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The "Fake Sheikh" Saga and Lessons on Urgent Injunctive Relief for Corporates

Details

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On 12 November, the postponed BBC Panorama programme, "The Fake Sheikh Exposed", was finally broadcast after several rounds of legal-wrangling and last-minute Court appearances.

The programme shed light on the activities of the reporter, Mazher Mahmood, the so-called Fake Sheikh.

Getting the BBC expose to the television screen was not without difficulty.

Days before the documentary was due to be televised, Mazher Mahmood's lawyers applied for a [High Court injunction](#) to prevent details of their client's physical appearance and whereabouts being revealed.

Whilst the Court declined to grant an injunction in this instance, it serves as a useful illustration of the temporary legal remedies available where damage may be suffered imminently and time is not on your side.

Types of injunction

An injunction is a Court Order that requires a party either to do something (known as a mandatory injunction) or to refrain from doing something (known as a prohibitory injunction).

A freezing order is a form of injunction which restrains a party from disposing of or dealing with assets.

It is commonly sought to prevent the transfer of assets out of the jurisdiction rendering them untraceable.

It will normally only be granted where there is evidence of fraud and it requires a respondent to produce an affidavit of assets which can assist in locating assets to be frozen.

The sanction for disobeying an injunction is contempt of Court, the penalty for which can be committal to prison.

An injunction is either interim or final. A final or perpetual injunction is granted after proceedings have concluded.

The purpose of an interim injunction, on the other hand, is generally to preserve the status quo provisionally until the dispute has been resolved by trial or otherwise. An interim injunction can be obtained either at the start of proceedings or before they have even been issued.

This article focuses on interim injunctions required urgently, for example in circumstances where a business wishes to restrain infringement of a patent or trademark or to prevent trade secrets being leaked into the public domain.

Without notice applications

In cases of exceptional urgency, a without notice application (or ex parte application) can be made whereby the usual obligation to give notice to the respondent is dispensed with.

However, applications should not be made without notice unless there is good reason to do so, for example if there is a real risk that giving notice would undermine the whole purpose of the application.

Applicant's duties

The applicant is under a duty to make "full and frank disclosure". All material facts must be disclosed which includes drawing to the Court's attention evidence or arguments which could assist the respondent to the extent that the applicant is or should be aware of such issues.

The consequences of breaching this duty are severe; the Court may well discharge any injunction obtained even if it would have granted an injunction with full disclosure given.

Since an interim injunction is a provisional measure implemented before trial of the merits, an applicant is required to give an undertaking to pay the respondent damages if it turns out to be unsuccessful at trial and the respondent has suffered loss as a result.

This is often in the form of a bank guarantee.

With a freezing injunction if the respondent pays into Court an amount equal to that claimed by the applicant then it will normally obtain a discharge of the injunction.

If the Court grants the injunction, a date for a return hearing will be fixed to give the respondent an opportunity to argue why the injunction should be set aside.

Costs-benefit

The costs of preparing for and attending an urgent injunction application can be very significant and add substantially to the costs of litigation. In spite of this, in our experience the outcome of an interim application will often be determinative of the whole litigation.

Injunctive relief can therefore play an important role in securing the early resolution of disputes.

However, the Fake Sheikh episode also demonstrates that the Court does not grant urgent injunctions lightly. Despite arguing that the revelation of his identity was a threat to Mr Mahmood's personal safety, the Court was still not persuaded that an injunction would be appropriate.

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