

9. Injunctions

9.1 Introduction

This review of injunction powers and procedure is of necessity fairly brief. The detailed principles and the supporting authorities are fully set out in Chapter 16 of the 31st edition of *Snell's Equity*, published in 2005. It contains almost all the up-to-date authorities (other than in respect of specialist jurisdictions). Domestic violence proceedings are dealt with at paragraph 9.25 et seq of this chapter. Proceedings for committal are dealt with in Chapter 10.

Most judges sitting in the county court will have had some professional experience of injunctions. But there will be a few, for example those with exclusively PI practices, who may not have. For their benefit it is useful to restate the basic principles.

9.2 The nature of an injunction

The media often use expressions such as 'X has taken out an injunction against the Daily Tabloid' as if an injunction could be obtained off a shelf, on demand. It cannot be stressed too often that an injunction is in all cases the product of a judicial decision applying established principles in the exercise of a judicial discretion. Although there are many cases where the grant of an injunction would be 'usual' or 'expected' it can never be regarded as a certainty or a formality.

The essential nature of an injunction is an order against a legal person (usually a party to the proceedings) directing them to do or not to do a specified act or acts. It is enforceable against the person to whom it is directed: in the case of individuals by imprisonment and in the case of corporate bodies by attachment of their possessions.

An undertaking is often used as an alternative to an injunction. It is closely similar, the difference being that the relevant party promises the court to do or abstain from doing a specified act or acts instead of being ordered to do so by the court. It can therefore only be done consensually. It is enforceable in exactly the same way as an injunction, except that in certain statutory procedures a power of arrest attaches only to an injunction and not to an undertaking.

An injunction must support a legal or equitable right capable of remedy.

9.3 Basic definitions

Throughout this section, for convenience, the word 'applicant' is used to describe the person seeking the injunction and the word 'respondent' to describe the person against whom it is sought. Although injunctions are perhaps more usually sought by claimants against defendants, this is not inevitably the case; a counterclaiming defendant may quite frequently turn out to be the applicant.

In accordance with post-CPR practice, Latin tags and expressions have as far as possible been avoided (or translated into an English equivalent). The one exception is the expression 'status quo' which seems to the writer to be virtually part of the English language now and has no good brief English equivalent.

Injunctions can be granted in a wide variety of situations, in the Common Law and Equity jurisdictions of the court (e.g. to restrain a breach of contract, to restrain the commission of a tort, or to restrain the disposal of disputed property). Similar principles apply to all these types of case.

9.4 Interim (formerly 'interlocutory') injunctions

The purpose of these is to stop the defendant from doing something that the claimant claims is an infringement of the claimant's rights, until there can be a trial. Consequently a court granting such an injunction has to be aware that:

- 1 The defendant may so far have done nothing at all; the claimant is expressing fear that if not stopped the defendant will do something in the future (hence the old Latin label of *quia timet* – because he fears).
- 2 The defendant may well have a perfect right to do what he is threatening to do and the grant of an injunction may turn out (once there has been a trial) to have quite unjustly stopped him from doing something lawful (or in the rare case of a mandatory injunction) have forced him to do something he was not obliged to do.

These important factors impact critically on the principles affecting the grant or refusal of an interim injunction, discussed in detail below. An interim injunction is made over a defined period; sometimes only until there can be a full hearing of the application, often until judgment is given in the case.

9.5 Injunctions 'on notice' and 'not on notice'

These expressions replaced the hallowed Latin expressions *inter partes* and *ex parte*. At the stage when the application is fully considered, an application for an interim injunction has to be on notice either for the full three-day period required by CPR 23.7 (and see also PD 25.2) or a shorter period fixed by the court (see also CPR 23.7). But very urgent applications have sometimes to be brought without notice, or at least without the full notice required by the rules. For reasons which appear below, it is now fairly common practice to give some form of notice even for an application which is technically without notice, thereby producing the odd hybrid of an application 'without notice, on notice'.

9.6 Final injunctions

A final injunction is made after the trial of the case. Often it is in the form of a 'perpetual' injunction, i.e. without any limit of time, for example the defendant is prohibited from ever entering the claimant's garden again.

9.7 Prohibitory/negative injunctions

The vast majority of injunctions are negative. Put simply, these are orders which can be complied with by the respondent doing nothing at all. So long as he refrains from doing the act which is prohibited, he is safe. If a claimant establishes his rights at trial, he will usually obtain a negative injunction with little difficulty.

9.8 Positive/mandatory injunctions

A mandatory injunction is an order that can only be complied with by the respondent doing what the court tells him he must do, for example to pull down a wall or restore some item of property. Sometimes it can quite closely resemble an order for specific performance and rather similar principles apply in deciding whether or not to grant such an order. A mandatory injunction is not commonly granted by way of interim injunction. Even after trial its grant is always discretionary, though on well-settled principles.

9.9 Statutory jurisdictions

Many of the basic definitions and principles set out above apply in statutory jurisdictions as well. There are, however, a number of detailed differences. In particular, injunctions in domestic violence and Housing Act cases, although procedurally resembling interim injunctions, have in some ways more the character of final injunctions. Under Pt IV of the Family Law Act 1996, the court may grant free-standing relief in the form of an order restraining the use and threat of violence, and acts of molestation. There is no requirement for there to be a substantive claim as there would be if a remedy were sought in tort. As a result, once the order is made the matter is disposed of and there is no requirement for a further, or 'final' hearing.

9.10 Injunctions that the county court rarely or never grants

Immediately following the coming into force of the homeless persons provisions of the Housing Act 1996, county courts were often asked to order local authorities by way of injunction to provide interim housing for applicants until their appeals from reviews had been decided. It is now firmly established in the Court of Appeal that there is no jurisdiction to grant such an injunction. Any such proceeding must proceed by way of judicial review, if at all (see *Ali v Westminster City Council* [1999] 1 WLR 384).

The county court can only make a freezing order (formerly called a Mareva injunction) in the following circumstances (see the County Court Remedies Regulations 1991):

- (a) in support of a judgment of the court (considered further below);
- (b) to preserve property which forms the subject matter of the proceedings;
- (c) in the Central London County Court Mercantile (Formerly Business) List;
- (d) in the Patents County Court.

As to points (c) and (d), which are not discussed below, any judge sitting in those jurisdictions is unlikely to need much help from this book. The only county court that can make a search

order (formerly called an Anton Piller order) is the Patents County Court. Accordingly, this chapter does not deal with a search order.

9.11 Powers of the county court

Section 38 of the County Courts Act 1984 has allowed courts to avoid many of the problems that existed before 1990 in establishing whether or not the court could grant an injunction in a case otherwise within its jurisdiction. (That, incidentally, often depended on whether there was a claim for damages to which the injunction was ancillary.) Subject to immaterial exceptions, it gives the county court the same powers as the High Court in such cases (but see the comments in paragraph 9.10 above about freezing and search orders). It must of course be remembered that the county court is the creation of statute and has no inherent jurisdiction. If no statutory authority for the injunction can be discovered, the court has no jurisdiction.

9.12 Powers of particular judges

A circuit judge (and therefore a recorder or a deputy circuit judge) can make any order that the court has power to make. A district judge has power to grant an injunction in any action where he has jurisdiction to conduct the trial (see PD 25 1.3)

9.13 The interim injunction

The practice is set out in CPR Pt 25 and particular in PD 25 to which reference should be made. The notes to Pt 25.1 (especially 25.1.9–16) in the White Book are also very useful and fairly comprehensive.

9.13.1 *Without notice*

All the main principles that apply to the grant of interim injunctions (see below) apply with even greater force where the application is made without notice. But the following matters are also of great importance.

- 1 The court will only know those facts which the applicant chooses to tell it. So the applicant's lawyers have a particular duty of disclosure and candour. If they turn out to have failed in that duty then (at whatever stage this emerges) they may well lose their right to obtain the injunction they would otherwise have obtained or may, if appropriate, be penalised in costs. Of course such failure of candour must be substantial. The habit of some advocates of pointing to minute errors of detail as indicating a lack of candour needs to be discouraged.
- 2 Now the Human Rights Act 1998 is in force it will be particularly difficult to obtain an order wholly without notice in a case involving freedom of expression unless the requirements of s.12 can be satisfied. Apart from that, however, an application wholly without notice will rarely succeed unless it is obvious that either it is impractical to give notice however short or that the giving of notice would precipitate the commission of the act which the claimant fears: for example, if the claimant wishes to restrain the cutting down of disputed trees and gives notice, the defendant may at once send for the men with the chain saws.

- 3 To obtain an order on such an application there must in any case be a real urgency which will not wait for proper notice. The court should always be prepared to be proactive to discover why the application is being made without notice (or why at the very least the respondent has not been told of the application) and should not make an injunction unless some other method of dealing with the problem would not be sufficiently effective (see also *Mayne Pharmia (USA) inc v Teva UK Ltd (unrep)* referred to in the White Book at 25.1.9. In general, the order should only be granted to protect against immediate danger of serious injury or irreparable harm, see *Beese v Woodhouse* [1970] 1 All ER 769. Often it will be sufficient to shorten the period of notice and use the application to fix an early return date.
- 4 If the court comes to the conclusion that an order is necessary, then it is desirable to make the least devastating order over the shortest period.
- 5 As the court will not (unless the respondent turns up) have heard anything about the respondent's case, the less the court comments on the merits the better (unless of course the applicant's case is demonstrably weak itself).

The court has power in an appropriate case to make an injunction before the issue of proceedings (see generally CPR 25.2). The old practice was to require an undertaking to issue and serve as soon as practicable, and this remains appropriate under CPR 25.2 (3). It must be remembered that the jurisdiction is only activated by either the issue of proceedings or an undertaking to do so.

9.13.2 *With notice*

This kind of application for an injunction is the most common.

- 1 The rules only require three days' notice. If that is all the notice the respondent has, it is highly probable that he will not be ready for the hearing but needs time to consider and serve evidence. Inexperienced (or aggressive) advocates sometimes take the line that as the rules only require three days' notice, the case ought somehow to be ready on the respondent's side. This is hardly ever a reasonable view. Generally speaking, if a respondent needs time to serve evidence then he should have it. How long he needs will depend on the individual case, but one would normally allow at least seven days, if not longer. Frequently such an adjournment is agreed. If there is to be a sequential exchange of evidence it is a good thing to set up a case management timetable.
- 2 Apart from statutory cases (where the hearing of the injunction may well be the trial of the case) it is not usual or desirable to admit oral evidence, and in particular cross-examination. Most hearings proceed simply on the paper evidence.
- 3 If there is to be an adjournment for evidence, the status quo often needs to be protected in the meantime. Frequently undertakings are offered and accepted (though the court needs to consider whether the form of the undertaking is acceptable and that the

individual giving the undertaking knows what they are doing – see further below). If no undertaking is offered then the applicant may have to apply for a very temporary order on a without notice basis, in effect on the basis of his own evidence alone. The court will hear the respondent as well if he wishes.

- 4 An interim injunction is generally granted over the trial of the case or further order. It is important that the injunction is formulated so that it is until ‘judgment in the case’ rather than ‘until trial’. If, for instance, the injunction is to prevent trees being cut down and is made only until trial, there is nothing to stop some quick action with the chain saws while the trial is proceeding.
- 5 Because an interim injunction is only a temporary remedy a party can always apply, if for instance circumstances change, to discharge or vary the order. It is for this reason that the injunction will be expressed as ‘until further order’.
- 6 At the heart of interim injunction practice lie the principles set out by the House of Lords (notably in the speech of Lord Diplock) in *American Cyanamid v Ethicon* [1975] AC (*Cyanamid*). Although the principles have been eroded in later decisions (one of the former editors of this book having gone so far as to suggest in a lecture that *Cyanamid* was dead), they are believed still to be important and should be present in the court’s mind at all times. Counsel still frequently brings a copy of *Cyanamid* to court. It must however be remembered that the principles are guidelines not rules (see *Cayne v Global Natural Resources* [1984] 1 All ER 225, 237). More detailed examination of the *Cyanamid* case is set out in paragraph 9.13.3, below.
- 7 There are important exceptions to *Cyanamid* which have been developed in subsequent cases, interestingly mostly in the Court of Appeal and not the House of Lords. Important ones include:
 - (a) A ‘serious issue to be tried’ means what it says. So it follows that the applicant still has to have an arguable case. It is therefore legitimate for the court to consider whether the applicant’s case as presented on the papers stands no chance of success (see, among others, *Associated British Ports v TGWU* [1989] 1 WLR 939). Where on undisputed facts one side’s case is very strong this may be taken into account in ‘tipping the balance’ (see *Series 5 Software v Clarke 1996 1AER 853*).
 - (b) It is legitimate to consider whether the case can be decided on a short and simple issue of law or construction. If the papers show that all the relevant facts are before the court, the court may be able to reach the conclusion that, assuming all disputed facts in the applicant’s favour, the applicant’s case fails in law. In which case, the court should say so rather than make an injunction and leave the issue to be tried at some future date (see *Associated British Ports*). This may be thought to be in accordance with the overriding objective. It is otherwise if the issues of law call for detailed argument and ‘mature consideration’ (see *Cyanamid*).

- (c) There are cases which in reality will not wait for a trial or where a trial will not take place, so that the only practical issue is whether the interim injunction will or will not be made and the grant/withholding of the injunction will put an end to the litigation. Examples are particularly plentiful in the labour dispute/employment/restraint of trade field. One example would be where the respondent has a job offer starting on Monday next which the applicant says he cannot accept because he will be in breach of covenant. It is unlikely that the offer will remain open while a trial is arranged. There is heavy pressure on the court to determine the issue (see *Cayne v Global Natural Resources*).
- (d) Irrespective of *Cyanamid*, delay, acquiescence/misconduct (including lack of candour on an application without notice) may deprive the applicant of his injunction.

9.13.3 *Cyanamid* principles

The basic principles are these:

- 1 So far as the merits are concerned, the court is only required to consider whether there is a serious issue to be tried. It is no longer necessary to follow the (pre-1975) practice of considering whether the applicant has a strong case on the face of it.
- 2 If the court is satisfied as to point 1, all it needs to consider is the 'balance of convenience'. This rather odd and in some ways inaccurate phrase may be better expressed (as suggested by Sir Robert Megarry V-C) as 'the greater or lesser risk of doing an injustice'. The basic considerations may be thought to be these:
 - (a) At the interim injunction stage nobody can say whether the applicant will obtain an injunction at trial. If in fact he fails, then the respondent will have been inhibited from doing something he wishes to do and is entitled to do for months or possibly years.
 - (b) The court therefore needs to consider:
 - How great /irreparable a harm will the applicant suffer if the injunction is not granted and the respondent is left to do what he wants until trial?
 - A similar question in respect of the respondent – what will he suffer if he is inhibited until trial?
 - When might the trial be expected to take place – can an effective order for an early trial be made?
 - Can the potential damage to applicant/respondent be sufficiently compensated in money? Is this practical in terms of the money available (see below as to undertakings in damages)?

- If the injunction is refused and, for example, the respondent is allowed to go on and build his house on what turns out to be the applicant's land, will the court at trial make a mandatory injunction to pull it down?
- Are there special factors in the individual case?
- Are the cases of the parties widely disproportionate in strength?
- Where the cases are evenly balanced, is there pressure in favour of preserving the status quo?

This list is not exhaustive. By way of further comment and example:

- 1 B threatens to chop down trees which A claims are his. They are fine and irreplaceable specimen trees and no money will properly compensate for their loss. Stopping them being chopped down for six months until there can be a trial will mean that B cannot build the desired extension to his house. Delay in doing this will cost B £20,000. There is evidence that A can afford the £20,000. The injunction will probably be granted.
- 2 Same basic facts as above. But the trees are 'bog standard' Leylandii nearing the end of their useful life. The evidence is that they can easily be replaced by half grown specimens which will cost a sum which B can afford. A cannot afford the £20,000 which B will lose if an injunction is granted and should not have been. If they are chopped down B will not be building over where they stood and the site can (if A is right) be restored to A. Probably, though not certainly, an injunction would be refused.
- 3 See *Wrotham Park v Parkside* [1974] 1 WLR 798 for an interesting example of what can happen where an interim injunction is not sought (none was sought in that case) or not granted, and the successful claimant seeks a mandatory injunction to pull down houses built in breach of covenant.

9.13.4 Other matter which the court must have in mind

- Is the claim being brought by somebody whose real interest is in money and is seeking an injunction to obtain a negotiating advantage? If the answer is 'yes' then he may not get his injunction (see *Middleton v City of London RP Co* 2005 EWHC 33CH [70-8]).
- The applicant must be able to show some property right or interest in the subject matter of the complaint. In a claim for breach of confidence the only proper claimant is somebody to whom the duty of confidence is owed.
- Provided a defendant exists it is not necessary that he should be identified. An injunction may be granted against persons unknown (*South Cambs DC v Persons unknown* 2004 EWCA Civ 1280).

9.13.5 Injunction pending appeal

If the court refuses an interim injunction it may nevertheless grant an injunction pending an appeal from that decision.

9.14 Mandatory interim injunctions

Although what has been said in the second *Cyanamid* point above can apply equally to a mandatory injunction as to a negative one, mandatory interim injunctions (other than in specialist/statutory jurisdictions) are rare and special considerations apply to them. In general, the policy behind an interim injunction is to preserve things as they are until there can be a trial, rather than to change them. The general rule is that the court will not make an order that makes such a change. But there are a few important exceptions.

- 1 Where on the facts there is a strong probability of grave damage (this is a brief summary). See for the modern statement of authority the decision of the Court of Appeal in *Zockoll Group Ltd v Mercury Communications 1998* FSR 354 where the court reviewed all the earlier cases. This should be the only quotation of authority which is necessary.
- 2 Cases where (as above) the injunction effectively disposes of the case and the issue can be determined on a summary application. This has an affinity in principle with both summary judgment and orders for the summary return of converted goods. The classic example (in the High Court anyway) is where the respondent registered a caution against the claimant's title which had no justification (see *Heywood v BDC* [1963] 1WLR 175).

9.15 Conditions

The court frequently imposes conditions on the grant of an interim injunction. The most common and familiar is the 'cross undertaking in damages' by the applicant. If an applicant obtains an injunction and then it turns out at trial that he was wrong, the respondent may well have suffered substantial damage (e.g. a passing-off case where effectively the respondent cannot sell his goods). If those are the only facts, the damages are irrecoverable because no legal right has been infringed, the damage having been caused by an order of the court. It has therefore become the practice for a long time not to grant an injunction unless the applicant undertakes to pay for any damage which the respondent may suffer as a result of the injunction being granted. If at trial it is then held the injunction should not have been granted, the court will direct an inquiry/assessment of those damages and order that, in accordance with the undertaking, they be paid by the applicant. In deciding whether to accept an undertaking in damages (and therefore whether to grant the injunction) the court will consider the means of the applicant which, in modern practice, ought to be in evidence.

Attention is drawn to the following points:

- 1 Not every injunction will lead to substantial loss, in particular injunctions restraining objectionable personal conduct would be quite inappropriate for a substantial (or probably any) cross undertaking.
- 2 Unless the court otherwise orders, the cross undertaking must be written into the order in all cases.
- 3 An undertaking is usually not required where the Crown is seeking to enforce the general law.
- 4 A liquidator should not be asked to give an undertaking that exceeds the assets in his hands.

For more detail *see Snell* (particularly the supplement to the current edition).

9.16 Costs in applications for interim injunctions

It has to be remembered that although an application for an interim injunction may have been bitterly fought, the court has (except in the plainest of cases) no idea who will ultimately prove to be right. It will often therefore be inappropriate to make an order for costs that fixes the liability for the costs of the application on the 'loser'. The historic Chancery practice (generally followed elsewhere) was as follows.

- 1 *Costs in the cause (now case) order*: in cases where the issues are fairly finely balanced or where in practical terms it was necessary and of use to both sides to bring the matter before the court.
- 2 *Claimant's costs in the case order*: i.e. that even if the claimant loses the case he will not have to pay the defendant's costs of the application. This and its mirror image 'defendant's costs in the case' are the most common and are appropriate where one party has plainly won the application and the other plainly lost, but the trial could have gone either way.
- 3 *Defendant's costs in the case order*: see 2 above.
- 4 *Claimant's/defendant's costs in any event order*: this is appropriate where either the application should never have been resisted or never been brought and is clearly the appropriate order where the case is obvious and there is unlikely to be a trial.
- 5 *Claimants'/defendant's costs in any event to be taxed [assessed] and paid forthwith*: this was a punitive form of order intended to express the court's disapproval of the loser's conduct.

It is not thought that the post-CPR practice has rendered most of these principles invalid or inappropriate. Some judges take the view that the old principles are still a fair and useful way of dealing with the issue and apply them. But it is also quite common to find courts reserving these costs until the end of the trial. The problem with this latter course (which this particular writer does not greatly favour) is that (i) very often the case settles so that there is no trial and some other way has to be found to deal with these costs (ii) the trial judge, months after the event (and even if he himself was the judge who dealt with the application) will not easily be able to recover the mindset of the application judge who would have been considering whether the application was fairly brought or resisted at a time when the final outcome could not be known by anyone.

The principal change made by the CPR is likely to be to points 4 and 5. In the old practice there was a clear distinction between the kind of order in point 4 and that in point 5: the latter being by way of deterrent and expressing the court's disapproval. The general CPR practice of requiring interim costs orders to be assessed and paid as the case proceeds should lead to almost all 'in any event' orders being dealt with that way, so that there will be no room for the old draconian alternative.

9.17 The final injunction

9.17.1 *Final negative injunctions*

These cause comparatively few problems. Attention is drawn to the following:

- 1 An injunction to enforce a negative contractual obligation will hardly ever be refused (see *Doherty v Allman* [1878] 3 AC709). However if in reality the claim for an injunction is a claim for specific performance of a contract by the 'back door' an injunction will be refused if specific performance would have been refused (e.g. a claim for personal services or an obligation the performance of which requires constant supervision by the court).
- 2 It is unusual to refuse an injunction to restrain a threatened or continuing wrong unless damages would be an adequate remedy or one of the following circumstances applies.
 - (a) The annoyance has ceased.
 - (b) Compliance would be difficult.
 - (c) The order would be ineffective.
 - (d) The defendant offers an undertaking.
 - (e) The order is unnecessary.
 - (f) The claimant has misconducted himself.
 - (g) The claimant has been guilty of laches (lapse of time) or acquiescence.

9.17.2 Final mandatory injunctions

A mandatory injunction is always discretionary, not least because in practical terms a party may not be able to comply and the court will avoid making an order which cannot be effectively enforced. (There is no point threatening to send somebody to jail for not doing what he cannot do.)

All the discretionary matters referred to above in relation to negative injunctions apply to mandatory injunctions, but in addition the following (not necessarily exhaustive) list sets out some common reasons for refusing a mandatory injunction.

- 1 Damages are an adequate remedy.
- 2 There is only small damage to the claimant.
- 3 Compliance would involve a high cost to the defendant.
- 4 The order would require the execution of successive operations requiring superintendence by the court (similar considerations apply in specific performance).

The following may weigh in favour of granting a mandatory injunction.

- 1 The defendant has rushed on with the works following the claimant's objection.
- 2 A restrictive covenant has been broken knowingly and after notice from the claimant.

9.18 Permission to apply for a final injunction

In some cases, once the rights of the parties have been established, there may be no need for an injunction as there is no evidence that the loser would seek to behave in the future in contravention of what the court has found. In such a case the court may refuse an injunction but give permission to apply for one in case it turns out in the future that there is indeed a threat of the right being infringed.

As to costs, the ordinary rules and practice apply and there are no special rules.

9.19 Undertakings

An undertaking is a formal promise given by a party to the court; in form it is very similar to an injunction. However, when an undertaking is offered, the judge has an important role to play especially where, as can be common in the county court, the respondent is in person. He needs himself to explain to the 'undertaker' what an undertaking is, what the consequences are of breaking it and what the particular undertaking means. All of this needs to be done in ordinary non-technical language. Having done this, the judge should satisfy himself that the 'undertaker' has understood. This is particularly important in cases like harassment cases where there is a risk that the person giving the undertaking may not be very well educated or may be of limited intellect. If the judge is not satisfied he should refuse to accept the undertaking. The person giving the undertaking should be required to sign the undertaking form before leaving the court.

9.20 People against whom injunctions should not be made

In general, an injunction should only be made against or an undertaking accepted from somebody who is a party to the action. They should not be made a party merely for that purpose if there is no substantive claim against them. Sometimes, of course, undertakings (through counsel) are given by solicitors, but they generally relate to matters pertaining to the conduct of the action and are not really within the scope of this paragraph.

It is generally inappropriate to make an injunction against (or receive an undertaking from) a minor or somebody who is mentally ill (see *Wookey v W* [1991] Fam 121). Inevitably, this may leave the court powerless to help.

9.21 Damages in lieu of an injunction

There are two situations where these may arise.

- 1 The court concludes that damages are an adequate remedy, refuses an injunction on that ground and gives the claimant the damages to which he is entitled at law. The case is then simply an ordinary damages case.
- 2 The court refuses an injunction on a discretionary ground and gives damages in lieu of the injunction (a jurisdiction originally conferred on the Court of Chancery by 'Lord Cairns' Act'). The county court would appear to have jurisdiction to grant this (in origin High Court) remedy under s.38 of the County Courts Act 1984. For the principles involved, see *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 and *Jaggard v Sawyer* [1995] 2 All ER 189. It is probably in practice a fairly rare situation (situation 1 above is far more common) but can arise where, for instance, the cause of action itself would not have entitled the claimant to damages (e.g. breach of a restrictive covenant where the parties to the litigation are, or one of them is, a successor in title). The measure of damage may be different from situation 1, see *Snell* for further detail.

9.22 Practice on an application

This is set out in PD 25. Particular attention is drawn to:

- practice on applications made before issue of the claim form (para. 4.4)
- applications by telephone (para. 4.5)
- what the order must contain (para. 5.1), which is considered further below.

An application will now almost always be heard in public, although there will continue to be exceptional cases where in particular applications without notice might need to be heard in private. Practice may vary in individual courts as to whether it is necessary to robe. The practice in the Central London County Court and (it is believed) all the London county courts is to sit unrobed (as is the practice in all divisions of the High Court).

9.23 Drafting the order

See the requirements of PD 25. In particular, the cross undertaking in damages must appear. An interim injunction should be framed 'until judgment' rather than 'until trial'. Otherwise, it expires on day one of the trial and, if the trial is long or judgment is reserved, there may be difficulties.

Nowadays the injunction appears on a separate (usually standard) form rather than as part of a larger order. This form should, as a matter of course, contain a penal notice if it is to be enforced by committal. It is as well to check this if possible.

It is no part of the court's function simply to rubber stamp injunctions or undertakings drafted by others. In each case the judge ought to consider whether it is an order he is prepared to make or an undertaking he is prepared to accept. He should be prepared to be vigorously proactive. Vital to this process is consideration of the ease or otherwise of enforcing the order if there is a breach. Thus:

- The modern practice (endorsed by PD 25 para. 5) is to formulate the injunction in clear everyday language. In particular the old forms – such as 'be restrained from doing all or any of the following' and 'by himself his servants agents or otherwise howsoever' – may be regarded as dead and replaced by language such as 'is forbidden from doing' and 'by himself or through others'.
- A well-drafted injunction tells a respondent precisely what it is he is (or is not) to do. He should be able to read the order and have no doubt whether he has complied or not. It is no service to anybody to frame injunctions so that time and cost is taken up on an application to commit in determining whether the conduct complained of, if proved, comes within the injunction as framed. Thus avoid at all costs 'is forbidden from causing a nuisance by smell at the premises known as...' and say instead something like 'is forbidden from frying fish and chips at the premises known as the Golden Cod unless the following regulations are complied with: (a) an extractor hood is switched on at all times, etc.'
- A mandatory order should state the time within which the act is to be done. A reasonable time needs to be given. For instance demolition of a building may need some form of official permission or compliance with regulations and cannot be done overnight. The relevant time needs to be considered in argument with the advocates.

9.24 Freezing orders

Effectively the jurisdiction of the ordinary county court is limited to two situations:

- 1 preserving the subject matter of the action; and
- 2 freezing assets in support of a judgment (which can include an order for costs which have not yet been assessed).

It is not thought that situation 1 will raise any particular problems, other than perhaps in some business cases the adequacy of the undertaking in damages.

The practice under situation 2, which evolved in a series of cases from the mid 1970s, many of them in the Commercial Court or the Court of Appeal, is strict and complex. It is a matter of great seriousness on both sides. The making of an order is a grave infringement of the respondent's personal freedom; the refusal to make such an order may deprive an applicant of the fruits of his judgment. Unless the application is made immediately at the close of the hearing it is (for obvious reasons) usually made in the first instance without any form of notice. It is a particularly important example of the need for full and candid disclosure. Most advocates who apply for these orders know what is required and take great care in preparation of the papers. (It is a good example of the type of case where, as it is known that the court will scrutinise everything closely, great care is usually taken.) Standard forms of order are annexed to PD 25 and should be studied and followed closely.

The practice ought to be that the papers, including the draft order, are delivered to the court in sufficient time for the judge to study them properly before the hearing. If this has not been done then the judge should seriously considering adjourning until he has been able to look at the papers properly (see *Memory Corporation v Sidhu* [2000] 1 WLR 1443, judgment of Mummery LJ at 1459). This kind of order should in no circumstances be made 'on the nod'.

9.25 Specialist statutory jurisdiction

In the main, the general principles set out in this section apply to these cases as well, but there are some detailed differences and particular requirements. The following guidance relates to domestic violence. The guidance relating to housing injunctions is contained in paragraphs 9.54 *et seq.*

9.25.1 Part IV Family Law Act 1996

Part IV of the Family Law Act 1996 came into force on 1 October 1997 following the recommendations of the Law Commission's Report, *Domestic Violence and Occupation of the Family Home*, Law Com. No. 207 (HMSO 1992). It replaced the then existing legislation in relation to personal protection orders and broadened the scope and powers of the court.

9.25.2 Who may apply?

Orders may be made between persons who are 'associated'. This term is defined in s.62 of the 1996 Act and will include cohabitants and former cohabitants, same-sex couples and relatives. The definition does not include, 'boyfriend and girlfriend'.

9.25.3 The relief available

Under Pt IV Family Law Act 1996 the court may make non-molestation orders between associated persons, restraining the use and threatened use of violence, intimidation, pestering, harassment, or other specified forms of molestation. There is also power to make orders relating to the occupation of a home that is, was, or was intended to be a home shared by the

associated person. Occupation orders, as they are known, may exclude one party from the share home, and its immediate vicinity. There is provision for the attachment of a power of arrest to both non-molestation and occupation orders.

9.25.4 What is molestation?

There is no guidance in Pt IV, nor any statutory definition, as to what amounts to molestation. It is suggested that a wide definition is appropriate, in line with that adopted by the Law Commission in its report, *Domestic Violence and Occupation of the Family Home* (Law Com. No. 207), the recommendations of which report resulted in Pt IV:

‘Domestic violence can take many forms In its narrower meaning it describes the use or threat of physical force against a victim in the form of assault or battery. But in the context of the family, there is also a wider meaning which extends to abuse beyond the more typical instances of physical assaults, to include any form of physical, sexual or psychological molestation or harassment which has a serious detrimental effect upon the health and wellbeing of the victim, albeit that there is no “violence” involved in the sense of physical force. Examples of such “non-violent” harassment or molestation cover a very wide range of behaviour.

‘Common instances include persistent pestering and intimidation through shouting, denigration, threats or arguments, nuisance telephone calls, damaging property, following the applicant about and repeatedly calling her at her home or place of workThe degree of severity of such behaviour depends less upon its intrinsic nature that upon it being part of a pattern and upon its effect upon the victim....’

9.25.5 The exercise of the court’s discretion

In deciding whether or not to make a non-molestation order, s.42(5) requires the court to look at all the circumstances, including the health, safety and well-being of the applicant and any relevant child. ‘Health’ includes mental as well as physical health (s.63(1)):

‘It must always be emphasized that, whatever the causes of domestic violence, the law should be concerned with its consequences and in particular the need to supply adequate protection for its victims. The law should also provide an affirmation that victims do not have to put up with violence, whatever the reason for its occurrence in the particular case ...’ (Law Com. No. 207)

9.25.6 Specific non-molestation orders

Section 42(6) provides that a non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both. The terminology of the specimen orders contained on the ‘tick box’ form of specimen orders is such that on the face of it, it is not possible to make an order to exclude the respondent from a property other than the shared home. In theory this would mean that a significant number of applicants would be denied the protection of an ‘ouster’ order, that was available to them before Pt IV Family Law Act 1996 was enacted. In practice, the problem should be addressed by making a non-

molestation order that specifically prohibits the respondent from intimidating, harassing or pestering the applicant by, for example, going to his new home and/or place of work.

9.25.7 Duration of orders

‘Fixed time limits are inevitably arbitrary and can restrict the court’s ability to react flexibly to problems arising within the family. In particular, it is important that non-molestation orders should continue to be capable of enduring beyond the end of a relationship, although in some cases, short-term relief will be all that is necessary or desirableAccordingly, we recommend that non-molestation orders should be capable of being made for any specified period or until further order...’ (Law Com. No. 207).

Section 42(7) provides that a non-molestation order may be made for a specified period or until further order. In practice, orders are usually made for a maximum of six months in the first instance. Open-ended orders should be made only in very exceptional or unusual circumstances (*M v W (Non-Molestation Order: Duration)* [2000] 1 FLR 107).

Different considerations apply to occupation orders and the length of time for which an order may be made will depend upon under which section the application is made. In practice, applications for occupation orders are comparatively rare.

9.25.8 Power of arrest

Section 47(2) makes it mandatory to attach a power of arrest to an order made on notice if:

‘it appears to the court that the respondent has used or threatened violence against the applicant or a relevant child...unless the court is satisfied that in all the circumstances of the case the applicant or child will be adequately protected without ...’

The presumption in favour of a power of arrest responds to a need voiced in evidence to the House of Lords in the Committee stage of the Family Homes and Domestic Violence Bill for victims of violence to have the protection afforded by an order with a power of arrest attached: ‘We were impressed by the weight of informed opinion supporting this... There are a number of advantages in this. A power of arrest is seen as a simple, immediate and inexpensive means of enforcement which underlines the seriousness of the breach to the offending party. It was felt that threatened violence should be included because it is wrong in principle that women and children should have to wait to be injured before the law can offer protection ...’ (Law Com. No. 207).

There is a discretion to attach a power of arrest to an order made without notice. Section 47(3) provides that the court may attach a power of arrest if it appears that the respondent has used or threatened violence to the applicant or a relevant child, and there is a risk of significant harm to the applicant or child, attributable to the respondent’s conduct, if a power of arrest is not attached immediately.

The discretion that applies under s.47(3) to attach a power of arrest for a shorter period than the substantive order when that order is one made without notice, applies equally to orders that are made on notice (see *Re B-J (a child) (non-molestation order: power of arrest)*).

A power of arrest should generally be attached only to that part of the order that restrains the use and threat of violence. A power of arrest should not be attached to unspecified acts of molestation. (*Hale v Tanner* [2000]2 FLR 879).

9.25.9 Undertakings

Before Pt IV Family Law Act 1996 came into force, most applications for personal protection injunctions were disposed of by way of undertaking. Part IV seeks to restrict the acceptance of undertakings by the court. Section 46 provides that the court must not accept an undertaking unless it is a case in which, if it were making an order, it would not attach a power of arrest. In other words, a case in which the court was satisfied that the applicant would be adequately protected without a power of arrest even though violence had been used or threatened. A power of arrest cannot be attached to an undertaking.

9.25.10 Applications without notice

Section 45 gives the court power to make a non-molestation order or occupation order without notice to the respondent in any case in which the court considers it just and convenient to do so. Where an application is made without notice, the affidavit in support must set out the reasons for asking for an order to be made without giving the respondent an opportunity to be heard. The affidavit should also address the criteria to be applied by the court, namely, all the circumstances, including:

- 1 any risk of significant harm to the applicant or a relevant child attributable to the conduct of the respondent if an order is not made immediately
- 2 the likelihood of an applicant being deterred from pursuing the application if an order is not made immediately and
3. whether there is reason to believe that the respondent is evading service and the delay in effective service by alternative means will cause serious prejudice to the applicant or a relevant child.

If it is felt inappropriate to make an order without notice to the respondent, but the matter appears urgent, an alternative is to abridge time for service so that a hearing on notice can take place within a shorter space of time than the requirement for two clear days' would otherwise permit.

Whilst it is common in practice for non-molestation orders to be made without notice, to make an occupation order requiring the respondent to leave the shared home, or in any other way restricting his use or occupation of the home without him having an opportunity to be heard will be most unusual. The circumstances would have to be very extreme indeed for a draconian order of this nature to be made without notice.

A non-molestation order made without notice can be made for as long as the order would have been made had it been made on notice, usually six months, or it can be expressed to last until a date shortly after the return date. Practice varies. The advantage of making the order last for, say six months, at the outset, is that if as is usually the case the order is not opposed, the cost of serving a second order personally on the respondent is avoided. If an order made without notice is made for a short period only, it should last long enough to cater for any difficulties encountered in serving the order on the respondent so as to ensure continued protection for the applicant.

Enforcement of orders under Pt IV Family Law Act 1996 are discussed in the following two paragraphs.

9.25.11 Enforcement by power of arrest

Where there has been an arrest pursuant to a power of arrest the respondent must be brought to a court of the same level that made the order within 24 hours of the arrest. Only Sundays, Christmas Day and Good Friday are excluded from the reckoning. If the respondent is not brought to court within the required timescale, or there has not been personal service of the order before the alleged breaches, the court has no power to deal with a committal pursuant to the power of arrest.

9.25.12 Application for warrant of arrest

An application for a warrant of arrest may be made at any time after the respondent has been served with a relevant order if the applicant considers that the respondent has breached the order or part of it, provided that a power of arrest was not attached to the order or to the part of it that the applicant considers that the respondent has breached. Application is made without notice to the respondent to the same level of court on Form FL407 detailing the terms of the order alleged to have been breached and how it is said the respondent is in breach. An affidavit in support must be filed.

9.25.13 Committal for contempt of court in molestation, etc. cases

Breach of a non-molestation and/or occupation order, or an undertaking, is a contempt of court and can be dealt with by committal proceedings brought under CPR 1998 Sch. 1 RSC Ord. 52 or Sch. 2 CCR 029. This procedure will only be followed:

- where an undertaking has been broken
- where a power of arrest was attached to the term of the order breached but the police decline to exercise the power of arrest
- where a power of arrest was attached to the term of the order breached but the respondent was either not brought before the court within 24 hours of his arrest or not brought back to court following an adjournment within the 14 days specified in r3.9A(4)(b)(I) of the Family Proceedings (Amendment No 3) Rules 1997

- where there was no power of arrest attached to the term of the order breached and the court declined to issue a warrant of arrest.

Application is made on notice to the respondent to show cause why he should not be committed. The notice must list the breaches alleged and there must be a witness statement in support.

9.25.14 The committal hearing

Whether the respondent is arrested and brought to court under a power of arrest, pursuant to a warrant of arrest or following issue of an application to show cause, the procedure at the committal hearing is the same.

In the county court, any judge apart from a deputy district judge may deal with the alleged breach of an order made under Pt IV.

The hearing is an open court.

The applicant and his solicitor should be present at the hearing, and the respondent should have the opportunity of legal representation. If the respondent is not legally represented consideration should be given to adjourning the proceedings to enable the respondent to instruct a solicitor. The court will be mindful that if the breaches are proved, the respondent may be deprived of his liberty.

At the first hearing the following courses are open to the court:

- to determine after hearing evidence/admissions whether the order has been breached and to decide upon the appropriate penalty. This course is only likely if the respondent is legally represented
- to adjourn the hearing to another date and remand the respondent in custody for a maximum of eight days. If the remand is for more than three days arrangements will have to be made for the respondent to be escorted to prison, otherwise the respondent may be detained in custody at the police station. The court will issue a remand order in Form FL409
- to adjourn the hearing to another date and remand the respondent on bail. There is power to order sureties/recognisances but this is usually impractical. There is no power to attach conditions to bail. The court will issue a remand order in Form FL409 and a bail notice in Form FL412
- to release the respondent and adjourn the hearing to a date no more than 14 days from the date of the arrest. The respondent must be given at least two clear days' notice of the adjourned hearing date.

When it is possible to deal with the alleged breach of the order, either immediately following arrest or at an adjourned hearing, the procedure is as follows:

- 1 You will need to be satisfied that the court had the jurisdiction to make the order in the first place, that it was served on the respondent before the alleged breach, and that the arrest was lawful. For example, the arrest will be unlawful if made pursuant to a power of arrest that was not attached to the part of the order that it is alleged that the respondent has breached.
- 2 You will need to know the detail of each of the breaches alleged, and be sure that the respondent understands them.
- 3 After the hearing evidence and/or admissions, you will record your finding in respect of each breach alleged and give reasons. The standard of proof is the criminal standard, i.e. you must be sure (*Dean v Dean* [1987] 1 FLR 517).
- 4 You must give a punishment for each breach proved, having given the respondent's advocate an opportunity to address you on any mitigating factors. A separate penalty should be imposed for each breach proved, and these can be expressed to be concurrent or consecutive. The maximum penalty is imprisonment for a term not exceeding two years and/or a fine not exceeding £2,500.

9.25.15 Sentencing for contempt

The options are as follows:

- 1 an immediate prison sentence of up to 2 years
- 2 a new restraining order coupled with a custodial sentence suspended on strict compliance with the new order until it expires
- 3 a new restraining order coupled with an adjournment of sentence until the expiry of the new order with permission to the applicant to restore for sentence to be imposed before then and in the absence of an application to restore the respondent to be relieved of his liability to be punished for the breach
- 4 a fine, on its own or in conjunction with option 1 or 2 above. In practice a fine is an unlikely punishment as most respondents will be without the means to pay;
- 5 a stern warning, but no penalty.

The sentence should reflect the frequency and severity of the breach, whether the respondent is an habitual offender against court orders, and personal circumstances.

A first offender need not consider that he will not be imprisoned. There has been a move away from the tacit acceptance of 'one free strike'. In *Wilson v Webster* [1998] 1 FLR 1097, on the applicant's appeal, the Court of Appeal substituted a sentence of three months' imprisonment for that of 14 days imposed by the court below. The respondent had broken an undertaking within one month of giving it by attacking the applicant in the street, knocking her to the ground and punching her in the face.

Similarly in *Neil v Ryan* [1998] 2 FLR 1069 the Court of Appeal allowed an appeal by an applicant against a suspended sentence for the first breach of a non-molestation order:

'When all is said and done, here was a woman in her own home, the victim of a serious attack when she, not unreasonably, would have believed that the court's order had given her a measure of protection from violence. If this sort of attack is not met by an immediate committal to prison, the likely message will be that the first attack in breach of an order of the court in effect will attract no immediate consequences... if that were the message then the protection which the court order is meant to provide would be illusory. The whole point of the order is that it should bite immediately, and that the person in serious breach of it should understand that there will be immediate punishment.'

However, in *Hale v Tanner* [2000] 2 FLR 879 Hale LJ took the opportunity to give some guidance as to sentencing practice for breaches or orders in family cases. In that case she emphasised that the approach would be quite different from any other type of case, because of the 'heightened emotional tensions that arise between family members and often the need for those family members to continue to be in contact with one another because they have children together.' The judgment of Hale LJ also sets out the various factors that the court should take into account when sentencing for contempt for breach of a non-molestation order. These include:

- if imprisonment was appropriate, the length of the committal should be considered without reference to whether or not the committal was to be suspended
- the length of the committal depended on the two objectives in committal proceedings marking the court's disapproval of disobedience to its orders and securing future compliance
- the length had to bear some relationship to the maximum of two years
- suspension was available in a much wider range of circumstances than in the criminal justice system
- the length of any suspension required a separate consideration although it would often be linked to continued compliance with the underlying order
- the context in which the breach had occurred had to be borne in mind, for example the emotions involved in family break ups

- in many cases the court would have to bear in mind that there were concurrent proceedings in another court based on the same or substantially the same facts. The court could not ignore those proceedings and might have to take their outcome into account. A court would not want to cause a contemnor to suffer punishment twice
- it would usually be desirable for a court to explain why it was making the order it was making.

9.25.16 Protection from Harassment Act 1997

By creating a statutory tort of harassment the Protection from Harassment Act 1997 creates civil (and criminal) remedies to protect individuals from 'stalking' which can cover a wide range of anti-social behaviour. There is no requirement for parties to be associated, unlike Pt IV Family Law Act 1996, nor even for any relationship to exist between them.

9.25.17 Prohibition of harassment

Section 1 of the 1997 Act prohibits harassment and provides that a person must not pursue a course of conduct:

- 1 which amounts to harassment of another, and
- 2 which he knows or ought to know amounts to harassment of the other. It amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other, i.e. it is an objective test.

Section 3 provides for a cause of action in damages for an actual or apprehended breach of s.1. Damages may be awarded for anxiety caused by the harassment and financial loss resulting from the harassment.

The right to apply for an injunction to restrain harassment is not mentioned in the 1997 Act, but the court's inherent jurisdiction to grant an injunction is not affected (see **Power to grant an injunction**, above).