Ps argued that Ds caused harm to property for past excessive mining and expert evidence showed that there will be further slips in land → harm could be avoided if Ds put the retaining walls in to restore the support *Redlands Bricks*
 - Very strong probability of future slip
 - Difficult to determine scale of damage, but likely significant (worth more than 10% of value of property)
 - → Quia timet has been justified.

5. [Court's Jurisdiction] Orders under s 23 Supreme Court Act

1. Anton Pillar order (search order on D's property)

- a. Applicant may seek an ex-parte mandatory interlocutory order from the Court under s 23 Supreme Court Act ('SCA') to order respondent to allow Applicant access to respondent's premises so that Applicant may inspect, copy and collect material for evidence relevant to their case as they fear respondent will destroy it.
 - i. A search order should only be used in **exceptional circumstances** and the Court must be careful to avoid making an order to be a mere investigatory tool → must be used for preservation of vital evidence.
- b. This requires:
 - i. **[1] First, there must be a extremely strong prima facie case**
 1. Requires a degree of likelihood that gives rise to a genuine concern that evidence might be destroyed: *Rickard v Swenrick*
 2. Must be a 'grave danger of destruction' *Anton Pillar KG v Manufacturing Processes Ltd*
 - a. Danger that papers (evidence) will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated
 3. Cannot be used for fishing expeditions *Anton Pillar KG v Manufacturing Processes Ltd*
 - ii. **[2] Secondly, the damage, potential or actual, must be very serious for the applicant**
 1. In *Anton Pillar KG*, Ps claim that Ds were communicating confidential info on P's technology to German manufacturers, which could damage the P's business.
 - iii. **[3] Third, there must be clear evidence the defendants have incriminating documents or things in their possession, and there is a real possibility they might destroy before any application inter partes can be made**
 1. Must be a 'grave danger of destruction'
 2. This requires more than a mere suspicion that the respondent will shred the evidence
- c. **The Plaintiff to provide a Undertaking**
 - i. The undertaking will require the applicant to compensate the respondent or any third party that is adversely affected by the grant of the freezing order in the event that the applicant does not

succeed in applicant's cause of action against the respondent: *Practice note 18, Practice Note SC Gen 13*

d. Respondent's rights:

- i. Shortly after the ex parte hearing concerning the search order, the defendant will have an opportunity at an inter-party hearing to argue why the order should be discharged

e. NOTE: Anton Pillar order is not a search warrant

- i. The Plaintiff must get the Defendant's permission to enter and inspect D's premises
 1. Anton Pillar Order brings pressure on Ds to give permission by ordering them to – if he does not give permission, he is guilty of contempt of Court.

2. Mareva order (freeze D's assets)

- a. **Applicant** may seek an order from the Court to grant an ex parte interlocutory judgment so as to prevent **Respondent** disposing of certain assets under *s 23 Supreme Court Act* ('SCA')
- b. There must appear to be a **debt due and owing** and also there must be a **danger that Respondent disposes their assets outside of Court's jurisdiction** pending trial (*Mareva v International Bulkcarriers*)
 - i. It is not enough for the plaintiff to assert a risk that the assets will be dissipated. Must demonstrate solid evidence: *Ninemia Maritime Corporation*
 1. Defendant has previously acted in a way which shows that his probity is not to be relied on.
 2. Type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on.
 - ii. **Mareva** - Claim by Mareva for unpaid hire and damages for repudiation of a charterparty → was granted an interim injunction restraining Bulkcarriers from removing/disposing out of the jurisdiction moneys to a London bank in the name of Bulkcarriers.
 1. Bulkcarriers received \$174,000 from voyage charterers but told Mareva that they are facing insolvency → danger that they will dissipate this money
- c. **Third Parties:** It is possible to grant a Mareva order to third parties if the third party holds on trust the assets for the debtor and has power to dispose the assets (*Cardile v LED Builders*) [**only in the most exceptional circumstances**]