

## Canary Wharf Group gets an injunction in anticipation of protesters moving into their sites

Canary Wharf Group won a High Court Injunction (which in this case was an Order banning protesters) amid rumours that the **St Paul's Anticapitalist Demonstrators** were planning to move their camp to the financial district.

The ban is indefinite and anyone breaking it will be in contempt of Court and could face a prison sentence, a fine or both. It is a usual practice that a power of arrest is also attached to an Injunction.

The Injunction was granted following a small demonstration and "chatter" on **social media** websites that the tent city on the site of St Paul's intended to move on to London's second financial centre, **Canary Wharf**.

### Civil Injunctions - Protective Measures

Injunctions are a discretionary remedy. They

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are not granted as of right. The Court has to be satisfied that an Injunction is appropriate and a necessary measure under any given set of circumstances.

Injunctions can be granted without serving notice on the other party, but this is likely to involve the Applicant in giving an Undertaking to the Court to pay the Respondent's costs if the application is ill founded and the Applicant subsequently loses the case.

Sometimes, rather than make an Injunction Order, the Court will accept an Undertaking from the Respondent. As breach would be a **contempt of Court**, imprisonment would result if the Undertaking was broken.

### Interim Injunctions

There are occasions in civil cases when obtaining an Injunction becomes a necessity

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# Removing an Arbitrator on grounds of bias

In common with various types of litigation, but unlike most forms of mediation, **arbitration is an adjudicative process.**

The parties in arbitration voluntarily refer their dispute to an independent third party. The arbitrator or the arbitral tribunal is selected by the parties to make a decision based on the evidence and arguments presented. The parties agree in advance that the **arbitrator's award** will be binding and final, and importantly, an arbitration award can be enforced by application to the High Court as if it were a **Court Judgment.**

## The Law

The current statutory framework concerning arbitration is contained in the **Arbitration Act 1996.** Section 1 sets out the guiding principles:-

*"the object of arbitration is to achieve a fair resolution of disputes by an impartial tribunal without unnecessary delay and expense"*

*"the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".*

*"...the court should not intervene except as provided by [the Act]"*

## Fundamental principles

One of the fundamental principles upon which arbitration rests is the entitlement of each party to have a **fair hearing** by an impartial arbitral tribunal or sole arbitrator. If the arbitral tribunal turns out to be "biased" then the law is in place to protect the party concerned and that party can make an application to the Court to remove the arbitrator. The

ground listed by section 24 (1) (a) of the Arbitration Act 1996 is:-

*"that circumstances exist that give rise to justifiable doubts as to his impartiality"*

In a recent case, *A v B and X* [2011] EWHC 2345, an application under section 24 (1) (a) of the Arbitration Act 1996 was made before the High Court to remove an arbitrator as there were circumstances that gave rise to doubts of the arbitrator's **impartiality.**

The dispute in the case was between two parties in relation to a **share sale and purchase agreement.** The parties in the litigation agreed to appoint a sole arbitrator to resolve the matter.

However, the arbitrator had previously received instructions from the Claimant and Defendant's solicitors and in particular had been instructed by the Defendant's solicitors in respect of a dispute in 2004.

The dispute in 2004 was settled at the time the arbitrator was instructed by both parties in the *A v B and X* case as the 2004 proceedings had stayed. However, the previous settlement in the 2004 dispute consequently broke down and the stay was lifted in order for the matter to proceed to trial.

The arbitrator initially failed to disclose this information to the parties involved in the *A v B and X* arbitration. However, prior to issuing the award in the arbitration which was in favour of the Defendant, the arbitrator wrote to the parties and informed them that he was currently acting as Counsel for the Defendant in the dispute from 2004.

The Claimant's solicitor's applied to the **London Court of International**

**Arbitration (LCIA)** to have the arbitrator removed as sole arbitrator on the grounds they doubted his impartiality. This challenge was denied by the LCIA following a detailed consideration of the arguments presented by both parties. The Claimant then proceeded to make an application to the High Court under section 24 (1) (a) of the Arbitration Act 1996.

Whilst the 2004 litigation did not have any connection with the current arbitration between the parties, it was a central argument as to the impact it may have had on the arbitrator's impartiality in the current arbitration.

The case was heard before Judge Flaux and he set out the common law test for apparent bias which was formulated by Lord Goff in *R v Gough* [1993]. Firstly, the test is **objective** and not dependant on the characteristics of the parties. Secondly, the test assumes that the impartial observer is "**fair minded**" and "informed". The third principle from the common law test is that the observer is expected to be aware of the way in which the legal profession operates in this country which was reinforced in Lord Woolf's judgment in *Taylor v Lawrence* [2002].

Accordingly, Judge Flaux found in favour of the Defendants.

**The case and judgment of Judge Flaux made it clear that the mere fact that an arbitrator was instructed by the same firm on two separate matters will not automatically give rise to a possibility of bias.**

# Code of Conduct for Third Party Litigation Funders

The **Civil Justice Council** has drafted a voluntary code of conduct for Third Party Litigation Funders. The eleven point code issued on 23 November 2011, particularises standards of practice and behaviour for third party litigation funders in England and Wales.

The **Association of Litigation Funders** (ALF) has been created by the code, and albeit voluntary, the members of the association will agree to abide by the code of conduct. Funders will pay a fee to become a member of the ALF and it is expected the ALF will self monitor compliance with the code.

Provisions in the code include the requirement for promotional literature produced by funders to be clear and not misleading. There are also stipulations regarding the details contained within litigation funding agreements.

The so called '**QC**' clause (referring to a Queens Counsel, otherwise known as a "Silk") is to assist where there is a disagreement between a claimant and a funder as to whether the litigation should continue. In this type of situation, a senior barrister will intervene to determine the merits of the case in the circumstances and resolve the issue.

Commenting on the new code, Lord Neuberger said "It's an important development and will help to foster standards of best practice and to



promote greater transparency among the providers of litigation funding services to the benefit of the consumers of these services."

It is hoped the funding industry will be characterised as fair and responsible in the light of the new guidelines. Further, it is expected the code will be beneficial to both consumers requiring funding to bring their claims and to funders.

The code has been created in response to **Lord Justice Jackson's civil litigation costs review** of December 2009. In his recommendation he stated "**Third party litigation funding** is becoming more and more important in the market and having a code of conduct will be good for practitioners and claimants to ensure that they are both operating under the same rules. Having an association for funders and lawyers to be members of also provides an added stamp of quality that can be used to attract clients".

Lord Justice Jackson's reaction to the code being published was that he expected solicitors to advise their clients to only enter into agreements with litigation funders who have signed up to the code.

The code was drafted by a working group that was set up by the **Civil Justice Council** and has been received positively by third-party funders. Most are expected to sign up to the code and become members of the ALF.

In November 2011, **Investec** became the first bank in the UK to enter the third party **litigation funding** market. The bank will offer commercial litigation funding to assist companies to pursue civil claims in court. The entrance of new types of funders into the market further highlights the necessity for a regulated framework of third party litigation funders. Only time will tell whether in fact the code is fit for purpose.

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to restrain certain activities of the parties until a trial has taken place and the Court has reached a final decision. In those cases, the Court can grant an Injunction that is also known as an Interim Injunction.

An **Interim Injunction** can only be granted after litigation has commenced or in an emergency situation, but in an emergency an Undertaking must be given that the litigation will be started immediately.

The usual purpose of an Interim Injunction will be to preserve the legal standing of the parties until their rights have been determined. In order for the application for an Interim injunction to succeed it would have to be demonstrated to the Court that there is good reason why the Respondent's rights should be restricted without knowing whether or not the Claimant will succeed in the litigation.

At this stage, the Applicant would not have to prove its underlying claim, but only that it had a **good prospect of succeeding**. The Court would have to be persuaded that there are serious issues to be tried and the Court would then have the discretion to grant an Injunction.

## Procedure

If there is an emergency, an application for an Injunction can be made **without notice** being given to the other side and should an Interim Injunction be granted, the Court would then later hear argument and evidence from both parties. In order to obtain the Injunction, an application must be made together with appropriate and persuasive evidence in support.

When making an application on a without notice basis, the Court places a degree of trust in the Applicant to tell the full and entire story and, therefore, it is important to ensure that the Applicant is **not misleading the Court**, whether by omission or otherwise. The consequences of failing to disclose a material fact – even if it harms the Applicant's position, may be that the Injunction, if

granted, will be set aside and the Applicant would have to pay any costs incurred by the other side together with damages for any loss suffered by the Respondent as a result of the Injunction.

The duty of disclosure applies to all material facts known to the Applicant and to any additional facts which should have been known if proper enquiries had been made. Furthermore, there is a duty to correct any misinformation or omission as soon as it becomes apparent.

Examples of where Injunctions might be necessary are:

- **Shareholder** disputes;
- Freezing bank accounts of a party where funds may be dissipated to avoid the effect of a future Judgment;
- **Search and Seizure** Order of documents and information which may have been illegally obtained;
- Restraining the publication of obvious and defamatory lies;
- Preventing infringement of **copyright, trademark** and other **intellectual property** rights;
- Restraining the wrongful use of **confidential information** and trade secrets;
- Preventing an ongoing **breach of contract**;
- To prevent breaches of **restrictive covenants**;
- To prevent dealings with particular customers or suppliers; and
- To prevent breaches of confidence.

Injunctions appear in many forms and can be used in a variety of circumstances. They are an important tool to be used in civil actions where immediate and protective measures are required, as in the case of the **Canary Wharf Group**.

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