

# Injunctions - An Overview

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**An injunction is an order of the court that requires a person to refrain from doing, or compelling them to do, a particular act. The aim of an injunction is to preserve the status quo between the parties from the time of the granting of the injunction to the full hearing of the issues in dispute between the parties.**

## Criteria Considered in Granting an Injunction?

The longstanding test for an injunction, as set out in *American Cyanamid Co. –v- Ethicon Limited* [1975] 1AER504 and followed in Ireland in the case of *Campus Oil v-v the Minister for Energy* [1983] 1 IR 88, is as follows;

1. there must be a serious/fair issue to be tried,
2. damages are not an adequate remedy, and
3. the balance of convenience lies in favour of granting or refusing the application.

The Supreme Court considered the test in the 2019 judgment, *Merck Sharp & Dohme Corporation v Clonmel Healthcare Ltd* [2019] IESC 65 and noted that the flexible nature of the remedy means that the elements of the test should not be considered as strict mechanical rules.

The Supreme Court set out its preference for the adequacy of damages limb of the test to be considered as part of the balance of convenience and not as a standalone anterior element of the test. This would prevent a situation whereby the court would not proceed to consider the balance of convenience if it had found that damages would be an adequate remedy. The court emphasised that the adequacy of damages should remain very relevant as to whether an injunction is granted, often the most important factor, but not necessarily conclusive. Instead, it forms part of the balancing exercise which the court must undertake when considering the balance of convenience.

In *Okunade v The Minister for Justice* [2012] IESC 49, the Supreme Court established that a party applying for a mandatory injunction (i.e. an order which requires the defendant to take some action before trial, rather than restraining the defendant from doing something) must demonstrate to the court that it

has a strong case that is likely to succeed at trial. This is a higher threshold than the “fair issue” test referred to above, which applies to prohibitory injunctions.

## Undertaking as to Damages

In most injunction applications the plaintiff will be required to provide an undertaking as to damages to the court. This undertaking means that the plaintiff agrees to compensate the defendant for losses suffered due to the injunction being granted if the case is determined against the plaintiff at the full trial of the matter. This has the effect of offering a measure of equal protection to the parties. In cases where the court is not satisfied that an undertaking of damages can be met, additional conditions may be imposed, including payment of funds into the court or an undertaking from another person or entity, e.g. a company with a controlling interest in a subsidiary company bringing the application.

## Types of Injunctions

### *Interim Injunctions*

In cases where there is extreme urgency, an application can be made for an interim injunction. This application is made ex-parte and an order will be made if the court considers that a plaintiff will suffer irreparable damage if the defendant proceeds with a particular action. It is usually only granted for a short period of time, for example, until a full hearing of the motion for interlocutory relief on notice to the other party.

### *Mareva Injunctions*

A mareva injunction is granted against a defendant by way of a court order which prevents him from removing or disposing of his assets below a specified level until a further court order or until the trial. It is often sought in cases where there is a concern that a defendant may dissipate or conceal assets to frustrate the enforcement of a judgment obtained against him. Given the onerous nature of such an order, the courts have imposed a high threshold that a plaintiff must reach to secure the order.



To be granted a mareva injunction the plaintiff must show to the court that:

1. they have a substantive right capable of being enforced against the defendant;
2. they have a good arguable case;
3. the defendant must have assets which are capable of being frozen;
4. evidence of a risk of dissipation by the defendant of the assets or removal of assets from the jurisdiction or otherwise dispose of them with the intention of defeating obligations to the plaintiff; and
5. the balance of convenience lies in favour of granting the injunction.

Consideration will also be given by the court to the conduct of the defendant. A risk of dissipation so as to warrant a mareva injunction may be inferred from all the circumstances including failure to repay money due and failure to respond satisfactorily to inquiries. A mareva injunction can be granted either pre-judgment or post-judgment and it can be extended pursuant to Order 15 Rule 13 Rules of the Superior Courts to cover additional parties with access to the assets frozen or to be frozen, and to restrain them from dealing with such assets.

A mareva injunction is often accompanied by ancillary disclosure orders requiring a defendant to disclose on affidavit details of their legal and beneficial assets.

It is also possible in certain circumstances to obtain a worldwide mareva injunction, for example, in *Trafalgar Developments Limited v Mazepin* [2019] IEHC 7, the Commercial Court granted judgment in default of appearance against two defendants in a dispute relating to an alleged corporate “raider attack” of a company. The court was satisfied that there was a significant risk of the defendants dissipating their assets in frustration of the judgment and it granted a worldwide mareva-type injunction, freezing their assets. This order extended to include the defendants’ cryptocurrency wallets.

#### **Anton Pillar Orders**

This is a mandatory injunction requiring the defendant to permit the plaintiff or his agents to enter their premises, inspect

documents or other articles and remove those documents or articles. Its objective is to preserve vital evidence in a case pending trial which the plaintiff believes would be destroyed.

Anton Pillar Orders are normally granted ex-parte, Given their onerous nature, there is a reluctance by the courts to grant such orders. A party seeking the order will have to demonstrate:

1. a very strong case;
2. the possibility of very serious damage to the plaintiff;
3. clear evidence that there are in fact such documents on the defendant’s premises and there is a risk that they will be destroyed or removed; and
4. the inspection will not do any harm to the defendant or his case.

In addition, the plaintiff must undertake to preserve the property pending the trial and notify the defendant at the time of the inspection of his right to apply to the court to vary or discharge the Order.

#### **Quia Timet Injunctions**

The objective of a quia timet injunction is to prevent anticipated infringement of a legal right occurring. In order for it to be granted the plaintiff must be able to establish a sufficiently strong case of threatened loss.

In *Attorney General (Boswell) v Rathmines and Pembroke Joint Hospital Board* [1904] IR 161, the court held that the plaintiff must have a well-grounded apprehension of injury, “almost amounting to a moral certainty” while in *Szabo & Ors v Esat Digiphone Ltd & Ors* [1998] 2 ILRM 102, the High Court referred to the stringent requirement of probability before a quia timet injunction would be granted on a permanent basis.

#### **Bayer Injunctions**

This is an extremely rare form of injunction and its purpose is to restrain a defendant from leaving the jurisdiction and/or requiring him to deliver up his passport. This will only be granted in exceptional circumstances, and in particular to facilitate compliance with a Court Order.

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## CONTACT POINTS

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.



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