**Interim injunctions**

This element covers prohibitory and mandatory injunctions, the *American* *Cyanamid* guidelines and undertakings.

**Civil procedure rules**

The main CPR which support the content of this element are:

- CPR 25.1 to 25.4 (in relation to interim remedies)

- 25A PD 1-5.5 (in relation to interim injunctions)

**What is the purpose of an interim injunction?**

**Key definitions**

An **injunction** is an order of the court requiring a party to do or to refrain from doing a given act. Breach of an injunction is potentially punishable **as contempt of court**, so breach can result in a fine and/or imprisonment.

An **interim injunction** is a temporary measure taken at an early stage in the proceedings (including pre-action) before trial and before any final decision on the merits of either party’s case to restrain the respondent from causing irreparable or immeasurable damage to the applicant by continuing conduct or ceasing conduct that has led to the dispute. It is usually made in circumstances of urgency and lasts until trial or further order.

A **perpetual injunction** is a final injunction (usually made at trial) that continues with no limitation of time. These are not covered in this element.

**Types of interim injunction**

Prohibitory injunction: **Requires the respondent to refrain from doing an act** eg An employer has brought a claim against an employee for breaching a confidentiality clause in an employment contract. The employer obtains an interim prohibitory injunction preventing specified uses of information pending trial.

Mandatory injunction : **Requires the respondent to do a specific act** eg In a claim alleging that a supplier of computer software failed to deliver up software at the end of the parties' relationship, the claimant obtains an interim mandatory injunction requiring the software to be delivered up pending trial.

Quia timet injunctions: **Allow both prohibitory and mandatory injunctions where a wrong has been threatened but not yet committed** eg In a claim alleging that the threatened closure of a bank account would be a breach of statutory duty, the customer obtains an interim mandatory injunction requiring the bank to keep the account open

**Evidence required - American Cyanamid guidelines / just and convenient**

An injunction may be granted where it is **just and convenient** (s.37 of the Senior Courts Act 1981). In *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, Lord Diplock laid down guidelines, now known as the 'American Cyanamid guidelines', on how the court should exercise its discretion to grant an interim injunction. These following summary will be considered in more detail in the following pages.

Step 1: Is there a serious question to be tried?

Step 2: Would damages be an adequate remedy for a party injured by the court’s grant of, or failure to grant, an injunction?

- Damages for the applicant?

- Damages for the respondent?

Step 3: Where does the balance of convenience lie?

Equitable and discretionary remedy

**Step 1: is there a serious question to be tried?**

An injunction is not a cause of action - it is a remedy. Therefore, an applicant cannot sue for an injunction. The applicant must have a pre-existing cause of action.

The court must be satisfied that this is not "frivolous or vexatious” and that “there is a serious question to be tried”. In many cases, this is not a difficult hurdle to surmount. However, if this test cannot be met, the injunction will generally be refused (and the court will not go on to consider steps 2 and 3).

**Step 2: would damages be an adequate remedy for a party injured by the court’s grant of, or failure to grant, an injunction?**

When considering the adequacy of damages, the court will firstly consider the issue from the applicant’s perspective and, depending on the outcome of this analysis, the court might then go on to consider the same issue from the respondent’s perspective:

**Step 2(a) – applicant's perspective** - the court will generally refuse an injunction if the applicant could be adequately compensated by damages for any loss caused by the refusal to grant an interim injunction. However, damages may be inadequate if the respondent has not means of paying them or the harm being caused is irreparable, cannot be quantified, or is serious and likely to continue.

**Step 2(b) – respondent's perspective** – if an injunction is granted, the respondent is going to be prevented from doing something, or required to do something, until trial – but it might transpire that the injunction should never have been granted, most likely if the applicant fails at trial. The court will ask itself whether the respondent could be adequately compensated by the applicant if it transpires that the injunction was wrongly granted. If so, then this suggests the injunction should be granted.

**Step 3: the balance of convenience**

**Step 3** – if it appears that damages would be adequate for neither party, then the court will consider a very broad range of factors to try to ascertain whether granting or not granting the injunction carries the lesser risk of injustice ie to ascertain where the 'balance of convenience' lies.

**Equitable and discretionary**

The guidelines just stated should be considered in the context of an injunction being an **equitable remedy**, so equitable principles apply, including that;

- An injunction will not be obtained when it would serve **no practical purpose**;

- The court might refuse to grant an injunction if the applicant has not come to court with **'clean hands'**

- Excessive **delay** may lead to a refusal of the application.

An injunction is also a **discretionary remedy**: there is no automatic right to an injunction just because all the ‘guidelines’ that follow in this element have been met.

An application for an interim injunction must be supported by **written evidence** setting out the facts to justify the relief sought (CPR 25.3(2)), keeping in mind the guidelines and considerations set out above. In addition, if the application is made without notice, the evidence must **state the reason why notice has not been given** (CPR 25.3).

**Procedure**

An application for an interim injunction is an interim application so the starting point is that the procedure is the same as any for any other interim application (see the element relating to interim applications). However, because an interim injunction is a form of interim remedy (CPR 25.1(a)), and one with potentially very serious consequences, there are some additional procedural considerations.

- **Cross undertaking in damages**

- **Without notice safeguards**

- **Applications before a claim is issued**

These are explained in the following pages.

**Undertakings**

A court will often decide to grant an interim injunction only if the applicant offers an cross-undertaking to pay damages to the respondent for any loss sustained by reason of the injunction if it is subsequently held that the applicant ought not to have been granted an interim injunction - for example, if proceedings are discontinued, or the injunction is discharged before trial, or if it is decided at trial that the applicant had not been entitled to restrain the respondent from doing what it was threatening to do.

The cross-undertaking is made to the court. It is there for the protection of the respondent, but the court can also require (as a condition of granting the injunction) an undertaking to be given for the protection of any other person who may suffer loss because of the order (25A PD 5.1 and 5.2).

**Without notice safeguards**

The application for an interim injunction can, like any interim application, be made without notice if this is justified. If the application is made without notice and the injunction is granted, it will be granted initially for a limited period only and the court will fix **a second hearing called the 'return date'**. The respondent will be given notice of that hearing and the opportunity to attend it to make representations, and at that second hearing, the court can make the following orders:

- Maintain order (to keep the injunction in place until the trial of the substantive matter).

- Discharge the injunction vary the terms of the injunction.

- Enforce the applicant’s undertaking in damages if it transpires that the injunction should not have been granted.

- Accept an undertaking by the respondent not to do the acts in question, in place of the injunction.

In the case of a without notice application, the applicant must make **full and frank disclosure** of all matters of fact or law relevant to the application – including those which are or may be adverse to the applicant. This is required for any interim application made without notice, and its importance is particularly pronounced when something as important as an interim injunction is at stake.

The applicant’s legal representatives must prepare a **full note of the hearing as soon as possible and this should also be served on the respondent (and any other party affected by the order) without delay**. The full note of the hearing ensures the respondent knows what case they have to meet at the next, with notice, hearing.

**Applications before a claim is issued**

In cases of exceptional urgency, not only can a party apply for an interim injunction without notice but a party can apply before a claim form has even been issued.

The court will only grant an interim remedy before a claim has been issued if the matter is (CPR 25.2(2)(b)):

- Urgent; or

- It is otherwise desirable to do so in the interests of justice.

In these circumstances, the applicant must undertake to the court to issue a claim form immediately.

**Summary**

- An interim injunction requires a party to do (mandatory) or to refrain from (prohibitory) an act on a temporary basis, usually until trial.

- An injunction may be granted where it is just and convenient.

- An injunction is both an equitable and a discretionary remedy. The guidelines for the courts’ exercise of discretion are:

- Step 1: is there a serious question to be tried?

- Step 2: would damages be an adequate remedy for the applicant and can the respondent afford to pay? If not, would damages be an adequate remedy for the respondent if it later transpires the injunction was wrongly granted and can the applicant afford to pay?

- Step 3: where does the balance of convenience lie?

- A court will often refuse to order an interim injunction unless the applicant undertakes to pay damages to the respondent if it transpires the injunction should not have been awarded.