Royds Solicitors

Dispute Resolution Bulletin

Autumn 2011

FAMOUSLY SECRET

Over recent months the newspapers have been involved in litigation wars with celebrities over so called privacy laws and the granting of super injunctions. Now that the dust has settled, Royds Solicitors take time to explain what an injunction is, and when it is super.

An injunction is a court order that requires a party not to do a certain act (known as a 'prohibitory injunction') or, less commonly, to do a certain act (known as a 'mandatory injunction'). Injunctions carry a sanction of contempt of court if they are disobeyed.

Injunctions are equitable remedies and, as such, they are subject to the discretion of the courts. Generally speaking, they will only be granted where it is just and convenient to do so and where no other remedies (such as damages or rescission) are available.

Applications for an injunction can either be made with notice or (only where the circumstances of the case permit) without notice to the respondent of the application.

Applications for an injunction are usually very expensive and should therefore only be considered where the risk to the applicant justifies such costs being incurred.

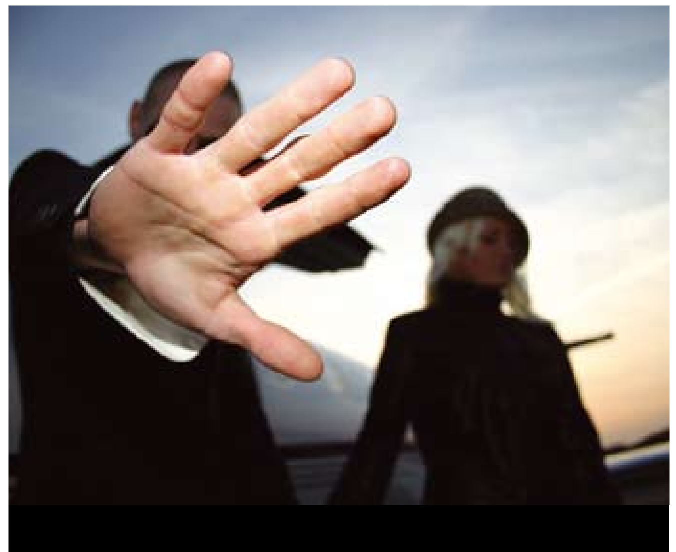
PROHIBITORY INJUNCTIONS

For a prohibitory injunction to be granted the applicant will typically need to show that:

- there is a serious question to be tried;
- the payment of damages would not be an adequate remedy for the applicant if the injunction is refused;
- the applicant's undertaking to the respondent in damages would compensate the respondent if the injunction is later shown to have been incorrectly made; and
- there are no special conditions which suggest the injunction should not be granted.

MANDATORY INJUNCTIONS

For a mandatory injunction to be granted the applicant will



typically need to show that:

- the applicant will suffer serious harm if the injunction is not granted;
- the applicant will most likely succeed at trial; and
- the respondent will not incur expenditure which would be disproportionate to the applicant's harm.

THE IMPACT OF THE HUMAN RIGHTS ACT 1998 ON INJUNCTIONS

The Human Rights Act 1998 ('the Act') came into effect on 2 October 2000. The Act gave statutory formulation to, among other things, an individual's right to private and family life (Article 8).

The Act has given rise to the increasing use of injunctions in the context of privacy cases, that is to say, cases where a party is seeking to protect information relating to their private life.

For an injunction to restrain publication of information in the privacy context, the applicant must typically show

- the applicant will suffer serious harm if the injunction is not granted; and

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- the applicant will most likely succeed at trial.

Anonymity orders may also be sought, which prohibit the identification of one or both of the parties to a privacy action.

THE SUPER-INJUNCTION

Super-injunctions prevent publication of the fact that the court has made an injunction. Super-injunctions are often confused with anonymity orders, (see above). The recent case involving Ryan Giggs and Imogen Thomas actually concerned an anonymity order, rather than a super injunction, and prohibited the publication of certain information which might reveal the identity of the applicant.

Super-injunctions are granted only in the rarest of circumstances. They are usually confined to situations where there is evidence to suggest that the respondent, were he to become aware of the injunction before it could be served on him, would take steps to frustrate the injunction by publishing the information that the applicant is seeking to protect.

Twitter has recently come to prominence in relation to super-injunctions and anonymity orders, as users claim to name those involved in proceedings. The internet is currently much harder to regulate than traditional media outlets, and the way injunctions will develop to overcome these difficulties will remain a source of interest in the future.

Change in the Law: Reversing Mistakes by Trustees

You are a trustee of a family trust and are advised by the trust's accountants that the trust's assets should be dealt with in a particularly tax efficient way. Sometime later HMRC decide that more tax is due than you expected; essentially that the advice given by the accountants was wrong. What can you do about it after the event? Well yes, the trust could sue the accountants for negligence, but that is an expensive, time consuming and acrimonious step. Could you have the transaction of trust assets that you had thought was tax efficient reversed because you relied on incorrect advice?

Until recently it had been thought you could, since it was thought that, following the 1974 decision of Re Hastings-Bass and subsequent cases based on it, the Court would set aside decisions lawfully made by trustees if it is clear that the consequence of that decision was not what was intended by the trustee when he made it because he failed to take account of something or he took into account something he shouldn't have. This was known as the Hastings-Bass Principle and was used to rectify decisions that trustees later came to regret, usually involving tax.

However in March 2011 the case of Futter v Futter and Pitt v Holt significantly limited the scope of when a Court will step in to assist the trust. The Court held that if a trustee has acted outside of his legal powers the action will be void i.e. it has no effect. If however the trustee acted within his legal powers but the consequence was unexpected, that act will be at best voidable. In those circumstances the Court will only step in to correct the mistake if all of the following conditions are met:-

1. The trustee made a mistake about the consequences of his actions.

2. The mistake was about the legal effect of the action and not only its economic consequences to the trust.

3. The mistake was so serious that it would be unjust for the person receiving the property to keep it in the circumstances.

Of the above three conditions the most significant change comes from (2). It is no longer enough to say that a transaction was less tax efficient than was considered possible by a trustee who had relied on professional advice. The trustee must have been mistaken as to the legal effect of the transaction e.g. that he thought Capital Gains Tax would not be incurred in the transaction when it fact it would.

If you are a trustee who has been advised to take a course of action you have come to regret contact David Bowman (dab@royds.com) to discuss the options available to you.

For further information, please contact : Stewart Wilkinson - saw@royds.com or James Millar Craig - jmc@royds.com

BULLETINS BY EMAIL: Please e-mail Julie Hopper on: jxh@royds.com if you wish to receive future bulletins by email.

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