ETHICAL OBLIGATIONS IN EX PARTE AND OTHER INTERIM APPLICATIONS

The Hon Mr Justice Anderson

> The undertaking as to damages which ought to be given on every interlocutory injunction is one to which (unless under special circumstances) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing, is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so.
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> *Graham v Campbell* (1878) 7 ChD 490, 494, per James LJ

Observations on material self interest

I have begun this paper with a reference to damage and compensation in conjunction with interlocutory injunctions in order to encourage ethical compliance by way of concern by solicitors and counsel for their own risk. It is of course elementary to lawyers that admission to our profession carries serious ethical responsibilities. The privileges of audience in Court and in a judge's private chambers, of robing, of taking oaths and declarations, of exemption from such responsibilities of citizenship as jury service, are granted on the irrebuttable assumptions that as well as the duty to a client the lawyer has a duty to the Court, to professional colleagues, and to justice. These duties are and must be reconcilable. Often it seems to judges that their mutuality is overlooked.

By way of illustration I invite you to recall the last few occasions you were instructed to advise a potential plaintiff in respect of an intended application for injunction. To what extent did you seek information about and advise upon the damage which might be caused to the intended defendant? What specific advice did you give your client concerning the undertaking as to damages which the client had to sign? Do you in fact know the nature of and principles of assessment of damages contemplated by the usual undertaking? Indifference to such matters or ignorance about the principles involved may render you liable to a client called to pay up on an undertaking after an injunction which, although justifiably granted at an interlocutory stage, has been discharged after trial. The possibility of being sued for negligence may curb indifference. Ignorance may be remedied by reading Dr Spry's *Equitable Remedies* (4th ed, 1990) 638-645.

Most of us will recall acting for a defendant who has been enjoined at an interlocutory stage and has suffered great disruption to business and peace of mind. *Mareva* injunctions and *Anton Piller* orders exemplify the potential

for mischief in the case of any grant of significant relief at an interlocutory stage. Sometimes of course an injunction may be discharged but even when a defendant acts immediately and successfully the damage is usually considerable. Reluctant thought I am to encourage litigation I suggest that in every case where an interlocutory injunction has subsequently proved unsustainable the defendant's solicitors seek instructions in respect of the plaintiff's undertaking. It is rarely indeed that the Courts are called upon to give judgment on such an undertaking and I have often wondered why this is so. The reason may be that solicitors and counsel overlook that even an unsuccessful defendant at trial may be able to invoke the plaintiff's undertaking if the interlocutory injunction should have proved to be inappropriate, and in such cases the plaintiff may well look to his or her own solicitor for indemnity or lay a complaint against counsel for incompetence. Hence my warning about self interest, although naturally the ethical duties of care and competence should predominate.

Ethical responsibility to the Court

I turn now to the matter of ethical responsibility to the Court. On an ex parte application there is an immediate and constant reminder in the certificate required by r 237(1). It should not be necessary to refer to this requirement but I have to conclude that it is more or less arcane because judges sometimes receive papers with the certificate omitted. Judges always check ex parte applications for the certificate. We do so because we wish to be assured, before contemplating the exercise of our powers without the benefit of adversarial scrutiny, that a solicitor in the capacity of an officer of the Court, or counsel, has thoroughly checked the papers for propriety and correctness. Judges consciously rely on r 237(5). The scope of the responsibility on the certifying practitioners is explained thus in *McGechan on Procedure* para 237.02(5):

> The practitioner certifying must "personally" satisfy himself that the notice of application and affidavits comply with the code. This requires personal perusal and consideration. The practitioner certifying is not justified in accepting the word of another, whether partner, employee solicitor, or secretary that such compliance exists. Note, however, that his obligation under this heading extends merely to satisfaction that the papers comply with the rules .... The practitioner certifying must also satisfy himself that the order sought is one that ought to be made. It follows that a practitioner should not certify an ex parte motion where upon consideration he reaches a personal view ... that the order involved should not be made. He cannot operate simply on instructions when he believes the order which might be obtained would be improper.... Wilful non-compliance would be a technical contempt, and would also open the practitioner concerned to professional disciplinary action.

Some examples

Let us consider situations when it would be improper for an order to be obtained, other than in the obviously contemptuous case of a solicitor wilfully permitting false information to be put before the Court. It will be observed that the ethical duty to the Court confirmed by r 237 is inseparable from a general ethical duty, owed also to clients and their opponents as well as to fellow practitioners.

1 *Delaying filing for tactical advantage*

The fact that an application for injunction and similar relief is usually an initiating rather than a responsive step in a proceeding means that an applicant has the ability to time the step for tactical advantage. I remember an occasion in practice many years ago when I was instructed for a defendant who was promoting an international sporting fixture and who had been served with an order for injunction in bar of the event virtually on the eve of it. The order had been made in what was then the Magistrates' Court, on an ex parte application, and on the basis of an affidavit sworn three weeks before the application had been filed. Of course the learned Magistrate who made the order might have picked up this unexplained delay, but the solicitor who prepared and filed the application did not bring the fact to the attention of the Court let alone seek to explain it. This incident, occurring back in the 1970s, is still vivid in my memory for the anxiety and disruption it caused my client, and for the abuse of the ex parte procedure for tactical advantage. Practitioners contemplating ex parte applications have a duty to act promptly and to consider whether prompt action will allow an application to be made in the preferable way, that is, upon notice. A Court would have power to discharge an otherwise justified injunction if it were to appear that the ex parte procedure was invoked for the improper purpose of mere tactical advantage.

2 *Proceeding ex parte when notice is practicable*

Rule 239(1) sets out the conditions when an application may be made without notice. In cases involving urgency the condition is where

> Service of notice ... would cause undue delay or serious detriment to the party applying.

Given that by virtue of r 235(2) notice may be very short (and in fact is sometimes a matter of an hour or so in very urgent cases), occasions when urgency alone is invoked ought to be quite rare. In practice judges scrutinise applications for ex parte relief in contentious proceedings to ascertain why the application should not be upon notice, and we expect counsel to make

full disclosure of all matters relevant to the issue of claimed urgency, consistent with the ethical responsibilities recognised by r 237. There have been occasions, unedifying to certifying counsel, when applications have been made ex parte without heed to or disclosure of written advice by opposing solicitors that they are authorised to accept service of any application and expect to receive notice. In such cases r 237 cannot have been observed.

3 *Failing to disclose arguments available to defendant*

A practitioner could not personally be satisfied that the order sought is one that ought to be made unless he or she has fairly considered the factual and legal arguments that in the particular circumstances could be advanced by the intended defendant. Further, counsel would not be acting with due competence if arguments affecting the prognosis for a possible application were not considered and advised to the client, particularly of course in view of the client's possible exposure on an undertaking. Opposing arguments should be disclosed in counsel's memorandum. Counsel's duty of disclosure can be no less compelling than the client's, since the duty is to the Court itself, as confirmed in *Digital Equipment Corporation v Darkcrest Ltd* [1984] Ch 512, 524. As stated by Isaacs J in *Thomas Edison Ltd v Bullock* (1912) CLR 679, 682:

> *Uberrima fides* is required, and the party inducing the court to act in the absence of the other party fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in defence of that application. Unless that is done, the implied condition upon which the Court acts in forming the judgment is unfulfilled and the order so obtained must invariably fail.

The duty of disclosure extends to all matters which are within knowledge *or would have been discovered by proper enquiry* (see *Brinks Mat Ltd v Elcombe* [1988] 1 WLR 1350) and which are material to the proceeding, and which tend to favour the position of the absent party or parties. The duty is particularly acute in respect of ex parte applications for *Anton Piller* orders (see *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 and *Brinks Mat Ltd v Elcombe*, supra).

Duties to fellow practitioners

I do not intend to expatiate on this facet of professional responsibility. It is sufficient to repeat the concept of mutuality of a practitioner's various responsibilities, to point to the implications of the examples of default which I have mentioned above, carrying as they do aspects of professional comity as well as other duties, and to cite the following from *Cordery on Solicitors* (8th ed, 1988) at 319:

> Professional misconduct will include dishonourable conduct on the part of a solicitor in the course of his employment towards his client, the Court or third persons, including his opponent in litigation.

Competence

There is a congruence of ethical punctiliousness and professional competence. The practitioner who has carefully observed the requirements of r 237, and in the process has weighed the factual and legal strengths of the client's case and the opponent's; has, in good faith, disclosed relevant information to the court; has competently advised on the implications of such matters as undertakings in the case of interlocutory injunctions, and dealt courteously with opposing solicitors and counsel, will demonstrate in a manner apparent from the papers and from any argument a level of competence consistent with ethical duties to the client, the Court and fellow practitioners. There is, however, an aspect of practice which tends to be inadequate. Although more readily perceived as bearing on ability it nevertheless has implications of duty to the Court in terms of assistance. I am referring to the *memorandum of counsel* in support of an ex parte application. You may be assisted by information about how judges actually deal with applications on the papers. Picture if you will a Duty Judge, half-way through a typically busy week, emerging from Court in the late afternoon and anticipating the amount of reading necessary for the next day's hearings. On entering his or her chambers the judge cannot fail to observe the gargantuan file, sometimes reposing in a carton, which has materialised since the afternoon tea adjournment. The first document is the Notice of Application, ex parte, which is read for content and to check for the r 237 certificate. The notice refers briefly to the relief sought and to the particulars of the numerous deponents in support of the application. Underneath the notice is a Statement of Claim, gross in proportion and complex in structure, which the judge lays aside for the time being in order to learn from the counsel's memorandum what the case is about. One of three types of memorandum comes to hand, to wit:

Type A – the Anorexic

This is a document which has and shows little weight. It overlooks the essential issues of fact and law, provides no assistance, and is plainly more concerned with its appearance than its substance.

Type B – the Obese

This type of memorandum is unhelpful because it says too much. It serves no purpose for a memorandum almost to replicate the application, statement of claim and affidavits. Yet this type of memorandum is quite common. Word processors and the tyrannical imperatives of time costing may be an influence.

Type C – the Helpful

This type is lean and muscular. It summarises the cause(s) of action and the nature and purpose of the orders sought. It explains why the application is brought ex parte and sets out, succinctly, the factual effect of the affidavits. It gives the legal principles including those which may not be helpful to the applicant. Its tone is laconic yet it says everything necessary. Such a memorandum informs the judge at the outset of the factual and legal issues raised by the application, expedites assessment of all the relevant documents, and naturally evokes prompt and appreciative judicial attention.