



Blackstone
CHAMBERS

“Employment Law in the High Court”
Presented by Blackstone Chambers
24th February 2006

INJUNCTIONS

PAUL GOULDING QC

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW
Tel: +44(0)20-7583 1770 Fax: +44(0)20-7822 7350 Email: clerks@blackstonechambers.com
www.blackstonechambers.com

Introduction

1. *Injunctions* is a topic worthy of a textbook in itself. The purpose of this paper is to focus on essential aspects of the law on injunctions relevant to High Court employment litigation. This includes procedural and substantive rules.
2. There is a useful list of interim remedies set out in CPR 25. These include:
 - 2.1. **Interim Injunctions** of which the more important are prohibitory, mandatory and springboard injunctions.
 - 2.2. **Other Interim Remedies** including freezing, search, delivery up, disclosure and *Norwich Pharmacal* orders.

Each of these will be considered briefly below.

Source Of Procedural Rules

3. The relevant procedural rules are found in Civil Procedure (*The White Book*). The most important source, so far as injunctions are concerned, is CPR Part 25 (which cross-refers to other important rules in this context including Part 23 - General Rules about Applications for Court Orders).
4. The first section (25.1-25.11) contains the relevant rules on interim remedies. Also of considerable importance is the Practice Direction on Interim Injunctions (25PD) which supplements CPR Part 25 and is found behind it in the White Book.
5. It is important to be alive to the updating of the CPR. The first place to look is in the Cumulative Supplements published from time to time. In the current edition, the Second Cumulative Supplement (reflecting the position as at 7 October 2005), there are important amendments to the Practice Direction, in particular in relation to search and delivery up orders, and standard forms for a freezing injunction and search order (which supersede those found in the White Book itself).
6. In addition to consulting the White Book Supplements, it is advisable to consult *Civil Procedure News* (provided as part of the White Book subscription service). Recent and

prospective amendments to the CPR can also be found on the Sweet and Maxwell website (www.sweetandmaxwell.co.uk/online/whitebook).

Interim Injunctions

7. Three types of interim injunctions will be briefly considered: prohibitory, mandatory and springboard.

(1) Prohibitory Injunction

8. Court orders that restrain a defendant's actions are known as prohibitory or negative injunctions. These are the common types of orders sought to prevent breaches of restrictive covenants, misuse of confidential information and unlawful termination of the employment contract.

The Court's approach

9. The court is not precluded from considering the strength of each party's case when deciding whether to grant an application for interlocutory relief, but should rarely attempt to resolve difficult issues of fact or law. Any view as to the strength of the parties' cases should be reached only where it is apparent from the affidavit evidence and any exhibited contemporary documents that one party's case was much stronger than the other's.

10. It follows that the major factors relevant to the court's discretion are (a) the extent to which damages are likely to be an adequate remedy for each party, and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court was able to reach as to the relative strength of the parties' cases (*Series 5 Software Ltd v Clarke* [1996] 1 All ER 853 (Laddie J) explaining and applying *American Cyanamid Co v Ethicon* [1975] 1 All ER 504; *CMI-Centers for Medical Innovation GmbH v Phytopharm Plc* [1999] FSR 235 (Laddie J)).

11. A defendant who has entered into a contractual restraint should seriously consider offering an appropriate undertaking until trial, provided that a speedy trial can be fixed and the claimant can satisfy the cross-undertaking in damages. It is only if a speedy trial

is not possible and the action cannot be tried before the period of the restraint has expired or has run a large part of its course, that it will be necessary to have a contested interlocutory application: *Lawrence David Ltd v Ashton* [1989] ICR 123 (CA); *Lansing Linde v Kerr* [1991] 1 All ER 418.

Section 12 of the Human Rights Act 1998

12. Special considerations arise when the grant of an injunction may interfere with the exercise of the Convention right to freedom of expression. This may occur where it is sought to restrain publication of confidential information.

13. Section 12 of the Human Rights Act 1998 provides as follows:

“No such relief [which might affect the exercise of the Convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.”

14. For some time, the meaning of the word “likely” in this section has been unclear. The matter was recently considered by the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253. The House rejected the submission that “likely” here means “more likely than not” or “probable”. Lord Nicholls of Birkenhead, with whom the other members of the House agreed, adopted a flexible approach when he stated (paragraph 20):

“The intention of Parliament must be taken to be that “likely” should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of “real prospect” but permits the court to dispense with this higher standard where particular circumstances make this necessary.”

15. Lord Nicholls explained this further (paragraph 22):

“...the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably (“more likely than not”) succeed at the trial...But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include...where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and

give proper consideration to an application for interim relief pending the trial or any relevant appeal.”

(2) **Mandatory Injunction**

16. The court may grant an interim mandatory injunction. However, the circumstances in which this will be appropriate will be extremely rare in the employment context due to the principle against specific performance of a contract for personal services, discussed above.
17. The principles applicable in relation to the grant of such a relief are found in *Nottingham Building Society v Eurodynamics Systems Plc* [1993] FSR 468 (Chadwick J) as follows:
 - 17.1. The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong.
 - 17.2. The court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thus preserving the status quo.
 - 17.3. It is legitimate to consider whether the court does feel a high degree of assurance that the claimant will be able to establish his right at trial.
 - 17.4. Even where the court is unable to feel such assurance, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if granted.

(3) **Springboard Injunction**

18. Where an employee has used confidential information belonging to his employer in his new business, and thereby gained “an unfair start” or “springboard”, the court may grant an injunction to prevent the employee from taking unfair advantage of the springboard. The term of any such injunction should not extend beyond the period for which the advantage may reasonably be expected to continue (*Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1960] RPC 135 (Roxburgh J); *Roger Bullivant Ltd v Ellis* [1987] FSR 172 (CA); *PSM International Ltd v Whitehouse* [1992] IRLR 279 (CA); *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 (Sir Donald Nicholls VC); *Sun Valley Foods Ltd v Vincent* [2000] FSR 825 (Jonathan Parker J)).

Other Interim Remedies

The list of interim remedies in Part 25.1

19. CPR Part 25.1 lists a number of orders for interim remedies that may be made. These include (in addition to interim injunctions considered above):
- 19.1. an interim declaration (25.1(1)(b));
 - 19.2. an order for the detention, custody, preservation or inspection of relevant property (25.1(1)(c)(i) and (ii));
 - 19.3. an order for delivery up of goods (25.1(1)(e));
 - 19.4. a freezing injunction (25.1(1)(f));
 - 19.5. a search order (25.1(1)(h));
 - 19.6. an order for pre-action disclosure and inspection (25.1(1)(i));
 - 19.7. an order for non-party disclosure and inspection (25.1(1)(j)).
20. There are two further useful provisions in Part 25.1.

20.1. The fact that a particular kind of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy (25.1(3)).

20.2. The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind (25.1(4)).

21. Some of the more important remedies from this list will be briefly considered below.

(1) Freezing Injunction

22. A freezing injunction (formerly known as a “Mareva” injunction) is provided for in Part 25.1(1)(f). This is an order:

- (i) restraining a party from removing from the jurisdiction assets located there; or
- (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not.

23. It can be a useful weapon in the litigator’s armoury, although it is rarely deployed in the employment context. Where recourse is had to a freezing injunction, regard should be had to the particular rules of law and procedure applicable to such orders, a useful discussion of which is to be found in the notes to Part 25 at 25.1.27. The standard form of freezing injunction must be used, which is found in the Annex to PD25 in the Second Supplement to the 2005 White Book.

24. The freezing injunction has, however, been given a new lease of life in the employment context as a result of the decision of Royce J in *Amicus v Dynamex Friction Ltd* [2005] IRLR 724.

25. Friction Dynamics went into administration. It transferred its undertaking to the two defendant companies. Craig Smith was said to be an influential figure in relation to all three entities. Amicus, which represented some of the employees, brought employment tribunal proceedings. They contended that there was a TUPE transfer and that no consultation took place in relation to redundancies in connection with the transfer. The

union sought a freezing injunction in the High Court against the two transferees ordering them not to dispose of their assets.

26. A freezing injunction was granted prohibiting the defendant transferee companies from disposing of, dealing with, or diminishing the value of any of their assets up to a value of £325,000 pending the conclusion of employment tribunal proceedings alleging failure to consult.
27. The High Court had the power to make a freezing order in respect of a pre-existing cause of action before an employment tribunal. Although the jurisdiction to grant a freezing order is only available in respect of a cause of action that exists at the time of making the application, proceedings before an employment tribunal were a cause of action that could be afforded protection by the court. Royce J considered that it would be highly unfortunate if the court did not have jurisdiction in circumstances where a person with a very strong case for compensation in the employment tribunal was frustrated by a respondent who is able to dissipate assets and thus bring to an end any realistic prospect of that individual recovering compensation.
28. Amicus had a good arguable case that there was a real risk of the dissipation of assets if a freezing injunction was not continued.

(2) Search Order

29. Search orders were formerly known as Anton Piller orders (from the case of *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA)). They are provided for in Part 25.1(1)(h) as follows:

“an order (referred to as a “search order”) under section 7 of the Civil Procedure Act 1997 (order requiring a party to admit another party to premises for the purpose of preserving evidence etc.)”

30. In addition to the rule itself, provision is made in respect of search orders in the Practice Direction at 25PD.7. However, the current version of this paragraph is found in the Second Supplement to the White Book, where the standard form of search order to be used is also now to be found.

31. A search order is draconian. It should only be sought in a compelling case. There are particular conditions to be satisfied and procedures to be followed both before and after such an order is made.
32. The purpose of a search order is to preserve evidence that a defendant, warned of impending litigation, would be likely to conceal or destroy so that it would not be available as evidence supporting a claimant's cause of action. It is an order obtained in secrecy requiring the defendant to permit his business premises and often his home as well to be entered and searched. It could have the effect that the defendant's business would be destroyed without the defendant being in a position to apply to the court for the order to be set aside before it was executed. Therefore, applicants for an order of such severity are under a strict duty to make to the court a full and frank disclosure of all matters that could be relevant and, having obtained the order, neither to act oppressively nor abuse their power in executing the order (*Columbia Pictures Inc v Robinson* [1987] Ch 38 (Scott J)).
33. In the early cases, three essential pre-conditions were identified for the making of a search order:
 - (1) an extremely strong prima facie case;
 - (2) the damage, potential or actual, must be very serious for the applicant; and
 - (3) there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.

(*Anton Piller*, above, per Ormrod LJ at p62).

34. For a recent restatement of these principles, see *Dyno-Rod Plc v Debel Ltd* [2004] EWHC 1100 (Ch) per Laddie J at paragraphs 4, 5 and 8, where he said:

“...the Claimant must show a strong prima facie case. It must show damage, potential or actual damage, which must be of a very serious nature and it must show that there is clear evidence that the Defendants have in their possession incriminating documents. It must also show that there is a real possibility that the Defendants might destroy such material

before an application inter partes can be made, and it must show that harm likely to be caused by the execution of the order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of the order. Those are the criteria for the grant of search and seize orders, but similar factors apply to freezing orders.”

35. The duty on an applicant applying for a search order is onerous. It is well-established that an applicant who applies for relief without notice is under a duty to investigate the facts and fairly present the evidence on which he relies (*Marc Rich v Krasner*, 15 January 1999 (CA), per Morritt LJ, who reviewed the earlier authorities including *Bank Mellat v Nikpour* [1985] FSR 87; *Lloyds Bowmaker v Britannia Arrow* [1988] 1 WLR 1337; *Brinks Mat v Elcombe* [1988] 1 WLR 1350; and *Behbehani v Salem* [1989] 1 WLR 723). The duty of disclosure extends not just to material facts which were or ought to have been known to the applicant; it also includes the effect of the order which is being applied for. More generally there is a duty to present a without notice application fully and fairly (*The Gadget Shop Ltd v The Bug.Com Ltd* [2001] FSR 383 (Rimer J)).
36. A failure in the duty of full and fair disclosure may result in the search order being set aside (*Kuwait Oil Tanker Co*, 27 November 1995 (CA; *Worldcom International v Home Communications Ltd*, 16 September 1998 (Timothy Walker J); *The Giovanna* [1999] 1 Lloyd’s Rep 867 (Rix J); *St Merryn Meat Ltd v Hawkins*, 29 June 2001 (Geoffrey Vos QC); *Elvee Ltd v Taylor* [2002] FSR 738 (CA)).
37. However, sometimes a defendant’s reliance on alleged non-disclosure may be seen as an act of desperation, as Slade LJ pointed out in the *Brink’s Mat* case at p1359:

“In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *Rex v Kensington Income Tax Commissioners* [1917] 1 KB 486 principle as a *tabula in naufragio*, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.”
38. A useful summary of the principles relevant to the exercise of the court’s discretion to set aside a without notice order for non-disclosure was recently given by Alan Boyle QC,

sitting as a deputy judge of the Chancery Division, in *The Arena Corporation Ltd v Schroeder* [2003] EWHC 1089 (Ch) at paragraph 213 as follows:

- 38.1. If the court finds that there have been breaches of the duty of full and fair disclosure on the *ex parte* application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.
- 38.2. Notwithstanding that general rule, the court has jurisdiction to continue or regrant the order.
- 38.3. That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
- 38.4. The court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
- 38.5. The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.
- 38.6. The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
- 38.7. The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
- 38.8. The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.

- 38.9. There are no hard and fast rules as to whether the discretion to continue or regrant the order should be exercised, and the court should take into account all relevant circumstances.
39. It is also the duty of counsel and solicitors, when they make a without notice application for relief, to make in the course of the hearing a full note of the hearing, or, if this is not possible, to prepare a full note as soon as practicable after the hearing is over, and to provide a copy of that note with all expedition to all parties affected by the grant of relief on that without notice application. This is essential so that the parties affected may know exactly what occurred and the basis and material on which the order was made, and so that in this way they may be provided with the material to make an informed application for discharge (*Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd*, 23 September 1999 (Lightman J); *Thane Investments Ltd v Tomlinson*, 6 December 2002 (Neuberger J)).
40. Anyone considering applying for a search order would be well-advised to consider with care the structures of Hoffman J in *Lock International Plc v Beswick* [1989] 1 WLR 1268. At p1281c, Hoffman J said:

“Even in cases in which the plaintiff has strong evidence that an employee has taken what is undoubtedly specific confidential information, such as a list of customers, the court must employ a graduated response...there must be *proportionality* between the perceived threat to the plaintiff’s rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an Anton Piller order. People whose commercial morality allows them to take a list of the customers with whom they were in contact while employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them.”

(3) Delivery Up Order

41. Where the strict preconditions for the grant of a search order are not satisfied, a less draconian yet still effective order is for the defendant to deliver up immediately (or forthwith) property belonging to the claimant. This is sometimes known as a doorstep Piller. This signifies that the claimant’s representatives may serve the order at the

defendant's premises, and seek immediate delivery up, but without any requirement on the defendant's part to permit access to the premises.

42. Important guidance was given in respect of such orders in *Adams Phones Ltd v Goldschmidt* [2000] FSR 163. In that case, Jacob J made the following observations:

42.1. Because the order did not require the defendants to permit entry or a search, a standard requirement of search orders, namely that there be a supervising solicitor, was not included and was not considered at the time of the without notice application. That was a mistake. In future, the claimant and the court should more carefully consider requiring a supervising solicitor for orders which approximate to full seizure, such as orders requiring immediate positive action by a party, particularly if the required action is at all complex.

42.2. It was also a mistake for the claimant to serve the order on a Saturday morning. There was no urgency calling for this, but by serving on a Saturday, it was near certain that the defendants would not be able to take legal advice.

42.3. The presence, even nearby, of the claimant or his employee at execution is a matter which might operate oppressively, particularly on a defendant deprived of legal advice and unprotected by a supervising solicitor. The court should be told of an intention to bring along such a person when the order is sought.

43. This approach is now reflected in the new paragraph 8 of the Practice Direction (found in the Second Supplement to the White Book) which concerns orders executed at a person's premises. This important paragraph provides (25PD.8):

"8.1 The following provisions apply to orders, other than search orders, for delivery up or preservation of evidence or property where it is likely that such an order will be executed at the premises of the respondent or a third party.

8.2 In such cases the court shall consider whether to include in the order for the benefit or protection of the parties similar provisions to those specified above in relation to injunctions and search orders."

(4) Disclosure Order

44. One of the most valuable orders obtained by an employer where unlawful competition has taken place is an order for disclosure of contacts made by the employee with clients, and sometimes with fellow employees or the new employer. Surprisingly, there is very little authority on the scope of such orders.
45. The court may, in an appropriate case, order a defendant to disclose contacts he has made with clients both before and after the termination of his employment (*Intelsec Systems Ltd v Grech-Cini* [2000] 1 WLR 1190).
46. In *Intelsec*, it was held that where an employer brought a claim for breach of confidence against a former employee the court had jurisdiction to make an order requiring the employee to disclose the names and addresses of business contacts irrespective of whether those contacts had been made before or after the termination of the employee's employment; but in the latter case only if it was necessary to rectify misrepresentations arising out of passing-off; and that any order made in respect of post-termination contacts must be proportionate and take into account the protection of the employee's own information.
47. In the light of recent decisions of the courts on the duty of employees and directors to disclose their own misconduct (see *Item Software v Fassihi* [2005] ICR 450 (CA)), there may be scope in the future for more extensive disclosure orders at an interlocutory stage requiring employees and/or directors to disclose details of their misconduct.

(5) Norwich Pharmacal Order

48. The *Norwich Pharmacal* case [1974] AC 133 established that where a person, albeit innocently, and without incurring any personal liability became involved with the wrongful act of another, that person came under a duty to assist the person injured by those acts by giving him information which he was able to give by way of discovery that disclosed the identity of the wrongdoer (*Ashworth Security Hospital v MGN Ltd* [2003] FSR 311 (HL)).
49. As Lord Woolf stated in *Ashworth* (paras 57-73), "new situations are inevitably going to arise where it will be appropriate for the [*Norwich Pharmacal*] jurisdiction to be exercised

where it had not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy." See, also, *Camelot v Centaur Communications Ltd* [1998] IRLR 80.

50. The jurisdiction of the court is not confined to the case of identifying wrongdoers (*CHC Software Care Ltd v Hopkins & Wood* [1993] FSR 241 (Mummery J)). It also extends to cases where there is a good indication of wrongdoing, but not every piece of what the claimant needs to plead a case is fully in position (*Carlton Film Distributors Ltd v VCI Plc* [2003] FSR 876 (Jacob J)).
51. However, the exercise of the court's jurisdiction to order *Norwich Pharmacal* relief against third parties who were mere witnesses innocent of any participation in the wrongdoing being investigated was a remedy of last resort. The jurisdiction is only to be exercised if the innocent third parties were the only practicable source of information. The basis of the jurisdiction against them is that, unless and until they disclosed what they knew, there could be no litigation in which they could give evidence. Thus, if the material could be obtained by way of pre-action disclosure, *Norwich Pharmacal* relief may be refused. See *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] 3 All ER 511 (Lightman J).

The Principle Against Indirect Specific Performance

52. One problem that sometimes crops up in this context is the rule or principle that a court will not grant a negative injunction if its effect would be to compel specific performance of a contract for personal services.
53. Typical situations where this can arise include restraining celebrities from working for a competitor, and also where an employee seeks an injunction to prevent the termination of his employment.

Celebrity Cases

54. This issue arose in recent cases concerning the move by the football manager, Alan Pardew, from Reading FC to West Ham, and that of Richard Littlejohn, the journalist from The Sun to the Daily Mail.

55. The leading reported case on this point is *Warren v Mendy* [1989] 1 WLR 853 (CA). Nigel Benn, the boxer, contracted for Frank Warren to manage him for a period of three years. Benn lost confidence in Warren and entered into an agreement with Ambrose Mendy for the introduction of commercial opportunities. Warren obtained without notice an interim injunction restraining Mendy from inducing Benn to act in breach of his management agreement with Warren. The injunction was discharged, a decision upheld by the Court of Appeal.
56. The Court reviewed the earlier authorities concerning musicians (*Lumley v Wagner* (1852) 1 De GM&G 604; *Page One Records Ltd v Britton* [1968] 1 WLR 157) and motor racing drivers (*Nichols Advanced Vehicle Systems Inc v De Angelis*, unreported, 21 December 1979; *Lotus Cars Ltd v Jaguar Cars Ltd*, unreported, 1 July 1982).
57. From these authorities, the Court derived the following general principles applicable to the grant or refusal of an injunction to enforce performance of a servant's negative obligations in a contract for personal services inseparable from the exercise of some special skill or talent (867E-H):
 - 57.1. The court ought not to enforce the performance of the negative obligations if their enforcement will effectively compel the servant to perform his positive obligations under the contract.
 - 57.2. Compulsion is a question to be decided on the facts of each case, with a realistic regard for the probable reaction of an injunction on the psychological and material, and sometimes the physical, need of the servant to maintain the skill or talent.
 - 57.3. The longer the term for which an injunction is sought, the more readily will compulsion be inferred.
 - 57.4. An injunction will less readily be granted where there are obligations of mutual trust and confidence, more especially where the servant's trust in the master may have been betrayed or his confidence in him has genuinely gone.

58. It may not be enough simply to rely on the fact that trust and confidence has **not** broken down to displace the general principle: see *Subaru Tecnica International Inc. & Anr v Burns & ors* (12 December 2001, Nicholas Strauss QC sitting as a Deputy High Court Judge, Chancery Division). Mr Burns was a racing driving who had entered into a 2 year agreement to drive for Subaru. He gave notice to terminate the agreement during the second year of the contract as he was entitled to do for material breach by Subaru, but Subaru relied upon the contractual term that such notice was of no effect where, as here, the driver had won the World Rally Championships. Subaru sought injunctions restraining Mr Burns from driving for another team, even if the effect of that injunction was that he was compelled to drive for Subaru, on the basis that the principle that the court would not enforce negative obligations in a contract for services if the effect would be to compel performance of the positive obligations applied only if the court was satisfied that trust and confidence had broken down.
59. Whilst the court noted the force in this argument, it rejected it as being inconsistent with earlier authorities such as *Warren v Mendy*, and held that the general principle is applicable in any case of a contract for personal services inseparable from the exercise of some special skill or talent. It therefore refused to continue the injunctions on the basis that the practical effect would be to compel the performance of a contract involving the exercise of a special skill or talent and a close relationship between the parties and there were no 'unusual circumstances' to displace the general rule.
60. There is a useful discussion of *Warren v Mendy* and related authorities in *Lauritzencool AB v Lady Navigation Inc* [2005] 1 WLR 3686, albeit in the commercial context of a time charter. In that case, Mance LJ recognised the existence of exceptions to the general principle discussed above, found in cases such as *Hill v Parsons* [1972] Ch 305 and *Irani v Southampton and South West Hants Health Authority* [1985] ICR 590 (see below).

Termination Cases

61. In *Hill v Parsons & Co Ltd* [1972] Ch 305 the employer was forced by union pressure to dismiss an employee, in breach of contract. The court granted injunctive relief to the employee to restrain the breach, in effect thereby re-instating the employee. The crucial factor justifying a departure from the general rule was that the employer and employee

were willing to maintain their relationship, and there was no question of what would now be characterised as mutual trust and confidence having broken down. Whilst the injunction was therefore on its face directed to the employer, its effect was to prevent interference in the contract by third parties, in that case, the union.

62. *Hill* was followed in *Irani v Southampton & South-West Hampshire HA* [1985] ICR 590, where Mr Irani had been issued with a dismissal notice following the finding of a panel of enquiry that the differences between him and his immediate superior were irreconcilable and that he, as junior, should be dismissed. Mr Irani sought an injunction requiring the Authority not to implement the dismissal notice without first applying and exhausting the disputes procedures incorporated into his conditions of service by the Whitley Council provisions.
63. The court granted an interlocutory injunction (on condition that Mr Irani undertake not to work pending final resolution of his claim), finding that *Hill* was very strong authority in his favour, on the basis that whilst the employee's relationship with his immediate superior had broken down, the employer itself had continued faith in Mr Irani's honesty, integrity and loyalty. Further, there was substantial evidence that termination of his contract would lead him to be denied access to National Health Service facilities, causing him substantial harm in circumstances where the court was satisfied that damages would not be an adequate remedy. According to Warren J., to have reached an alternative decision would be to conclude that 'an authority in the position of the defendant is entitled to snap its fingers at the rights of its employees' under their contracts.
64. The Court of Appeal considered the nature of the required confidence in *Powell v London Borough of Brent* [1987] IRLR 466, [1988] ICR 176. Mrs Powell had been informed that she had been selected for promotion and undertook the duties of the new position for two months before being informed that the appointment had not been confirmed and the position was being re-advertised, which decision was taken following a complaint by an unsuccessful candidate that there had been a breach of relevant equal opportunities practice. The Court of Appeal held that an injunction would not be granted to compel

an employer to let an employee continue in employment *unless* it is clear on the evidence that:

64.1. It is otherwise just to make such an order;

64.2. There exists sufficient confidence on the part of the employer in the servant's ability and other necessary attributes for it to be reasonable to make the order. Sufficiency of confidence must be judged by reference to the circumstances of the case, including the nature of the work, the people with whom the work must be done and the likely effect upon the employer and the employer's operations if the employer is required by injunction to suffer the employee to continue in the work (per Ralph Gibson LJ at 194A-C).

65. However, the court cannot simply speculate as to whether a workable relationship would arise: see *Wishart v National Association of Citizens Advice Bureaux Ltd* [1990] IRLR 393. Mr Wishart was made an offer of employment 'subject to the receipt of satisfactory written references' which was withdrawn following receipt of references which the employer considered to be unsatisfactory (in respect of his level of sickness absence). At first instance the judge considered the case to be substantially similar to *Powell* and granted an injunction on basis that there was no reason why, if Mr Wishart took up his post pending trial, he should not perform to the employer's entire satisfaction. The Court of Appeal discharged the injunction, on the basis that the case was not similar to *Powell*, and hence fell within the exceptional category, since,

65.1. there was no evidence that the employer had or had expressed confidence in Mr Wishart; and

65.2. there was no established employment relationship.

66. In certain circumstances, an employer might seek to argue that they have lost trust and confidence, but nevertheless injunctive relief may be granted against them. In *Ali v London Borough of Southwark* [1988] IRLR 100, Millett J. held:

"The court will intervene by way of injunction in an employment case to restrain dismissal only where it is satisfied that the employer still retains

confidence and trust in the employee or, if he claims to have lost such trust and confidence, does so on some irrational ground.”

67. Further, it will not be enough for an employer to assert that trust and confidence has broken down in circumstances where that very issue has not been determined pursuant to disciplinary procedures incorporated into the contract of employment: see *Barros D'Sa v University Hospital Coventry and Warwickshire NHS Trust* [2001] IRLR 691.
68. In the absence of sufficient mutual trust and confidence it may still be possible to obtain injunctive relief where the purpose is to preserve the contractual relationship but not to compel the employer to allow the employee to resume his duties: see *Robb v LB of Hammersmith and Fulham* [1991] IRLR 72. Mr Robb was suspended on full pay during an investigation into his capability, during the course of which the parties attempted to negotiate his termination. In the light of the negotiations, the employer decided that there was no useful purpose in continuing to follow the disciplinary procedure, and, after negotiations broke down, Mr Robb was summarily dismissed. The Court granted his application for an injunction restraining his employer from giving effect to the purported dismissal until the contractual disciplinary procedure had been followed, despite the fact that the employer had lost trust and confidence in Mr Robb, on the basis that:
 - 68.1. The all important criterion was whether the Order was workable. Where an injunction is sought to reinstate an employee so that he can actually carry out the job for which he was employed, trust and confidence are relevant. However, Mr Robb did not seek reinstatement so that he could actually perform his duties, but in order that the disciplinary process could be followed. Trust and confidence had no relevance to the workability of that order.
 - 68.2. Although damages would be an adequate remedy for Mr Robb, in that he would be entitled to damages representing loss of salary during notice and the period for the probable length of completion of the disciplinary procedure, damages would not be an adequate remedy for the manner of his unlawful dismissal and his deprivation of the disciplinary procedure.

69. Even where it was impossible to conclude that a workable situation between the parties would arise, the court may still be prepared to grant injunctive relief: see *Wadcock v London Borough of Brent* [1990] IRLR 223, in which an injunction was granted on the employee's undertaking that he would work in accordance with the orders, instructions and wishes expressed by his employer.
70. The decision in *Jones v Gwent County Council* [1992] IRLR 521 is something of an anomaly in this context. Mrs Jones had been suspended during two sets of disciplinary proceedings, in which she was ultimately cleared. A third set of proceedings was brought to consider the charge that her return to work would cause an irrevocable breakdown in relationships between management and staff based on her past behaviour. In her absence, it was determined that Mrs Jones should be dismissed and remain suspended in the meantime. She sought an injunction restraining the council from dismissing her unless proper grounds existed and a proper procedure had been carried out. It was granted by Chadwick J., who concluded under RSC Order 14A that the letter of dismissal was not valid and effective, and that an injunction should be granted on the basis that "this is not a case in which this defendant council can be relied upon to act fairly and rationally in relation to the plaintiff's employment".
71. Different approaches have been taken to the situation in which an injunction has been sought to restrain an employer from giving effect to a dismissal by reason of redundancy until the terms of the redundancy procedure had been complied with.
72. In *Alexander v Standard Telephones & Cables plc* [1990] IRLR 55 the application was rejected, on the basis that the exceptions established by cases such as *Irani* and *Powell* were inapplicable in a case where (a) there was no work for the claimants; (b) it could not be said that the employers had complete confidence in the employees; and (c) the employer would suffer detriment if the employees' employment was continued, as it would have to dismiss other employees whom it considered more capable of doing the work.
73. In *Anderson v Pringle of Scotland Ltd* [1998] IRLR 64 an interim injunction was granted where the employee contended that a LIFO policy had been incorporated into his terms and conditions. The Court of Session held that injunctive relief was appropriate where it

could be granted before the dismissal took effect, and that, as it was a redundancy case there was no suggestion of mistrust between the parties.

74. For a recent illustration of the circumstances in which the court may grant an injunction to restrain the termination of employment until completion of the contractual disciplinary procedure, see *Gryf-Lowczowski v Hinchingsbrooke Healthcare NHS Trust* [2006] IRLR 100. Gray J held that the fact that trust and confidence between the employers and the employee had broken down was not a bar to injunctive relief. The effect of the injunction would not be that the employee would return to work but to prevent any dismissal until the employers had followed the contractual disciplinary procedure.
75. The Judge went on to hold that if injunctive relief was not granted and the claimant was dismissed, he would be confined to a claim for damages for wrongful or unfair dismissal, the former being limited to the contractual notice period of three months and the latter to the statutory cap. In the circumstances, such a remedy in damages would not be adequate. If dismissed, the claimant would be deprived of the disciplinary procedures which would provide him with an opportunity to justify and vindicate himself and he might well find himself unable to find alternative employment, at least within the NHS. See, also, *Kircher v Hillingdon Primary Care Trust*, 13 January 2006.