

Your World First

C/M/S/

Law . Tax

Injunctions blog

Review of 2017





Injunctions blog

Review of 2017

2017 has been another busy year for the Courts in considering injunction applications. In this post we look back at some of the most important decisions of the year.

In particular, we consider:

- The use of injunctions regarding threatened strikes by employees
- Recent issues arising from freezing orders
- The Court of Appeal comments on the “notification injunction”
- FRAND injunctions
- Prison sentences for breaching injunctions
- The use of injunctions to protect legal privilege
- Anti-suit injunctions against affiliated companies

The use of injunctions regarding threatened strikes by employees

1. *Govia GTR Railway Limited v The Associated Society of Locomotive Engineers and Firemen*

In [*Govia GTR Railway Limited v The Associated Society of Locomotive Engineers and Firemen*](#), the Court of Appeal (CA) upheld the High Court's decision to reject an application by GTR, the owners of the franchise running Southern Rail, for an interlocutory injunction to prevent ASLEF, the train driver's union, from calling strike action for a number of days in December 2016 and January 2017. In dismissing the appeal, the CA rejected GTR's arguments that the strikes would be in breach of EU law and confirmed the limited application that EU law would have in cases of industrial strike action.

2. *Thomas Cook Airlines Ltd v British Airline Pilots Association*

In [*Thomas Cook Airlines Ltd v British Airline Pilots Association*](#) the court refused to grant an interim injunction preventing strike action by a trade union.

The British Airline Pilots Association (BALPA) were in a dispute with Thomas Cook Airlines Ltd (Thomas Cook) over the pay and conditions of the pilots it employed. BALPA union members were asked to vote on a ballot paper containing the words: *"It is proposed to take discontinuous industrial action in the form of strike action on dates to be announced over the period from 8 September 2017 to 18 February 2018"*. Union members voted in favour of strike action and Thomas Cook applied for an injunction arguing that the ballot was defective as BALPA had not set out specific dates on which it expected to take strike action. BALPA argued it would be impractical to provide specific dates as such dates depended on factors including the progress of negotiations and the number of votes in favour of the ballot.

The judge found that the ballot question was not unlawful. The court recognised industrial action was contingent both on factors which are not known prior to the ballot papers being sent out to members and other variables outside the control of the defendant which meant setting specific dates was not practical.

Recent issues arising from freezing orders

3. *Frederic Marino v FM Capital Partners Ltd*

In *Frederic Marino v FM Capital Partners Ltd*, the Court of Appeal upheld a decision not to vary a proprietary freezing order to allow the defendant recourse to proprietary assets in order to meet his living and legal expenses. The case can be viewed as a restatement of the principle that the subject of a freezing order who is requesting a variation on the basis that he would otherwise be unable to pay his living and legal expenses must satisfy the court that the other assets he owns cannot be used to fund his expenses.

4. *Brainbox Digital Ltd v Backboard Media GmbH & Another*

In *Brainbox Digital Ltd v Backboard Media GmbH and another*, the court considered whether a freezing injunction obtained by the claimant should be continued and, if so, whether further fortification of the cross undertaking in damages was required.

The court confirmed that a party must show a good arguable case that further fortification is required. The judge underlined the court's wide discretion as to the conditions on which it may grant or continue an injunction. Noting that judicial discretions should not be fettered by rigid rules. The question of the extent of the cross-undertaking remains a matter of discretion for the judge who grants the injunction: see *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, per Lewison LJ at [68]-[69], [73].

The judge concluded the defendants had not shown that there was a good arguable case that there was a sufficient risk that the loss which they would suffer, as a result of the injunction if wrongly granted would exceed £125,000. Therefore, the judge held that requiring Brainbox to provide further fortification would be disproportionate in the circumstances.

5. *Barclay Pharmaceuticals Ltd v (1) Antoine Mekni (2) Martine Mekni (3) Dorian Mekni (4) Anice Mekni (5) Xiaohui Wang*

In *Barclay Pharmaceuticals Ltd v (1) Antoine Mekni (2) Martine Mekni (3) Dorian Mekni (4) Anice Mekni (5) Xiaohui Wang* (unreported) [2017] the Claimant obtained judgment against D1 for over £15 million as a result of a fraud. Post judgment, the Claimant obtained a freezing order over D1's assets and also joined various members of D1's family who were said to be holding D1's assets as nominees. Under the terms of the freezing order, D1 was entitled to spend a reasonable sum on legal representation.

D1 had failed to make interim payments and failed to give full disclosure of assets. He had also failed to disclose the source of funding for his ongoing legal representation. The Claimant applied for an order requiring D1 to disclose the source of his legal funding. The court considered whether it would be just and convenient to make the order to ensure that the injunction was effective.

The Court noted that D1 was a proven fraudster who had failed to pay anything towards the judgment debt and failed to disclose his assets. It would be easy for D1 to disclose the source of his legal funding and would cause D1 no prejudice. It was arguable that legal costs were being paid from assets that would be subject to the freezing order (and which had not yet been disclosed) and so the Court ordered D1 to disclose the source of funding.

The Court of Appeal comments on the “notification injunction”

6. *Candy and others v Holyoake and another*

In [Candy and others v Holyoake and another](#), the Court of Appeal ruled that a wide-ranging “notification injunction” granted by the High Court last year was not a distinct type of injunction. It was, in effect, a modified version of a freezing order, and the same test of risk of dissipation of assets applied as for a conventional freezing order. However, Lady Justice Gloster accepted that the position might well be different in relation to a simple order requiring notice to be given of a proposed disposition of a specific property.

At a hearing on 7 and 8 April 2016 (previously reported on the blog [here](#)), Mr Justice Nugee granted Mr Holyoake a notification injunction restraining CPC and the Candy brothers from disposing, dealing or otherwise engaging on transactions with their assets worth more than £1 million without first giving Mr Holyoake’s solicitors seven days’ notice in writing.

At a subsequent hearing, CPC and the Candy brothers produced evidence that the notification regime was causing them real practical difficulties in running their business, not least that adhering to the regime had already cost them an estimated £250,000 in legal fees. On the basis of that evidence, a number of changes were made to the regime; most notably the threshold for notification was raised to £5 million and those transactions made in the ordinary course of business were excluded.

The Candy brothers and CPC appealed the notification injunction.

On the particular facts of this case, Gloster LJ held that there was no real risk of dissipation and the balance of convenience was strongly against the grant of the notification injunction. On that basis the appeal was allowed.

FRAND injunctions

7. *Unwired Planet v Huawei*

In [*Unwired Planet v Huawei*](#) Mr Justice Birss created a new type of injunction – the FRAND injunction.

This case forms part of a long-running dispute between Unwired Planet and Huawei relating to the determination of FRAND (Fair, Reasonable and Non-Discriminatory) licensing terms for a portfolio of standard essential (SEPs) telecoms patents.

In April 2017, Mr Justice Birss handed down the main FRAND judgement in this dispute, in which he determined, for the first time by a UK Court, the FRAND royalty rate and terms of a licence between the parties (the Settled Licence). In the April judgment Birss J also found that, in principle, an injunction ought to be granted to prevent Huawei from infringing the two standard essential patents that were found valid and infringed. As at the date of the April decision Huawei was willing to enter into a UK portfolio licence, but refused to enter into a worldwide licence. The Court found that a worldwide, and not UK, licence is FRAND, and therefore Huawei was unlicensed, yet had the means to become licensed open to it. However, the grant of an injunction was stood over for consideration at this later hearing.

Birss J considered the correct form that a final injunction should take in respect of patents subject to a FRAND undertaking when the court has settled a FRAND licence but the defendant has not entered into it.

Birss J recognised that a standard form of injunction would not be appropriate in the context. In addition to the issue raised regarding re-negotiation, he noted that if, for example, a dispute arose about an alleged repudiatory breach of the Settled Licence Huawei could find itself in contempt of Court if it continued to sell products during a period where there was an argument that the licence had terminated.

With an eye to these issues, the “FRAND injunction” was created.

The FRAND injunction is essentially a normal injunction to restrain infringement of the relevant patents, with two added features. Firstly, the injunction will cease to have effect if the defendant enters into that FRAND licence. Secondly, if the licence term is shorter than the life of the relevant patent(s) the injunction is subject to an express liberty to either party to return to court in the future to address the position at the end of the term. In any event, the injunction should be subject to an express liberty to apply in the event the FRAND licence ceases to have effect.

Prison sentences for breaching injunctions

8. *Kimyani and others v Sandhu*

Ms Sandhu had committed repeated breaches of a disclosure order obtained as part of a freezing injunction. She had the chance to redeem herself by finally providing an “accurate and frank account of events”, but intentionally failed to do so. Newey J emphasised that deliberate breaches of freezing orders are very serious, and therefore the case required an immediate custodial sentence. He sentenced M. Sandhu to 12 months in prison.

9. *OCS Group v Dadi*

The respondent, a former employee of the claimant, had breached an interim injunction aimed at preserving evidence pending trial. Despite being served with an order containing a penal notice, Mr Dadi committed four breaches of the order. Mr Dadi twice breached the confidentiality provision, deleted emails from his phone and, most seriously, deleted 8,000 emails from his online webmail account.

Recognising that imprisonment is “always a punishment of last resort”, the High Court nevertheless concluded that imprisonment was warranted to mark the court’s “strong disapproval” of Mr Dadi’s conduct, and to act as a “warning to others” tempted to “flout” the court’s orders. Although prison sentences are unusual in the case of employment disputes, the serious consequences of Mr Dadi’s actions resulted in his being sentenced to six weeks imprisonment (the minimum term) for each of the four breaches, to run concurrently.

10. *A v B*

Mr H had been found in contempt of court for failure to make disclosures required by a freezing order and sentenced to 18 months in prison. The sentencing judge had advised Mr H that if he complied with the disclosure requirements there would be substantial remission. Since then, Mr H had fully complied with the disclosure order, the proceedings had ended and the arbitration award and costs had been settled in full.

Knowles J held that the information that Mr H had no assets was useful and should have been disclosed. However the court was satisfied Mr H’s conduct did not involve a conscious or tactical plan not to comply with the freezing order. The language barrier and lack of communication prevented Mr. H from being able to understand what was required of him after the committal hearing. It was clear that key communications had not reached him, or not in translated form. Between the two court dates, Mr H fully complied with the disclosure obligations imposed on him and he gained no advantage by the non-disclosure. The court considered the sanction of prison unnecessary. Mr H’s contempt was purged.

11. *All England Lawn Tennis Club (Championship) Ltd v Miller*

In *All England Lawn Tennis Club (Championship) Ltd v Miller* [2017] (unreported) a Wimbledon ticket tout was given a suspended sentence of four months’ imprisonment for failing to comply with an order which required him to provide information regarding the ticket touting transactions he was involved in.



The use of injunctions to protect legal privilege

12. *Lachaux v Independent Print Ltd*

In [*Lachaux v Independent Print Limited*](#), the Court of Appeal upheld an injunction granted against a defendant publisher to stop it from using privileged information that had been provided to the publisher in breach of confidence.

13. *Western Avenue Properties Ltd v (1) Soni (2) Denning Sotomayor Ltd*

In [*Western Avenue Properties Ltd & another v \(1\) Sadhanh Soni \(2\) Denning Sotomayor Ltd*](#) the claimants were granted an injunction to prevent their former in-house lawyer from acting for another party who had an interest adverse to the claimants in order to avoid the risk that confidential information might be used to the claimants' disadvantage.

14. *S v S*

The case of [*S v S \(Application to Prevent Solicitor Acting\)*](#) concerned an application for an injunction to prevent a solicitor from acting for a wife in divorce proceedings when the solicitor had previously met with the agent of the husband as part of a beauty parade. The High Court rejected the application for an injunction on the facts of this particular case.



Anti-suit injunctions and affiliated companies

15. *Dell Emerging Markets (EMEA) Ltd v IB Maroc.com SA*

In [*Dell Emerging Markets \(EMEA\) Ltd and another v IB Maroc.com SA*](#), the High Court granted an anti-suit injunction preventing the defendant from pursuing foreign proceedings against an affiliated company of the first claimant. This case confirmed the broad availability of the use of the English anti-suit injunction which, in some cases, will be capable of extending to restrain foreign proceedings against affiliated companies – even where they are not a party to a contract.

16. *Team Y & R Holdings Hong Kong Ltd v Ghossoub & Others*

In [*Team Y & R Holdings Hong Kong Ltd and others v Ghossoub and Cavendish Square Holding BV and another v Ghossoub*](#) the English Court heard an application for an anti-suit injunction that would have restrained the defendant from pursuing unfair prejudice proceedings in Hong Kong against (i) two companies that had signed contracts including exclusive jurisdiction clauses in favour of the English Court and (ii) related companies within the same group (that had not signed up to the contracts containing English exclusive jurisdiction clauses).

The English Court decided not to grant an anti-suit injunction where a group company (not subject to a contractual exclusive jurisdiction clause) was also a party to foreign proceedings. It comes shortly after the decision in *Dell Emerging Markets (EMEA) Ltd v IB maroc.com* [2017] where the High Court was prepared to grant an anti-suit injunction against a group company that was not itself subject to an exclusive jurisdiction clause. This decision shows that the court's assessment will be highly fact specific. In the present case, a key factor was the fact the Defendant was pursuing an unfair prejudice action in Hong Kong which was a claim that could only be decided by the court of the relevant company's incorporation. Therefore, on balance, issues should be allowed to be determined in the round before the Hong Kong court regardless of contractual jurisdiction clauses.





Law . Tax

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

cms-lawnow.com



Law . Tax

Your expert legal publications online.

In-depth international legal research and insights that can be personalised.

eguides.cmslegal.com

CMS Cameron McKenna Nabarro Olswang LLP
Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Cameron McKenna Nabarro Olswang LLP is a limited liability partnership registered in England and Wales with registration number OC310335. It is a body corporate which uses the word "partner" to refer to a member, or an employee or consultant with equivalent standing and qualifications. It is authorised and regulated by the Solicitors Regulation Authority of England and Wales with SRA number 423370 and by the Law Society of Scotland with registered number 47313. It is able to provide international legal services to clients utilising, where appropriate, the services of its associated international offices. The associated international offices of CMS Cameron McKenna Nabarro Olswang LLP are separate and distinct from it. A list of members and their professional qualifications is open to inspection at the registered office, Cannon Place, 78 Cannon Street, London EC4N 6AF. Members are either solicitors or registered foreign lawyers. VAT registration number: 974 899 925. Further information about the firm can be found at cms.law

© CMS Cameron McKenna Nabarro Olswang LLP

CMS Cameron McKenna Nabarro Olswang LLP is a member of CMS Legal Services EEIG (CMS EEIG), a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices. Further information can be found at cms.law