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"INTERLOCUTORY INJUNCTIONS IN
KENYA: A SERIOUS QUESTION
TO BE TRIED"

Dissertation submitted in partial fulfillment of the
requirements for the LL,B Degree,
University of Nairobi.

By
Muchiru P. Njenga

Nairobi

1985
June MCMLXXXV

« NEW DIRECTIONS IN THE
GRANT OF APPLICATIONS FOR
INTERLOCUTORY INJUNCTIONS »

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DEDICATION

For M.D; Maitu, Wambui and Warura Junior

To Maitu for Creating Me;
To Wambui for sustaining me;
And Warura for motivating me;
And last but not least to M.D. for whatever.

A C K N O W L E D G E M E N T S

I must acknowledge with profound gratitude, the person who inspired in me an attempt to offer my humble views about this controversy, the person of Mr. Pheroze Nowrojee; Lecturer, and Lawyer inter alia a repository of legal wealth and whose supply of wit and humour interposed with a sharp intellect are infinitely boundless - His assistance is acknowledged in those meager terms. To my supervisor Mr. Isabir~~ye~~ whose immeasurable patience facilitated a final production of this work without which I would have been at great loss to produce - Not to forget the extremely overworked librarian staff in the persons of Mrs. Kimani and Mr. Nyingi of the Law Section who helped me enormously in acquiring cases and other materials not otherwise accessible - although their praise is rarely sung I give them sincere thanks of appreciation and can only encourage them to continuing assisting mankind. Thanks also to Mr. Kuloba for access to his unpublished manuscript and information therein. Also to Mr. A.B. Shah, Advocate and Mr. Rustam Hira, Advocate for their gracious granting of interviews and access to information - and to all others for helping to put the wheels in motion in producing this piece of work - But notwithstanding all omissions and shortcomings are entirely the responsibility of the author.

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ABBREVIATIONS

Books and Periodicals

Camb. L.J.	Cambridge Law Journal
Harv. L.R.	Harvard Law Review
L.Q.R.	Law Quarterly Review
Mod.L.R.	Modern Law Review
Univ.T.L.J.	University of Toronto Law Journal

Books

Halsburys Laws of England, Hailsham Edition Volume XVII.
Kuloba, Kuloba R., Principles of Injunctions.
Meagher, Lummow & Lehane, Equity Doctrines & Remedies
Petit-Petit, Equity and the Law of Trusts.
Snell-Snell, Principles of Equity.

Cases

A.C.	Appeal Cases
Ch.	Chancery
C.L.R.	Common Law Reports
De G & J.	De Gex Jones Temp Cranworth - 4 Ch 1835-84
D.L.R.	Dominion Law Reports 1912
E.A.L.R. [E.A.]	East African Law Reports
E.R.	English Reports
G.L.R.	Ghana Law Reports
K.L.R.	Kenya Law Reports 1912-1956

K.B.	Kings Bench
L.J.N.S	The Law Journal New Series 1832-1849
L.R.	Law Reports
Man.R.	Manitoba Reports.
Ont. W.N.	Ontario Weekly Notes
Ph. Phillips	or 2 Ch 1841-49
T.H.C.D.	Tanzania High Court Digest
Tan. L.R.	Tanganyika Law Reports 1921-1957
W.L.R.	Weekly Law Reports.

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INTRODUCTION

One of the most important and frequently sought for remedy in equity is the injunction which as will be seen later can take various forms. Basically it is an order of the court directing a person or persons named to refrain from doing some particular act or thing.¹ The subject of the grant of injunctions is widely accepted by scholars and the judiciary inter alia of being complex and at times ambiguous.² This is due in part to the fact that it hasn't received much legislative stimulus or authority in its formulation.³ This is because it's mainly made up of case law and is deducible from precedents which form a corpus of highly technical decisions.

The body of local East African cases don't appear to demystify the situation as merely purport to illustrate foreign English principles in a far from satisfactory manner. A study of injunctions is an exercise in equitable discretion which ensures the true realisation of justice on articulated principles to temper the rigours of the law.

The single focus and subject matter of this work is the grant of interlocutory injunctions. Its grant illustrates the equitable scope of remedies based on the doctrines of equity. Its wide potency and frequency of usage in the daily litigation and judicial framework

attests to its utility. The interlocutory injunction aids a party to temporarily restrain a party enjoined to the suit⁴ and to maintain the status quo pending final determination and adjudication of the suit. The increase of such applications in the High Court range from inter alia, Patent and trade mark disputes⁵; Expulsion from clubs and societies⁶; Restrictive covenants of employment⁷; and for specific performances of contract⁸.

The criteria for the grant of such interlocutory injunctions was relatively well settled⁹: - Until the judgement of the English House of Lords in the case of American Cyanamid Co Vs Ethicon Ltd.¹⁰ Where Lord Diplock with whom all their lordships concurred, enunciated a newer and relatively modern and liberal approach. The thrust of this approach was to cast less of a burden of proof on parties seeking grants of interlocutory injunctions. By requiring that the previous test of satisfaction by the court of the applicant's case to have a prima facie probability of success be discarded as it was being used as a rule of law rather than of practice. His Lordship stated that a mere satisfaction of the court that "...there was a serious question to be tried..." should suffice.¹¹ The Kenyan approach has been stated to be that prevailing before this decision and has recently been re-stated in Salim and Others vs Okongo and Others¹² viz that a prima facie case with a probability of success must first be made out.

In this paper I will examine the antagonism both in contextual approaches and also in the divergence of the Bench-members sympathy to either approach. Essentially this will be at the crux of this work. The judicial and intellectual battle that has raged following the American Cyanamid decision and Lord Diplocks dictum there-to can be reflected in various observations that have been made. One editor of the Law Quarterly Review¹³ has noted "that English Courts [have been] experiencing indigestion over the new rules for interlocutory injunctions"...while a Judge in the New Zealand Supreme Court has complained thus "The authorities as to when an interim injunction should be issued are in a state of dissaray".¹⁴ In Fellowes & Son Vs Fischer¹⁵ the indomitable Lord Denning M.R. claimed that the American Cyanamid case had perplexed the legal profession and had been criticized in legal journals and that it was impossible to reconcile it with a previous House of Lords decision in Stratford vs Lindley.¹ The extreme extension of these observations is well demonstrated by some authors from an Australian treatise who have categorically stated "The truth of the matter is that no real principle can be laid down".¹⁷

It is against the foregoing background and arguments inter alia that in the first chapter of this work I will discuss the definition and types of injunctions and the nature, jurisdiction, scope and evolvment of the interlocutory injunction. I will also briefly mention its

functions and frequency of use in Kenya. In the second chapter I propose to discuss the general considerations and conditions precedent for such grant of interlocutory injunctions. While in the third chapter I will take a comparative analysis and critique of conditions and cases prior to the 1975 American Cyanamid¹⁸ decision and subsequently after it. In this part I will indicate past and present conditions for such grant in England and Kenya and a few other common-wealth countries; to show the circumstances and contexts they have been arrived at. In the last chapter and part of this work I intend to make ^{notable} ~~a~~ostable observations and critiques on this area as well as to offer suggestions and any other recommendations I deem feasible and prudent this will in effect conclude this thesis.

A study of this area of interlocutory injunctions was motivated by a recognition of its wide-scope and potential as an equitable remedy and all-purpose lever which I feel of necessity must be dynamic and bold and relevant to the fluid nature of society and the prevailing norms therein. And it is in such recognition that it may be prudent to remember and indeed keep in mind the statement of Bacon "And he that will not apply new remedies, most expect new evils for time is the greatest innovator." Without prejudice this will be the permeating intellectual and contextual stance the author will hope to project throughout this humble piece of work.

FOOTNOTES TO THE INTRODUCTION

1. The Civil Procedure Act [Cap 21, Laws of Kenya] Order XXXIX Rule 4, & (2).
2. Baker; "The Future of Equity" [1977] 93 Law Quarterly Review 527 at 528;
Lord Denning in Fellowes vs Fischer [1976] 1 QB 122;
Hancox J. in Areva Construction (K) Ltd. & D. Meier vs J. K. Kamere and Another H.C.C. 10559 [1982] unreported decision.
3. Kuloba R. 'Principles of Injunctions'. Unpublished Manuscript 1981 at the preface.
4. Civil Procedure Act [Cap 21, Laws of Kenya] Order 39, Rule 1.
5. East African Industries Ltd vs Trufoods Ltd. [1972] E.A. 420.
6. Mwamba R.F.C vs Kenya Rugby Football Union H.C Nbi, No.556 of [1981] unreported decision.
7. Giella vs Cassman Brown & Co [1973] E.A. 358.
8. Abdul Salim and Others vs Okongo and Others Civ. App. No 44 of [1975] unreported decision.
9. Ibid at 2.
10. [1975] 1 All E.R. 504.
11. Ibid at 511.
12. Supra at note 8.
13. Baker; "The Future of Equity" [1977] 93 Law Quarterly Review 529 at 537.

14. Greenwich vs Murray [Unreported Supreme Court, Wellington. New Zealand 21/12/1977].
15. [1975] 3 W.L.R 184 at 189.
16. [1965] A.C. 269.
17. Meagher, Gummow & Lehane: Equity Doctrines and Remedies 1975 at 403.
18. American Cyanamid Supra note 10.
19. Bacon; on innovations cited in "Note development in the law of injunctions" [1965] 78 Harvard Law Review 994.

CHAPTER I

A. TYPES OF INJUNCTIONS AND THE MEANING OF AN INTERLOCUTORY INJUNCTION

The injunction is an order of the court directing a person or persons or authority to refrain from doing a particular thing or less often to do some particular act or thing.¹ It is an equitable remedy that restrains parties enjoined to the suit from committing inter alia, a tort, a breach of contract or from breaking the law. It is enforceable by courts by statutory fines for contempt or for attachment of property as in appropriate cases. It is an equitable remedy subject to discretion of the court and is meant to be used judicially within the settled principles of law.

The injunction comes in various forms of which the first type is the class of injunctions known as prohibitory and mandatory injunctions. The former type acts to restrain the doing or continuance of some wrongful act thus its restrictive in nature. Whereas an injunction to restrain the continuance of some wrongful omission is called mandatory. The rigorous ^{v. J. O. S. V. S.} surrounding the award of this latter, mandatory injunction make it more rare than the relatively easier and more usual prohibitory injunction.

The other types of injunctions are the perpetual and interlocutory injunctions. The perpetual injunction

is granted only after the plaintiff has fully and finally established his right and the actual or threatened infringement of it by the defendant. This injunction is permanent in that it is granted at the final determination of the parties rights. The interlocutory injunction that is the subject matter of this paper is, an injunction that is as stated 'Interlocutory' or interim in nature. This injunction is distinct in that it doesn't purport to finally determine the individual rights of the parties. It is granted before the main trial of an action and is intended to preserve the matters in status quo until the question or litigation before the parties can be determined. It's operation may afford the plaintiff a temporary stay of matters until the case is heard whereupon the injunction could be dismissed, varied or allowed to continue in permanent terms. The effect of which is to allow the defendant at the hearing to oppose it fully.

There is also statutory provision for the grant of ex parte applications for injunctions where the court is satisfied purely on the strength of the plaintiffs representations that the object of granting the injunction might be defeated by delay in the issue of notice of application for it being served on the other party. But the provision only gives such ex parte injunctions to be operational for a maximum of only

two weeks where upon it must be heard for variance or otherwise.²

As stated in the introduction, the subject-matter of this paper is the grant of applications for interlocutory injunctions. The single focus on it rather than on the other types and forms of injunctions is because of its seemingly complex and confusing nature of its application. Which factor isn't diminished by the historical pre-requisites for its grant and the subsequent historical evolution it has undergone worldwide thereafter. But let it not be seen that it is without purpose for it has significant importance but as a rose has thorns as part of it so does the interlocutory injunction analogically have constraints.

As I have mentioned the object of the interlocutory injunction is to preserve the status quo by preventing a threatened wrong or any further perpetuation of injury until the issues and equities can be determined after a full examination and hearing. Once granted it stands as a binding restraint until rescinded by further action of the court. It has been observed;

"The whole purpose of an interlocutory injunction is that matters should be preserved in status quo until the question to be tried to be investigated can finally be disposed of".³

Other judicial authority while paraphrasing the above

quotation has been put thus by Lutta J.A.

"...as I understand it...the object of keeping matters in status quo is in order that if at the hearing of the substantive action the plaintiff obtains a judgement in his favour then the respondent or defendant will have been prevented in the mean-time from dealing with the property of the subject matter in such a manner as to make the judgement ineffectual..." 4

Although the interlocutory injunction is a provisional order to restrain from the doing of a certain act or to require certain affairs to be altered temporarily until a named date, in practical terms it may sometimes formally dispose of the main matter in controversy or settle the matters as between the plaintiff and defendant.⁵ It is also important to note that the interlocutory injunction is granted in cases only in which monetary compensation affords an inadequate remedy to an injured party.⁶ Though the proverbial delays of Lord Eldon's Chancellorship no longer exist, there is still an inevitable lapse of time between the commencement of an action and the trial.⁷ Thus the injury being suffered by the plaintiff may be such that it would be unjust to make him wait until the trial for relief. And so it is in these circumstances that the court will utilize its equitable discretion to grant an interlocutory injunction before the trial with the object of keeping matters in status quo⁸ or of facilitating the administration of justice at the trial. An interlocutory injunction may also be granted pending an appeal⁹ if the prevailing circumstances so demand.

This reiterates the fact that the grant of interlocutory relief is always discretionary and depends on the facts of each case. So as to decide fairly without in effect prejudging the questions of law or facts in the main suit yet pending full determination and adjudication.

B. ENFORCEMENT OF THE INTERLOCUTORY INJUNCTION

The general rule is that the party against whom an injunction is made and who disregards it is liable to be dealt with for contempt of court proceedings whatever the nature of the injunction may be. It is consistent that a court has both the power and jurisdiction to prohibit a wrong should be seized of the same power to enforce its prohibition. Statutory provisions are provided in The Civil Procedure Act¹⁰ which sets out sanctions with regard to disobedience of such temporary injunctions and it provides such person guilty thereof to be committed to prison and order that his property be attached and sold; while there is further "supplemental proceedings"¹¹ set out as a sanctions with regard to disobedience of injunction decrees. This is all in addition and not deviation from the inherent power found in the case-law for the normal sanction of contempt of court as provided in the Judicature Act.¹² Thus in total the various sanctions include; imprisonment of individual violators, attachment of the defendants property; fines and costs; and ancilliary damages and other declarations and sanctions viz against

corporations e.g the attachment of property and detention of directors of the violating party. The other device employed is for parties to deposit undertakings of damages by either the plaintiff and/or cross-undertakings by the defendant depending on the circumstances of the case. This is to mitigate the final determination of damages and or to constrain either party to adhere to the terms of the injunction or risk a forfeiture of such sums of money as already deposited in the undertakings.

C. THE NATURE OF INTERLOCUTORY INJUNCTIONS

It has been stated in a judgement by Lord Lutta, J.A. that the nature of an interlocutory injunction is

"...to preserve the status quo thereby preventing the plaintiff from being deprived of his rights forever...." 13

Other judgement have reemphasized this point elsewhere by stating:

"...the court does not decide the rights of the parties but seeks to have the status quo maintained...." 14

The sine qua non for the award of this form of injunction is that the applicant will only be granted it so long as he might otherwise suffer irreparable injury which would not be adequately compensable by an award of damages. Indeed this is the first and basic principle in the award of all types of injunctions, moVe so when it is of an

interlocutory injunction.

The House of Lords of England in the epic and milestone case of American Cyanamid Co Vs Ethicon Ltd.¹⁵ had stated that there was two grounds to be established before an injunction could be granted. These were stated by the noble and eminent Lord Diplock; with whom all their Lordships concurred to be first, that the applicant must establish a prima facie case meaning that if the case remains as it is there is a probability that at the trial of the action the plaintiff will be entitled to relief. He further stated, that secondly, the court must look at the balance of convenience. While the indomitable and ~~brilliant~~ person of Lord Denning has also stated in an English case:

"...The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary, it must not be made the subject of strict rules....." 16

It has further been termed by Sheridan C.J.:

"...a drastic remedy...."¹⁷

The tenor and objects as stated by Lord Diplock in the American Cyanamid case have been similarly adopted in part in Kenya by Judges such as ^{Madam} 18 ~~Madam~~ J.A. inter alia.

D. SCOPE

It is pertinent to remember the first principle of injunction law viz that prima facie you don't obtain an

injunction to restrain actionable wrongs for which damages are the proper remedy.¹⁹ While it has been noted by Buckely L.J. that more is needed to show that "...there is certainly a case to be tried...."²⁰ or as put very succinctly in the articulate language of Lord Diplock in the American Cyanamid case that the court must be satisfied that:

"...the claim is not frivolous or vexatious in other words that there is serious question to be tried...." 21

The extent of the scope is one that can only be qualified as extending to the particular circumstance of the case and the discretion of the Judge. His Lordship while trying to explain its limits merely succeeded in illustrating its relative elasticity by deprecating any attempts to fetter the discretion for the grant of injunctions vested in Judges and courts. While Madan J.A. has noted²² that the discretionary element exercised is a judicial discretion not easily to be interfered with by an appellate court unless it can be established that the discretion has not been judiciary exercised, in itself quite an onerous task.

Due to the gravity and rigours associated with the interlocutory injunction courts have felt more comfortable awarding other remedies to litigants and using the injunction sparingly and even then only in clear and simple cases it being regarded as a remedy not to be lightly indulged in. But a court may grant the applicant an

injunction and in addition award damages for the same injuries if he establishes his title and its violation. As in statutory provisions or the common law, specific relief in equity may not always cover the whole field of doing justice thus the inherent jurisdiction to award damages in equity is important to note. The courts of Equity have always had the jurisdiction to grant damages and this power didn't originate from statute but was always possessed as a matter of practice.

The effect of the grant of an interlocutory injunction only binds the parties and privies to it, although servants and agents may be held liable. The statutory provision states that the injunctions therein are to prevent the ends of justice being defeated. Although Lord Cottendam has stated;

"....its utterly impossible to lay down any general rule upon the subject by which the discretion of the court is in all cases to be regulated....." 23

But it would be prudent to set the limits within the ambits of the observation of Jessel M.R. in Beddow Vs Beddow that:

"What is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles....." 24

The remedy of the interlocutory injunction may be used to give effect to a right recognisable only in Equity e.g. to restrain breaches of trust or breaches of

restrictive covenants enforceable only in Equity or acts of Equitable waste but its more commonly used to aid legal rights like the restraining of tortious acts or breaches of contracts.

E. EVOLVEMENT AND JURISDICTION

In Kenya the evolvement is noted significantly from the decision in Kanji Vs. Wakf Commissioners.²⁵ But it has been noted elsewhere²⁶ that in England by the 19th century there were two broad classes of cases in which injunctive relief was open. To enable protection of purely equitable rights against infringement by exercise of a legal title or right in a manner contrary to good faith or inconsistent with purely equitable principles. Secondly in aid of legal rights when the common law of damages was inadequate. In the first case courts of chancery dealt with matters entirely in its original and exclusive jurisdiction and entirely on Rules of Equity, while in the second case the court of chancery had no original jurisdiction and its function was simply to grant an injunction in aid of legal right.

But articulated standards were slowly emerging. By the mid-century an applicant had to demonstrate that there was a substantial question to be decided before an interlocutory injunction could issue. This test was espoused by several very experienced appellate

Judges like Lord Cottendam²⁷, Lord Cramworth²⁸ and Turner L.J.²⁹

The statutory provisions for the jurisdiction of the interlocutory injunction are to be found in The Civil Procedure Act³⁰ as the sources of injunctions stated as "Temporary and Interlocutory Orders" which are read in conjunction with provisions of the Judicature Act'.

Per Section 3 (1)

"The Jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with:-
.....
.....

(c) subject thereto and so far as the same do not apply, the substance of the common law, the doctrines of Equity [italics, mine] and the statutes of general application in force in England on the 12th August 1897 and the procedure and practice observed in courts of Justice in England at that date."

There are no italics here

The result of this reception clause was to make doctrines of Equity part of Kenyan law as early as in 1921 where a Kenyan case shows that Kenyan courts were always free to issue injunctions although there was no statutory express provision for it. It can be discerned that the Civil Procedure Act was enacted in 1924. In this case of Kanji Vs Wakf Commissioners³¹ the respondent sought and did obtain an injunction to restrain Kanji the appellant, his servants or agents from continuing or repeating to cause stones and other building materials

to be stacked up on the land rested in the respondents.

The injunction as an equitable remedy was originally only obtainable in the Court of Chancery or Court of Exchequer in Equity. But the power to grant injunctions was later extended to Common Law Courts by provisions of the Judicature Act of 1873 and its successor in 1925. Its effect was to transfer to the High Court in England all the jurisdiction including that of granting injunctions, which further resulted in the merging of common law to Equity in Kenya, where injunctions are granted by the High Court of Kenya which has original jurisdiction to do so. This merger of Common Law and Equity was reflected upon by Jessel M.R. who remarked;

"There are not two estates as there was formerly, one estate at common law by reason of payment of rent from year to year and an estate in Equity under the agreement. There is only one court and the Equity rules prevail in it". 32

The jurisdiction of the Kenyan courts was recognised as early as in the case of Gulam Mohammed Vs Nathou Ambarau where the defendant failed to argue his way out of the jurisdiction of the High Court of Kenya while residing outside, but sued within Kenya. The High Court in this case held it was given jurisdiction by the High Court of England through the 1897 Order in Council as stated in Section 3 of the Judicature Act. Subordinate Courts in Kenya are possessed with juris-

diction to grant both perpetual and temporary injunctions in conformity with doctrines of Equity and statutes of general application in force in England on the 12th of August 1897.

The jurisdictional history in England was that it was part of the chancellors concurrent jurisdiction born of emergency to make up for the defects of the Common-Law when the latter became inadequate and too rigorous in application and thus repugnant to justice. The basic limitation was that an injunction wouldn't be granted if the Common Law remedy of damages was adequate. Equity never examined or over-ruled a Judgement of Law but merely prevented unjust use of Common Law Courts. In 1615 following Earl of Oxford's³⁴ case, a year later King James I declared the Supremacy of Equity in matters of conflict over the Common Law. Prior to 1854 the jurisdiction to grant injunctions had been exercised solely by the Chancellor but in 1854 provisions of the Common Law Procedure Act³⁵ gave to the Common Law Courts a jurisdiction to grant injunctions in all cases of contracts or other injury. This Act was repealed by the 1873 Judicature Act giving such jurisdiction to the supreme court it empowered the new court to grant injunctions ".in all cases in which it appears to the court to be just or convenient"³⁶ to do so. But this observation was to be applied as qualified by Jessel M.R. in Beddow Vs Beddow.³⁷ The ever present crucial

aspect is that this discretion of the court is a sound and reasonable discretion guided by legal principles and capable of review or correction by an appellate court. By the 1897 East African Order in Council civil jurisdiction was admitted into Kenya to be read together with the present Judicature Act. The Court of Appeal in Kenya has stated that the granting of interlocutory injunctions are purely matters of procedure.³⁸

When Lord Cairns Act was passed in 1858 it stated inter alia that a court if conditions so warranted could award damages to injured parties in substitution or addition for such injury or specific performance and such damage was to be assessed in such manner as the Court was to direct. Statutory provisions in the Civil Procedure Act and rules therein contain provisions to regulate supplemental proceedings which are taken in a course of an action or other proceedings. Although the basis of the equitable jurisdiction to grant an injunction has always been the inadequacy of the common-law remedies the onus on the applicant to prove that inadequacy to qualify for the grant of the order. It was failure of the early attempts of the Common Law Courts to add the injunction to their judicial armoury that necessitated the chancellor to come to the aid of those whose wrongs couldn't be adequately redressed by damages. This often meant concurrent proceedings had to be entered;

in the Common Law Courts to establish the right and in the Court of Chancery to obtain the remedy which finally lead to the amalgamation of the courts in 1875.

F. FUNCTIONS

The statutory provisions in The Civil Procedure Act³⁹ provides for 3 fold purposes viz; To restrain the commission of a wrongful act; To restrain a breach of contract or to prevent the repetition or continuance of a wrongful act or breach of contract. So an interlocutory injunction can be stated to serve preservation of property, prevention of violation of rights and prevention of commissions of torts or breaches of contract. In Kenya the courts have held that the purpose of grants of this order are to preserve matters in status quo the question in the suit can finally be disposed of.⁴⁰ So the object can quite authoritatively said to be to decide fairly without prejudging the questions of law or fact in the main suit whose full hearing is still pending. It has been put thus by Madan J.A.:-

"At that stage of hearing the application the main issues are still at large and they have as yet to be proved in evidence in court subject to the statutory test of cross-examination".⁴¹

The Kenya Court of Appeal in the case of Wairimu Mureithi vs City Council of Nairobi⁴² has stated and I quote in extenso the leading judgement of Madan J.A.

".....I would respectfully borrow the following words from the speech of the Lord Diplock in the American Cyanamid case 43 case which the Court of Appeal" see no cause to differ". "The object of the interlocutory injunction is to protect the plaintiff against injury for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial.....If damages in the measure recoverable at Common Law would be adequate remedy and the defendant would be in a financial position to pay them; no interlocutory injunction should normally be granted, however strong the plaintiffs claim appears to be at that stage....." 44

This best captures the object and function of the interlocutory injunction.

FOOTNOTES TO CHAPTER I

1. Pebt. P.H: Equity and the Law of Trusts [4th Edition Butterworths] at 398.
2. Order XXXIX Rule 3 (2) as amended by Legal Notice 1981 No.16 to [Cap 21 Laws of Kenya].
3. Halsburys Laws of England Hailsham Edition, Volume XVIII paras 41-44 at 27-30.
4. Devani Vs Bhadresan and Another [1972] E.A. 22.
5. Per Lord Dennings Observation [1975] 3 W.L.R.
6. Order XXXIX Rules (1) (a), 2 (1) and (2) Cap 21 Laws of Kenya.
7. Snell: Principles of Equity [27th Edition, Sweet and Maxwell 1973] at 638.
8. Jones Vs Pacaya Rubber Produce Co. [1911] K.B at 457.
9. Kibutiri Vs Shell H.C.C. 3398 of [1980] unreported.
10. Section 63 (c) and Order XXXIX Rules 2 (3) and (4) [Cap 21, Laws of Kenya].
11. Ibid Order XXI Rule 28 (1) (2) (3) (4) and (5).
12. Section 5 [Cap 8, Laws of Kenya].
13. Ibrahim Vs Shakh Bros Ltd. [1973] E.A. 118 at 123.
14. Vander Prye Vs Nartey [1977] I G.L.R. 428.
15. [1975] I All E.R 504 at.
16. Hubbard Vs Vosper [1972] I All E.R. 1023.
17. Hesham Tejper Vs Khinji [1930] T.L.R. 653 at 659.
18. In Wairimu Mureithi Vs City Council of Nairobi. Nbi. Civ. App 55 of [1979] unreported decision.

19. Tulk Vs Moxhay [1848] 2 Ph 744.
20. Supra note 8 at 445.
21. Supra note 11
22. Supra note 18.
23. Saunders Vs Smith [1838] 3 My & Co 711.
24. [1878] 9 Ch 89.
25. [1921] 8 K.L.R 182.
26. Professor Hammond: 'Interlocutory injunctions.
Time for a new model [1930] University of Toronto
L.J., Vol. I.
27. Great Western Railway Vs Birmingham [1848] 2 Ph 597.
28. De Matos Vs Gibson [1849] 4 De Sol. 276.
29. [1851] S.M.N.S. 410.
30. Order XXXIX [Cap 21] Rules (1) - (9).
31. Supra note 25.
32. Walsh Vs Lonsdale [1882] 21 Ch.D. 9.
33. 6 E.A.L.R 174.
34. [1615] Rep Ch.
35. Subsections 79 and 82.
36. Section 16.
37. Supra note 24.
38. Pennys Gray Vs Cobb and Powyland Ltd.
6 E.A.L.R. 53 read with Order XXXIX Rule (1) & (2)
Cap 21.
39. Supra note 30.

40. Jannohamed Vs Madhani [1953] 20 E.A.C.A. 8
Ibrahim Vs Sheikh Bros. Ltd. [1973] E.A. 118.
41. Jethabai Vs Fischer C.A. Misc App 18 of [1979]
unreported.
42. Supra note 18.
43. Supra note 15.
44. Ibid. at 406 and 408.

CHAPTER II

CONSIDERATIONS PRECEDENT FOR THE GRANT OF INTERLOCUTORY INJUNCTIONS

A. The principles for such grant in Kenya have been set out inter alia in the court of Appeal decision in giella vs Cassman Brown¹: Together with other², cases the requirements can thus be summarized. Firstly an interlocutory injunction will not normally be granted unless the applicant can show a prima facie case with a probability of success. Secondly if the applicant might otherwise suffer irreparable³ injury which would not be adequately compensated by an award of damages. Thirdly if the court is in doubt about either the first or second condition; it will decide an application on the balance of convenience. And lastly the court will decide if matters ought to be preserved in status quo.

These conditions as will be shown in this chapter are by no means exhaustive as there are other factors to be taken into consideration. These include the conduct of the parties enjoined to the suit and the conditions to be observed in deciding if to grant or deny the injunction. In this chapter the position in England for the grant will be mentioned in anticipation of arguments to be observed in the subsequent chapter. This will seek to provide a general framework in which the grant of interlocutory injunctions are decided and the rationale behind the decided cases.

At this point its necessary to briefly mention that the first principle as mentioned earlier is one that has been and still is controversial³ both in Kenya and elsewhere in

view of the English decision of American Cyanamid Co. vs Ethicon Ltd⁴ where the House of Lords reversed the earlier view of having to show a prima facie case with a probability of success. The test that there should merely be a serious question to be tried was substituted. At this stage I only intend to point out to the American Cyanamids approach and cases that have followed it both in England and Kenya, without fully going into an analysis of the merits or weaknesses of either approach for which I will subsequently discuss in the Third Chapter after having initially laid the foundation. I will now discuss the stated principles individually.

PRIMA FACIE TEST

The primary consideration for the grant of an interlocutory injunction is the prima test that an applicant has to fulfill at the outset. It appears that what is meant is that a deduction of evidence submitted by the plaintiff should disclose a case for injunctive relief. One of the difficulties experienced here is that since the injunction is an equitable remedy and the test of a prima facie case is one that is relative. As will be illustrated later, the judges discretion allows diverse rulings of opinions as to when a prima facie case has been made out. The result of which at times will differ with individual judges.

In East Africa Industries Ltd vs Trufcods a case involving the plaintiffs seeking an interlocutory injunction against the respondents claiming the latter were passing off the plaintiffs goods as their own. In dismissing the appeal it was held that " A plaintiff has to show a prima facie case with a probability of success.⁶ " This principle was followed in Griella vs Cassman Brown⁷ where the respondents had similarly applied for an interlocutory injunction to restrain the respondents in an

action involving a contract of restraint of trade between the two parties and its validity. It was held there that there was only a possibility but no probability of the action succeeding and thus as the case was not certain it ought to have been decided on the issue of the balance of convenience.

This principle as in Giella's case. has also been followed in the case of Taws vs Akbarkhan⁸ where Sachdeva J. stated

" all that a court is required to do is to indicate in its opinion if there is a probability of success in the suit which is seeking to enforce the restraint".

This case among others like Mwamba R. F.U. vs Kenya⁹ R.F.U. and Salim and others vs Okongo and others¹⁰ was decided after the decision in the American Cynamid case of which holding the courts refused to follow or take cognisance of. The decision in Mwamba's case was that "(First) the applicant must show a prima facie case with a probability of success¹¹". While in Salims case it was declared by Mustafa J.A. that 'American Cynamid did not apply to Kenya and that "the conditions for the grant of an interlocutory injunction are now well settled in East Africa and I can see no reason to depart from them"¹²

In some other cases in Kenya, courts have used a less onerous test. In Dewani and others vs Dattoo it was stated that what is required in order to obtain a temporary injunction is an arguable case and not a "likelihood of success". The significance of this case is that it was decided nearly twenty-two years before the decision of the American Cynamid case! Thus showing that the prima facie test does not have such strong roots as may be imagined. In Devani vs Phadresa¹⁴ a similar view was adopted. The case involved the appellant dentist who had sought an interlocutory injunction against the respondents; his landlords alleging an oral covenant by them not to permit

a competitor in the same building and a breach of that covenant. It was held that 'finally there was a substantial question to be tried. This decision was similarly decided prior to the American Cyanamid case. The thrust of these two cases was to precede on a similar legal basis as that pursued by Lord Diplock in American Cyanamid viz laying down a more objective and liberal test.

A few cases subsequent to this decision have also tended to incline to the American Cyanamid approach. In Jethabai vs Fischer¹⁵ it was held that in applying the prima facie case rule it was wrongly attempting to comment on the merits of the case at too early a stage and that the requirement of the applicant showing a prima facie case can't be said to be a necessary condition for granting a temporary injunction. While in Wairimu Mureithi vs City Council of Nairobi¹⁶ a case where the appellants sought a temporary injunction against the respondents to restrain them or their agents from demolishing the plaintiffs kiosk that was the subject matter of contention until final determination of the suit. Madan J.A. there held that the "arguable" case is the correct view. In another case¹⁷ Cotran. J. granted an injunction after holding that the applicant had not shown a prima facie case with a probability of success. Although this was done to facilitate an appeal in that case. In yet another case of Minnesota Mining Co. vs Shah and another¹⁸ Cotran. J.. sought to merge the two approaches in holding that: There is little difference between "a prima facie case with a probability of success" and "a serious question to be tried".

In England the position had been stated in a previous House of Lords decision in Stratford vs Lindley¹⁹ where it had been held that a plaintiff was not entitled to an interlocutory

injunction unless he established a prima facie case. This had been the prevailing position until the subsequent House of Lords decision in American Cyanamid Ltd vs Ethicon Co.²⁰. Here Lord Diplock stated, inter alia "All that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious i.e that there was a serious question to be held". His Lordship deprecated the prima facie case rule as one that had been used as a rule of law rather than practice and he felt the phrase "prima facie" was vague and confusing. To demystify the central issue required for the grant he stated

The use of such expressions as a probability a "prima facie case" or "a strong prima facie" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief²¹,

thereafter substituting the test espoused above. Lord Diplock observed also that the rule the purpose sought to be achieved by giving the court a discretion would be stultified by almost half if it was followed.

In an old case Great Western Railway Co. vs Oxford Railway²² it was held that the court will not interfere if it thinks there is no real question between the parties - but seeing there is such a substantial question to be decided it will preserve the property until such a question can be regularly disposed of. Another case²³ has held that the need to show a probability that the plaintiff is entitled to relief is the proper test: Scrutton L.T elsewhere²⁴ has used the criteria of an alternative or a strong prima facie case that the right which he seeks to protect in fact exists. While in a recent case Cayne vs Global Natural Resources P.L.C. held "The court should not . . .

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necessarily conclude that the plaintiff has failed to prove a triable issue because on such application it is not necessary for the parties to establish firmly the outcome of the case"²⁵.

Buckley L.J.²⁶ has also espoused a less onerous test stating 'the need to show that there is certainly a case to be tried.'

In N.W.L. vs Woods²⁷ it was stated that the degree of likelihood of the defendant succeeding in establishing that defence to which the court was required to have regard should be the guiding factor. An Australian case has similarly held that

"When it is said that the plaintiff must show a probability of success that does not mean it is more probable that not that he will succeed it is enough that he shows sufficient likelihood of success to justify in the circumstances the preservation of property"²⁸

C IRREPERABLE INJURY

It has been stated by one scholar that the object (of an interlocutory injunction) is to prevent a litigant who must necessarily suffer the law's delay from losing by that delay the fruit of his litigation.

This is referred to as "irreparable injury or damage" meaning that the money obtained at the trial would not be adequate compensation.³⁰ It appears that in this condition emphasis is placed on the risk of damage which must be serious and uncompensable by damages.

It has been held in Attorney General vs Hallet³¹ that irreparable injury means injury "which if not prevented by an injunction cannot afterwards be compensated by any decree which the court can pronounce in the result of that cause". In the East African Industries decision which was followed in Giella's

case. It was held in the latter that inter alia an interlocutory injunction won't be granted '..... unless the applicant might otherwise suffer irreparable injury...' In Jan Mohammed vs Madhani³² an action seeking a temporary injunction against the respondents until the hearing of the suit from carrying on the respondents business or using or occupying the premises thereof, or using or wasting the furniture and chattels therein. It was Held here inter alia that save in exceptional circumstances an injunction would not be granted unless there is likelihood of irreparable injury viz substantial injury which would not be adequately remedied or atoned for by damages.

In Nsubuga and another vs Mutawe³³; Mustafa J.A. stated he

found it difficult to imagine how a tailor like the plaintiff could have suffered irreparable injury by handing over clothes to his customers which could not have been adequately compensated by damages. Although the Trial Judge had held so, the Appellate court of whom Mustafa J.A. was sitting thought otherwise. This case illustrates the fact that there is no uniform standard formula as to when the test of if any irreparable injury may result has been fulfilled by an applicant as the two courts here can be seen to have had differing conceptions on the same point. Chanan Singh J. , on the other hand granted such injunction in Sapra vs Tip Top Clothing³⁴ holding there was irreparable injury to be occasioned to the plaintiff in this case who had already established the alleged breach of copyright. In Despina Pontikos³⁵ where the applicants sought an interlocutory injunction of a mandatory nature in order for the defendants to deliver their cargo to them whose value was £250,000 and continually appreciating. It was held there that it was in the interests

of all parties that the cargo should be released as the plaintiff were bound to suffer irreparable injury if this was not done.

Other illustrations of irreparable injury can be cited viz where a Railway Company blocked up a mode of access to a rivals Station³⁶, the court taking the view that the inevitable diversion of traffic couldn't be measured or estimated. Or in the case where a court³⁷ granted an injunction against a declaration of a dividend by a Company holding such damage to be irreparable since if it were ultimately held to be improperly declared it would never be recoverable (even if measurable) to the persons to whom it was paid. The extent of irreparable injury has been Held³⁸; to be serious damage to the extent of being irreducible in damages or other means less formidable than an injunction. In Jiwa Hesham vs Zenab³⁹ it was established that damages are not an adequate recompense for breach of contract for sale of land which breach specific performance is grantable for. The cases that illustrate this condition of there being irreparable harm which would not be compensated for by damages are numerous in Kenya⁴⁰

D THE BALANCE OF CONVENIENCE

Although an injunction will not be granted solely because the balance of convenience favours the grant, nevertheless this feature is usually of some importance. Here the court is called upon to balance the inconvenience to the defendant that might result from the injunction being granted. On the other side of the balance is the inconvenience that the plaintiff may be occasioned

by the denial of the injunction if at the trial he proves to be in the right. Recourse is only to be had to the balance of convenience as a last resort and where there is doubt to the other fore-going pre-requisites. The balance of convenience principle encompasses a consideration of if the matter justifies preservation of the status quo. The third principle; as stated to justify the grant of an interlocutory injunction in Giella's case was that if a court was in doubt about either of the first two principles it should decide the matter on the balance of convenience. It has been put thus in Halsbury's Laws⁴¹.

"where any doubt exists as to the parties rights or if his right is not disputed but its violation is denied, the court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties".

It has also been held⁴² that 'the burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer if its granted lies on the plaintiff'⁴³.

In Fellowes & Son vs Fischer⁴⁴ which case involved the interpretation of the validity of a restraint of trade clause drafted by the plaintiffs a firm of solicitors in England against their executive clerk and its enforceability after he left their employment. It was held 'there was a serious question to be tried but in the absence of evidence as to adequacy of damages as a remedy for the successful party on the trial of the action the balance of convenience favoured letting the defendant continue in his employment.

While in the American Cyanamid case Lord Diplock had stated

"where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience arises"⁴⁵.

The Kenyan case of Arey Construction & another vs Kamere and another⁴⁶ (also citing other cases⁴⁷) made the same point that any doubt was to be resolved following the balance of convenience of the case. In the case of Transgem Trust vs Tanzania Zoisite Corp. Ltd.⁴⁸ the court held an injunction could not cause the defendant undue inconvenience provided it was conditioned on the plaintiff paying the defendants the amount owing for shipment already made and upon placing a deposit in court to cover the defendant's possible damages if they later succeeded.

In the final analysis the balance of convenience may be relied on in the circumstances to justify the preservation of the status quo either to the detriment or benefit of either party. Worley v. P. Noted ' I have always understood the whole purpose of an injunction is that the matter ought to be preserved in status quo until the matter to be investigated can finally be disposed of⁴⁹. Simpson J. on his part has said that 'the determining whether the matter should be maintained in status quo it is well established that regard must be had to the balance of convenience.'⁵⁰ In Beecham vs Bristol Industries⁵¹ a case whose facts were analogous to those in American Cyanamid viz a chemical patent dispute, it was held to be enough for the applicant that he shows a sufficient likelihood of success to justify in the circumstances the preservation of property. In Fellowes Vs Fischer⁵² it was stated that "where other factors appear to be evenly balanced it is

a counsel of prudence to take such measures as are calculated to preserve the status quo". In which case "status quo" was said to mean the position prevailing when the defendant embarked upon the activity sought to be restrained. While else where⁵³ it has been held that after establishment of a serious question to be tried, measures should be taken to preserve the status quo.

E CONDUCT OF THE PARTIES

Before the interlocutory injunctionⁱ is granted the court must take into account not only the foregoing considerations as have already been outlined as being condition precedents but must also look at the conduct of the parties in helping it to arrive at a just decision . This is consistent with the fact that the remedy sought is an equitable remedy and recognizing also that this is an inherent jurisdiction of equity where the court exercises its discretion whether to grant the injunction or not on the accepted principles as laid down by both case law and statutory provisions thereto. A party may be granted or denied an injunction on the single point of the parties conduct in the matter before the court. This misconduct may include unjust or wrongful conduct; delay or acquiescence; or any other misconduct. There is a requirement that in the pursuance for remedies that are equitable in nature, a party must live up to the maxim that he must come to equity with 'clean hands'. This relates to the fairness or good conduct of the party invoking the courts jurisdiction. It requires the denial of relief to a party who is guilty of misconduct, and does not come to Equity with clean hands.

Lord Eldon observed in Blakemore vs Glamorganshire Canal Navigation Ltd.⁵⁴ that "...many cases have occurred in which the injunctions are applied for and are granted or refused not upon the grounds of the rights possessed by the parties but upon the grounds of their conduct and dealings before they applied to the court for the injunction to protect and preserve that right". The rule of law requiring a party to come to equity with clean hands looks into the plaintiffs past record in relation to the issue at hand. (which must be clean⁵⁵).

In K.I.G. Bar, Grocery & Restaurant Ltd vs Gatabaki⁵⁶

the appellants repossessed premises, on the failure of the respondents to comply with their obligations under the lease. The respondent applied to the High Court for relief against forfeiture and for a temporary injunction which was granted on terms restraining the interference with the respondents possession of the premises. The order however was conditional to the payment of rent into the court. This condition was not fulfilled and the appellants applied to the court for a discharge of the injunction upon which refusal the appellants appealed arguing the respondents had not had clean hands. Mustafa J A. said (there). "It seems to me that the trial judge did not consider the position of the appellants at all. He purported to act on equitable principles in refusing the appellants application and yet the respondent did not come to equity with clean hands. They committed a serious breach of the condition of the order given in their favour by the indulgence of the court, and yet the appellants must have suffered damages by the non-payment of rent on due-rates".

In Hansraj vs Manji Ltd⁵⁷ it was held that there may be cases where the defendant by his conduct in this case by hurrying to put up buildings so as to avoid an injunction or otherwise acting with reckless disregard of a plaintiff's right may disentitle himself from asking the court that the damages be assessed in substitution for an injunction. In this case a mandatory injunction was granted against the defendants whose conduct was found to amount to uncleaned hands. In the Despina Pontikos⁵⁸ the court addressed itself to the conduct of the parties. The trial Judge held that the defendants were pursuing a policy of procrastination if not evasion and for this reason they were denied the interlocutory injunction they had sought. In summary it can be said that the personal conduct of the parties may be decisive and should be taken into consideration after the minimal conditions have been met.

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There is another maxim in Equity that parties must observe before the equitable remedy of the injunction can be granted. This is the maxim that equity aids the vigilant and not the indolent. This is an important factor in the consideration of if there has been acquiescence or delay on the part of either party. Since the court is asked to exercise its discretion the court ascertains that it does so for only those manifesting reasonable diligence in asserting their rights and for those who sleep on them, they may waive or forfeit their rights to enforce the same. The delay to constitute 'laches' must be inexcusable and unless action or inaction of the plaintiff has been such as to mis-lead the defendant or evidence the plaintiff's assent to the conduct of the defendant the latter cannot assert laches.

It has been stated in Halsburys Laws⁵⁹ -

"If however the plaintiff has himself shown, by his conduct on a previous occasion, that the injury complained of is one which may in some way be compensated by money the court may decline to grant the injunction."

This principle was followed in Gort vs Clark.⁶⁰ where it was held this may persuade the court not to grant an injunction but it does not take away its jurisdiction to do so in a proper case. In the case of Tantalis Ltd. vs Mawa Handal Anstals Ltd⁶¹ where the plaintiff applied for an interlocutory injunction to restrain the defendant from removing materials from the wreck of a ship Widhan C.J. in relation to laches found that there had been an unexplainable delay on the part of the plaintiff in applying for an interlocutory injunction. In Sapra Studio vs Tip Top Clothing⁶² there had been a four month-delay in applying for the injunction it was found to amount to acquiescence which could bar the injunction sought. Chanan Singh J there while dealing with the issue of delay referred to the principle cited in Halsbury's Laws⁶³ in which law C.J. had said that a delay of a few months during which time endeavours were being made to settle the matter outside the court could not amount to acquiescence on the part of the plaintiff⁶⁴.

In Great Western Railway Co. vs Oxford Railway it was stated 'delay or laches fortiori, acquiescence by the plaintiff in the infringement of his rights may disentitle him to the injunction particularly if the defendant has incurred expenditure in the mean-time. And further that "The jurisdiction to interfere is purely equitable and it must be governed by equitable principles per Turner L.J., while in Selbit vs Goldwyn⁶⁰ it was noted that since the

interlocutory relief is granted only in matters of urgency a plaintiff who delays there by demonstrates the absence of any urgency requiring prompt relief.

Unlike the common law whose jurisdiction is statutory the jurisdiction of equity in execution of injunctive relief is clearly discretionary. Although this does not mean it is to be exercised in an arbitrary manner. In the words of Jessel M.R in Beddow vs Beddow⁶⁷ "what is right or just must be decided not by the caprice of the Judge but according to sufficient legal reasons or settled legal principles". If exceeded^{ed} or wrongly exercised this judicial discretion is reviewable on appeal. This was emphasized by The East African Court of Appeal in Despina Pontikos⁶⁸ where it was stated clearly that the issue of injunctions is an exercise of discretion and its well established that a higher court can only interfere with the discretion of a Trial Judge in exceptional circumstances. Sir Paul Grahānⁿ C.J, in Sargaent vs Patel⁶⁹ where the respondent sought an interim injunction from the court to restrain the appellant from alienating the partnership business. His Lordship there explained that whereas an appeal lies to the the court of Appeal against an injunction order, the granting of such an order is a matter within the discretion of a court below and its only to be interfered with if the discretion is found not to have been exercised judicially.

ADEQUACY OF DAMAGES

Although this aspect is at times treated under the rubric of the balance of convenience and other times as a separate factor^{of irreparable damage!} it is an important factor which justifies being treated separately thus

its inclusion under an independent heading.

The remedy of damages must be shown to be inadequate to compensate for the threatened injury as the equitable jurisdiction to grant an injunction has always been the inadequacy of the common law remedies which can be shown i.e. damages if it's shown damages are impossible to quantify or if assessable but there is little possibility of getting them or if the plaintiffs position i.e. in the expulsion from club membership etc would be irretrievably altered by denial of an injunction or as has been stated in Halsbury's Laws⁷⁰ "It is the very first principle in injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy". It has been applied in East African Industries Ltd vs Trufoods⁷¹ per Spry V.P, holding.

"I cannot see that the appellant company would suffer any loss that could not sufficiently be compensated by an award of damages" it was held further that an interlocutory injunction will not normally be granted if the injury would be adequately compensable by an award of damages. Another case⁷³ has also held that unless its such substantial injury which cannot be adequately decided or atoned for by damages an interlocutory injunction will not be granted.

In Ibrahim vs Sheikh bros⁷⁴ Ltd where the respondent a limited liability company sought and obtained an interlocutory injunction to prevent the appellants from collecting rents on appeal it was held by Law J.A. that the respondent was not in danger of being deprived of its rights as a monetary award could be sufficient compensation for any loss or injury if proved at the subsequent trial. In Tulk vs Moxhay⁷⁵ when the first 'principle'

of injunction law as cited was applied it was held that the appellants could be adequately compensated by damages so no injunction would be issued. While Lord Diplock in his notable judgement in American Cyanamid stated

"the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial establishing his right to a permanent injunction if he would adequately be compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial"⁷⁶.

His lordship went on further to say,

"The extent to which the disadvantages of each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies"⁷⁷.

While in another English case it has been said that⁷⁸ "the damage must be substantial and one which could not be adequately remedied by pecuniary payment". The cases⁷⁹ illustrating this irreparable injury that is not adequately compensable by damages shows how formidable the interlocutory injunction is as an equitable remedy in the protection of equitable rights where the common law has gaps in its inherent nature.

There is another limb to this rubric of the adequacy of damages, it has been observed that⁸⁰ the price that the plaintiff has been asked to pay, for the grant of the injunction has been invariably an entry into what is called "the usual undertakings" as to damages. By this the plaintiff undertakes that he will abide by any order the court may make

if it should ultimately turnout that he was not entitled to the injunction and the defendant has suffered damages thereby as has been stated in Ushers Brewery Ltd vs P.S. King & Co.⁸¹. Though the undertaking is for the defendants benefit its given to the court and its non-performance will therefore constitute a contempt of court. The plaintiff may also be required to pay money into the court. Conversely if undertakings are offered by the defendant on similar principles giving suitable undertakings thereof the court may be inclined to withhold the injunction as in the case of Cromford and High Peak vs Stockport Disley.⁸³ In such a situation a cross-undertaking will automatically be inserted in the order unless the contrary is expressly agreed at the time⁸⁴.

The court in Newby vs Harrison⁸⁵ rejected quite conclusively the argument that after the introduction of this undertaking if the action was dismissed the court no longer had any jurisdiction over the parties and the undertaking could not be enforced. Where an injunction is granted in the usual undertakings the court may if it doubts the plaintiffs ability to pay any damages that may be ordered make the injunction conditional on the plaintiffs depositing a sum of specified money which the court or parties lawyers to the satisfaction of the court as was the position in the Despina Pontikos⁸⁶ among other cases.⁸⁷ It may be added that the court may require the defendant to enter into an undertaking as a condition of refusing an injunction thus the defendant in appropriate circumstances may be required to undertake to keep an account to assist the court, should the plaintiff succeed at the trial in ascertaining what damage he has

suffered in the mean-time⁸⁸.

If a party breaks his undertaking or condition upon which the injunction was granted the court will normally dissolve the injunction unless the breach is minor or technical. The onus being on the party who obtained the injunction to show that the breach is excusable⁸⁹. It has been noted in Kenya that the practise of courts has been to make an extremely liberal use of undertakings and to grant injunctions where issues have been regarded as somewhat less than an arguable case and short of anything which can be called a prima facie case with a probability of success. In Shah and another vs Devji,⁹¹ Rudd J, clearly brought this fact out when he stated judges granted injunctions in some quite shadowy cases but gave additional terms to give security to the defendant. In Pike vs Cate⁹² it was decided that a personal undertaking was sufficient terms to impose as a condition for the interlocutory injunction where there was a real issue and not a shadowy one in that case⁹³, Kekewich J stated that the position would be different if the issue was a shadowy one and suggested in that case it should be refused. Some observers⁹⁴ of the practice in the High Court of Kenya have noted that there have been occasions where this safeguard of undertakings of damages has been so disregarded that Advocates walk into Judges chambers and emerge with temporary injunctions without any undertakings as to damages before issuing the injunctions.

FOOTNOTES TO CHAPTER II

1. (1973) E.A. 358 at 360 E
2. E.G. East African Industries Ltd vs Trufoods (1972)
E.A. 420
3. See; D.S. Salter; "The grant of interlocutory injunctions
in Kenyan Independent approach"
A. Gove; Interlocutory injunctions; A final Judgement 38
Modern Law Review (1975) 672.
4. (1975) 1 ALL E.R. 504
5. Ibid
6. (1972) E.A. 420 at 420E.
7. Supra note 1
8. Civil Appeal 1815 of (1975) unreported
9. H.C.C.C. No. 556 of (1981) unreported
10. Civil Appeal No. 14 of (1975) unreported
11. Supra note 9
12. Supra note 10
13. (1952) 25 K.L.R. 55
14. (1972) E.A. 22
15. C.A. Misc. Civ. App. 18 of (1979) unreported
16. Nairobi Civ App. 55 of (1979) Unreported
17. Kibutiri vs Shell. H.C.C.C. 398 of (1980) unreported
18. H.C.C.C. 346 of (1980) unreported
19. (1965) A.C. 269
20. Supra note 4 at 510
21. Ibid
22. (1848) 41 E.R. 1036
23. Smith vs Grigg (1924) 1 K.B. 659

24. Preston vs Luck (1884) 27 Ch D. 497 at 500
25. (1984) 1 ALL E.R. 225
26. Jones vs Pacaya Rubber Produce Co (1911) K.B. 445 at 557
27. (1979) 1 W.L.R. 294
28. Beecham vs Bristol Industries. (1968) 118. C.L.R. 518
29. Hammond G., 'Interlocutory Injunctions. Time for a New Model'
(1980) University of Toronto L.J.I.
30. Hoffman La Roche vs. Secretary for Trade and Industry
(1975) A.C. 295 at 355
31. (1847) 16 M & U at 569
32. (1953) 20 E.A.C.A. 8 at Headnote 5
33. (1974) E.A. 587
34. (1974) E.A. 489
35. (1975) E.A. 33
36. London North West Railway Co vs. Lancashire and
Yorkshire Railway. (1867) L.R. 4 eg. 174
37. Bloxham vs Metropolitan R. Co. (1868) 3 civ. App. 337
38. Dewani and Ors vs Dattoo (1952) 25 K.L.R. 55
39. (1966) E.A. 7
40. Supra note 9
41. Halsburys Laws of England. Hailsham Edition vol. XVIII para 766
42. Supra note 14
43. Supra note 4~~3~~ at para 766
44. (1976) 1Q. B. 142
45. Followed in Fellowes Ibid
46. H.C.C.C. 1055 of (1982) Unreported.
47. Following Salim supra note 10 and Taws supra note 8
48. (1968) T.H.C.D. 199
49. Supra note 32
50. Supra note 14

51. Supra note 28
52. Supra note 44
53. Mohammed Zainuddin vs Yap Chee. Mal L.J. (1978) Vol. I
54. (1832) 1 My & K 154
55. Shell: Principles of Equity (27 Edition 1973) at 639
56. (1972) E.A. 503
57. (1956) 2 L.R. 367
58. (1975) E.A. 38
59. Supra note 41 para 739 at 353
60. (1868) 18 L.T.R. 343
61. Supra note 57
62. Supra note 34
63. Supra note 41
64. Hansray vs Manji (1956) 2 L.R. 367
65. Supra note 22
66. (1923) 58 L.J. News 305
67. (1878) 9 Ch. 89
68. Supra note 58
69. (1949) 16 E.A.C.A. 63
70. Supra note 41 at 739
71. Supra note 2
72. Ibid
73. Supra note 32
74. (1973) E.A. 118
75. (1848) 2 Ph. 744
76. Supra note 4 at 510 letter Ct
77. Ibid
78. Litchfield vs Queen Anne Gate Syndicate Ltd (1919) 1 ch 407
79. See Salim Supra note 10; Mwamba supra note 9
80. Petit P.: Equity and the Laws of Trusts (4th Edition

CHAPTER III

COMPARATIVE ANALYSIS OF PAST AND PRESENT
CONDITIONS (VIZ THE PRIMA FACIE TEST)

1. A CASE STUDY OF ENGLAND

A. THE PAST CONDITIONS PRIOR TO THE AMERICAN CYNAMID CASE IN 1973.

Before the American Cynamid case courts decided to grant or refuse interlocutory injunctions according to their view of the substantive law involved, where the plaintiff asserted a right or applied to restrain the exercise of an alleged right he had to show a prima facie case that the right claimed or denied did or did not exist. However the strength of the case required was not discussed in any detail by the courts.¹ Decisions as to whether the evidence disclosed a prima facie case were made without any comment as to what was meant by this term. Very often no mention was made even of the requirement of a prima facie case. The court simply considered the arguments before it on the substantive law and allowed or refused an interlocutory injunction with no explanation of the theoretical basis of the decision.²

Down to the mid 1960's the principles enunciated in the 19th century did not alter although greater refinement and articulation took place. In 1965 the principal requirement could be summarized viz the necessity to demonstrate a strong prima facie case. This formula envisaged a two-fold test, the requirement was that it had to be demonstrated to the prima facie standard both that the right existed and that it had been infringed. Where the likelihood or probability

of success was problematic for example or if the facts were in serious dispute an interlocutory injunction was often refused or alternatively an early trial ordered.³

In 1884, Cotton L.J. treated it as a matter "of course" that the court should be satisfied that "there is a probability that the plaintiffs are entitled to relief"⁴ while in 1924, Atkin L.J. regarded it as axiomatic that a plaintiff "must establish to the satisfaction of the court a strong prima facie case"⁵. It has also been accepted by the court as plain and beyond question that the plaintiff must show that, "he has a prima facie case or if you will, a strong prima facie case"⁶ in the words of Lord UpJohn and Lord Evershed, Master of the Rolls.⁷

The clearest and fullest statement of principle was made in 1965 in the House of Lords itself in Stratford & Sons vs Lindley,⁸ In which case the House after considering many conflicting affidavits and a hearing that took 5 days of argument reversed the court of Appeal on the point, that a prima facie case had been established to justify the grant of the injunction which the House restored. Lord UpJohn stated there..... "..... The principles which ought to guide your Lordships seem to me clear. An appellant seeking an interlocutory injunction must establish a prima facie case of some breach of duty by the respondent to him. He may obtain a quia timet injunction, in case of a threatened injury but I need not consider that further because a prima facie case of an actual breach has been established"⁹. Their other Lordships agreed with principles stated by Lord UpJohn and applied the same test that is "The question now to be decided is

whether the plaintiffs have made out a prima facie case"¹⁰.

The real debate about the conditions for the grant of interlocutory injunctions began in 1967 in Harman Pictures vs Osborne¹¹ where without any reference by counsel or the court to Stratford vs Lindley¹² which as a decision of the House of Lords was binding on all courts, Goff J. suggested that no more was required than a demonstration of a case reasonably capable of succeeding. Apparently some counsel gratefully accepted the formula and on the strength of it began treating this case ' as deciding that if the plaintiff has an arguable case an injunction should be granted and the status quo maintained. But this apparent break with the traditional criteria did not last long as Goff J's statement was expressly disapproved by the English Court of Appeal in Hubbard vs Vosper¹³; Lord Denning in this case again without any reference to Stratford vs Lindley¹⁴ (which was also binding on his court) put up a new formula altogether viz...."The right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence and then decide what is to be done.... the remedy by interlocutory injunctions is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules". Megaw L-J's opinion in the same case ran even wider "Each case must be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and Law which are relevant to the particular case"¹⁵

That very broad approach was followed shortly by the same court in Evans Marshall & Co Ltd vs Bertola.¹⁶ The court then went even

further and held that although the failure of a plaintiff to show that he had a reasonable prospect of obtaining a permanent injunction at the trial was a factor which would in the normal case weigh heavily against the grant of an interlocutory injunctions it was not a factor which as a matter of law precluded its grant.

It has been argued¹⁷ that this shift in judicial stance is attributable to the English Chancery bar which was reacting to the problem it was faced with in respect of an overloaded civil litigation system. Where counsel began to use the interlocutory injunction as a means of providing a rapid and relatively cheap method of arbitration of disputes. A motion was filed often by arrangement with the other party when a dispute arose affidavits in support and opposition would be filed and since the court had to decide whether a prima facie case had been made out - in effect a preliminary trial was gained. More often than not the defendant having got an indication of the Judges views simply abided by the result. The English Court of Appeal in particular appears to have been trying to achieve a formula which would accommodate room in this development in the law yet leave enough room to refuse an injunction where the Justice of the case so required that the parties be left to the ultimate result at the full trial. Thus while in form the proceedings were concerned with the desirability of preserving the status quo until the true legal position could be ascertained at trial, in reality the threshold test was used to justify answering the merits at least in a preliminary way.

This device worked extraordinarily well. The quality of the chancery bar being such that in very few cases was the result at trial (where a trial ultimately resulted) different from the result on motion¹⁸. It has been stated that in the decade before American Cyanamid of the thousand or so passing off cases (heard) all or virtually all of them were decided on motion¹⁹. But if English Courts were endeavouring to achieve flexibility in the face of a litigation explosion and more diverse kinds of claims. It should nevertheless have been predictable that sooner or later questions would be raised as to the desirability of preliminary 'mini-trials' - it was against this background that American Cyanamid was decided by the House of Lords of England in 1975.²⁰

B. THE AMERICAN CYANAMID CASE

The facts of American Cyanamid Co vs Ethicon Ltd Case²¹ were that the plaintiffs were owners of a patent. They claimed that the defendants were infringing it and sought an interlocutory injunction. The defendants challenged the validity of the patent. In the hearing Graham J followed the usual practice and held that the plaintiffs had made out a prima facie case and then, on the balance of convenience granted an interlocutory injunction. The defendants appealed to the Court of Appeal. They too followed the usual practice but found that the plaintiffs had not made out a prima facie case and so refused an injunction. The plaintiffs then appealed to the House of Lords who held that there were serious questions to be tried and that on the balance of convenience, the right course was to grant an interlocutory injunction. Accordingly they reversed the Court of Appeal and

restored the decision of Graham J.

In American Cyanamid case the leading judgement was by the eminent and noble Lord Diplock with whom all their Lordships concurred. He stated, inter alia

"...There was no rule of law that the court was precluded from considering whether on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the action. All that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious i.e. that there was a serious question to be tried"²²

and he went further to state

"The use of such expressions as "probability" "a prima facie case" or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court must no doubt be satisfied that the claim is not frivolous or vexatious in other words that there is a serious question to be tried"²³.

Lord Diplock then went on to list factors to be taken into consideration in deciding the balance of convenience including the adequacy of damages but went on to say

"..... in addition to those which I have referred there may be many other special factors to be taken into consideration in the particular circumstances of individual cases. The instant appeal affords one example of this.." ²⁴ He also stated

"It is no part of the courts function at this stage of litigation to try to resolve conflicts of evidence on affidavits

as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial"²⁵

In stating the foregoing inter alia he made no reference to the earlier decision of the House of Lords in Stratford vs Lindley²⁶ but he was concerned that the court should abstain from expressing any opinion upon the merits of the case until the hearing. His Lordship ~~then~~ went on to establish a detailed framework of principles designed to regulate the discretion of Judges. He said that once the court is satisfied that there is a serious question to be tried it should go on to consider the balance of convenience. Only after it has taken into account the compensability by damages of either party and the preservation of the status quo, and only where the balance of convenience is even should the court go on to consider as a last resort the relative strength of each party's case.

No cases from other Commonwealth jurisdictions were cited and the House did not refer at all (neither apparently did Counsel) to its own prior decision in Stratford. Although Lord Diplock felt that in effect what the Court of Appeal was doing was trying the issue of infringement upon the conflicting affidavit evidence as it stood without the benefit of oral testimony or cross-examination. He also noted that the court of Appeal considered that there was a rule of practice so well established as to constitute a rule of law that precluded them from granting any interim injunction unless

upon the evidence adduced by both parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would if committed violate the applicants legal rights .

'Lord Diplock contended that the term 'prima facie' was an elusive concept, and it lead to confusion. The main propositions of the judgement inter alia that are pertinent are That one set of standards should be adopted for all classes of cases. Secondly, as a preliminary matter an interlocutory injunction should not issue unless the court is satisfied that the claim is not frivolous or vexatious in other words that there is a serious question to be tried. And thirdly that once a serious question to be tried has been established the court should move to the balance of convenience.

C. THE POST AMERICAN CYNAMID CASE ERA.

An examination of the influence of the American Cynamid principles on later cases is an interesting illustration of the operation of the doctrine of precedent. A, diversity of approaches subsequent to American Cynamid is apparent. In the largest proportion of reported cases express reference is made to American Cynamid Case. Sometimes Lord Diplock's principles are followed rigidly²⁷. At other times the general approach of American Cynamid Case is accepted but a less literal adherence to the principles is given²⁸. In a few cases judges have expressly stated that they did not believe Diplock's principles to have been intended as rules to be followed rigidly. For, the vice-Chancellor of the High Court Mother Care Ltd vs Bobson Books Ltd. "Literalness may

strangle reason; and there is high authority for saying that however eminent the judge, the words of the judgement ought not to be constituted as if they were an Act of Parliament".²⁹ Other novel ways have been created to deviate from the letter if not spirit of Lord Diplock's Judgement as will be seen later.

In the Fellowes & Son vs Fischer³⁰ case that concerned a dispute between a firm of solicitors and one of their former legal executives who had left the firm and who allegedly in defiance of a restraint of trade covenant was endeavouring to join the employ of a rival firm. There was serious questions as to the validity of the clause. The appellants counsel put it specifically to the court of Appeal the trial judge having refused an injunction that American Cynamid meant that his client need not at that stage establish a prima facie case. Lord Denning flew to the attack criticizing the decision in American Cynamid and claiming it had perplexed the profession and that it was impossible to reconcile with the earlier decision of the House in Stratford vs Lindley and that the court was faced with two conflicting decisions. He stated the main difficulty facing the court of Appeal was that following American Cynamid, the relative strength of each party's case could be looked at as a last resort. The majority of the court took the view that since there was no evidence as to the adequacy of damages as a remedy to either party the decisive factor must be the balance of convenience which favoured refusal of an injunction. Moreover the majority felt that the relative strength of the parties case must be a factor and that sometimes the court could not do justice without assessing the merits at least in a preliminary way. In effect already

the back door was being tested after the front door was slammed. Lord Denning relied on this factor in refusing an injunction but seized on language used by Lord Diplock in suggesting that there may be "many other special factors to be taken into consideration," in the particular circumstances of individual cases. Denning M R said:

"These individual cases are numerous and important. They are all cases where it is urgent and imperative to come to a decision. The affidavits may be conflicting. The questions of law may be difficult and call for detailed consideration. Nevertheless the need for immediate decision is such that the court has to make an estimate of the relative strength of each party's case".

The Court of Appeal had thus deviated from American Cyanamid and other judges also found it possible to relate substantive weaknesses in a plaintiffs case to a likelihood that no great harm would be suffered if an injunction were not granted.

The protest evidence in Fellowes & Son vs Fischer³¹ stemmed in reality from the difference in conceptual thinking between the two courts. American Cyanamid Case had expressed a direction to prevent unnecessary harm until a matter could be tried rather than to form a preliminary view of whether the plaintiff was suffering any legally wrongful harm at the defendants hands. Lord Denning M R, as head of the division of the High Court was mindful of the practical success of the process in Chancery where he had reckoned 99 out of 100 cases had not gone beyond the interlocutory stage.³² Although Lord Dennings use of Lord Diplock's special factors to avoid rules in American Cyanamid can be criticized as creating a very general exception to American Cyanamid rules

themselves for instance in such cases as industrial disputes, breaches of confidence, restraints of trade, and passing off cases. These special factors' requiring the court to apply the old principles in Stratford vs Lindley where Lord Upjohn setting out the agreed view of the house stated the plaintiff had to show a prima facie case both of right and breach. It is submitted that these special factors' clearly refer to the balance of convenience not to situations where Cynamid can be ignored and the old prima facie test applied.

In Hubbard vs Pitt³³ the whole question was reargued again. This case involved property developers who were seeking to prevent the Islington Tenants campaign from picketing their premises. Foibles J. had granted an injunction on the old law (he had heard the case prior to American Cynamid decision). On appeal the majority followed American Cynamid without question or hesitation but Lord Denning was still unrepentant and strongly protested against limitations on freedom of speech and demonstration he further suggested the case illustrated the difficulty of the American Cynamid decision posed i.e. that it meant in this case and most cases granting an injunction³⁴. While the case of Bryanston Finance Ltd vs de Vries No. 2³⁵ added a further dimension to the routes around American Cynamid by holding that principles in that case were only intended to apply where the relief sought was interim. But in the type of case where the interlocutory hearing is in effect the final trial of the action, the court must resort to the old prima facie case and in so doing consider the relative strength of each party's case. The court was

able to justify this position by noting that Lord Diplock's concern and indeed the whole thrust of his argument had been to avoid prejudging matters at an interim stage.

The scope of American Cyanamid rules has been delimited further by Lewis vs Heffer³⁶ a case involving internecine warfare and power struggles between members of a local branch of a political party. The court of Appeal upheld a trial court judges refusal of an injunction with the judgements (of Lord Denning, Orrod and Lane LJJ) all turning on the balance of convenience with Lane LJ going further and claiming that rules in American Cyanamid were designed to cover a commercial situation where loss, hardship or misfortune can be compensated by payment of money. He felt 'these rules could not apply to a political situation in the constituency in which everything was in a state of flux..... of a kind that would have delighted Heriacleitus himself'³⁷. The effect of which is that where the facts are confusing and in dispute American Cyanamid does not apply and/or that it only applies in commercial situations - Either of which approach would mark a considerable in road into the principles stated in American Cyanamid.

The scope of the rules in American Cyanamid were given effect and appreciated in the case of Smith vs Inner London Education Authority³⁸ in which an attempt was made by one party in a suit between a students parents' and a local authority over provision of sufficient schools to suggest that American Cyanamid should not be extended to cases against local authorities in public law. The argument was rejected conclusively although the court agreed that

the balance of convenience must be taken into account more widely where the interests of the public in general to whom these duties are owed. Moreover the court thought this might be one of the special factors' adverted to by Lord Diplock in Cynamid itself.

The only stated exception to the American Cynamid Case that has not been challenged yet appears to be Bestobel Paints Ltd vs Biggs³⁹ where the plaintiffs were seeking an interlocutory injunction to restrain the defs from displaying a sign representing that their paint was of poor quality. Oliver J. there held that "There is an old and well established principle which is still applied in modern times and in which is in no way affected by the recent decision of the House of Lords in American Cynamid that no interlocutory injunction will be granted in defamation proceedings where the defendant announces his intention of justifying to restrain him from publishing an alleged (defamatory statement until its truth or untruth has been determined at the trial except in cases where the statement is obviously untruthful and libellous".

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Lord Diplock has been afforded the opportunity to clarify the views he stated in American Cynamid in the case of N.W.L. vs Woods⁴⁰. which he has thus re-stated "when properly understood there is in my view nothing in the decision of the House in American Cynamid to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply"⁴¹. He stresses that in Cynamid the interlocutory stage would not finally dispose of the action he continues by outlining the "Practicalities" viz industrial dispute cases and he considers why it would be neither prudent nor profitable for the losing party to reopen the case for a

full trial and states "cases of this kind are exceptional, but when they do occur they bring into the balance of convenience an important additional element..... where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction of the action had gone to trial is a factor to be brought into the balance...."42

Thus Lord Diplocks restatement in the above case, that attention may be paid to the merits of the case where the decision on the interlocutory injunction disposes of, the case may be capable of extensive interpretation to vary with the circumstances of each case.

In Cayne vs Global Natural Resources PLC⁴³ that was decided last year Kerr L.J. stated " The test for the application of Cynamid is therefore whether the case is one where the court can see that it is likely to go trial at the instance of the plaintiffs and whether the grant of an injunction is therefore appropriate or not as a way of holding the situation in interim " 44

In summary of American Cynamid Case, in England, it is noted that its now established and accepted that a prima facie case need not be shown. Even Denning Master of the Rolls has given up his frontal attacks on the principles thereto. But a question worth pondering over is whether as it seems the court has simply shifted the strength of the parties case to another rubric i.e. of the balance of convenience?. There is still little (if any) uniformity of approach

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between the decisions even after Lord Diplock's attempt to legislate for the exercise of discretion by Judges in applications for interlocutory injunctions. It may therefore be questioned whether this attempt should be welcomed as a laudable effort to bring some consistency of approach to an area where this was formerly lacking or whether his elaborate framework for decisions, should be regretted as unnecessary restriction on the freedom of Judges. To which question the author would categorically adopt the former view appreciating Lord Diplock's bold efforts to provide a light at the end of the tunnel. The content of the principles is not so much innovatory because apart from the first test of a serious question to be tried there are no other real changes in adequacy of damages; the status quo and general balance of convenience which all continue to be relevant factors in the American Cyanamid Case.

The courts in England in general although initially unwilling, have now gone along with the change of approach mandated by American Cyanamid.⁴⁵ And fears by some that possible effects of Hubbard vs Pitt⁴⁶ would be a greater use of injunctions in the civil liberties area haven't been realised. The factual basis for criticizing Lord Diplock's presumption is going. The classic model has been replaced by a balancing model.

2. THE KENYAN SITUATION

A. BEFORE THE AMERICAN CYNAMID CASE

Prior to the English decision in American Cynamid, the position prevailing had been somewhat unclear but evidently inclined positively to the approach based on the test of a prima facie case. Although a few cases had been decided which had demanded a less onerous test that had been put in different way ie. an 'arguable case'. But the dominant and authoritative approach would appear to be that as exemplified in East African Industries Ltd vs Trufoods.⁴⁷ This was a case where the appellant applied in the High Court for an interlocutory injunction to restrain the passing off of the respondents product as the appellants. The trial court had dismissed the application on appeal, Spry, V.P. stated, in his case

"There is I think no real difference of opinion as to the law regarding interlocutory injunctions although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success (emphasis mine) and if the court is in doubt it will decide the applications on the balance of convenience....."⁴⁸

Spry re-emphasized these conditions for such grant again in the case of Giella vs Cassman Brown in a case where an interim injunction had been granted in the High Court to stop the appellant from competing with the respondent his former employer on the basis of a covenant by him not to engage in a similar undertaking in any of the six major towns of East Africa. Spry V.P. on appeal held⁴⁹ that the conditions for such grant are inter alia, "first an applicant must show a prima facie

case with a probability of success⁵⁰.

In some other cases the courts appear to have utilized a less onerous approach than that demanded by the prima facie test with a probability of success concept; Such case is Devani vs Bhadresa and another⁵¹. The appellant, a dentist filed action against the respondents his landlords alleging an oral covenant by them not to permit a competitor in the same building. He claimed an injunction and applied ex parte for an interim injunction to restrain the respondents thereto. This was granted. The Trial judge held, inter alia, that there had been non-disclosure and finally that "there was a substantial question to be tried"⁵² and that therefore, the balance of convenience had to be considered and that this was against the appellant. On appeal the court of appeal echoed the Trial Judges view and stated, inter alia, that 'where there is a substantial question to be investigated the Judge has a discretion and must consider the balance of convenience and the extent of compensability of damages'⁵³. This approach is significant in that it appreciated the need for flexibility admittedly it did not mention the prima facie test as the prevailing approach. The approaches espoused by this case would give credence to the view that the prima facie approach strengthened and became stigmatized thereafter by the two cited decisions of Giella vs Cassman Brown⁵⁴ and East African Industries Ltd vs Trufoods.⁵⁵ Whence a dogmatic approach was pursued centred on the two decisions. In also yet, another case illustrating that the prima facie test even though it existed was not the subject of such strict adherence as followed subsequent to the above two decisions is the case of Dewani & Others vs Datoo & Others⁵⁶

In which case Connel J put the matter beyond doubt that in Kenya what was required in order to obtain an interlocutory injunction is an "arguable case" and not a "likelihood of success".

It is evident that the East African Court of Appeal did not take cognisance of these cases where a prima facie test was not advocated. In Giella's, case a close examination of the judgement of Spry V.P. reveals that the case was infact decided on adequacy of damages and not on the probability of success which his lordship had therein stated. Indeed Spry V.P. merely repeated the conditions he had set down in the earlier East African Industries Case viz inter alia that an applicant must show a prima facie case with a probability of success. In his judgement in the Giella case the crux of the whole matter appeared to have hinged on the question of damages his Lordship stated "The respondent had completely failed to show that it could not be compensated in damages"⁵⁷.

The three basic formulations for the grant of interlocutory injunctions as set out in the decisions in East Africa Industries Case and Giella's case viz the probability of success; irreparable harm which would not be adequately compensated by damages and if in doubt on the balance of convenience these appear to have been followed subsequently in latter decisions without any questions.⁵⁸ These basic formulations leave more unanswered questions than they purport to answer. For example the question of imminent serious consequences and also what is meant by 'balance of convenience' which can only be verified by reference to the body of case - law and the rules therein and even then these are still ambiguous. There

is internal inconsistency in this formulation viz the first condition appears to state categorically that a court must be satisfied to the existence of a prima facie case while the statement of the third condition indicates a court need not be satisfied in the same regard i.e. if a prima facie case has not been proved the court may grant an injunction where the balance of convenience favours the plaintiff.

As I shall argue these two court of Appeal decisions while purporting to clarify the conditions for such grant in Kenya have only thrown more confusion on the issue and being decisions of the highest judicial institution have bound the present court of Appeal and subordinate courts hand and foot in trying to follow them.

B. SUBSEQUENT TO THE AMERICAN CYNAMID CASE.

At the very outset the position for the guiding principles required for the grant of the remedy still remain controversial even after the two court of Appeal decisions discussed earlier viz Giella's case and the East African Industries case. Although there had been an initial attempt to restate them as propounded in the two above decisions it has still not diminished the ambiguity surrounding that issue. As will be shown later. These decisions have not stood the test of time and considerable in roads have been made into them.

Four years after the American Cynamid decision in England the former East African Court of Appeal took the opportunity to restate the conditions for the grant of interlocutory injunctions. The

case was Salim and others vs Okongo and others⁵⁹ Here the

appellants claimed that the first and second respondents leased the subject premises to the third respondents. The appellants thus filed a suit for specific performance and applied for an injunction restraining the first and second respondents from giving possession to the third respondent. The High Court dismissed the application holding that an agreement for a tenancy had to be in writing and also that the appellants had not been in possession. The court of Appeal in dismissing the appeal Held, inter alia and in the judgement of Mustafa J.A. with whom Wambuzi, P. and law V.P., concurred;

"I am of the view that the conditions for the grant of an interlocutory injunction are now well settled in East Africa, and I can see no reason to depart from them. These are stated in Giella vs Cassman Brown.. The decision of the English House of Lords to the contrary in American Cyanamid vs Ethicon; does not alter the situation here. The conditions are firstly the probability of success secondly the irreparable harm which would not be adequately compensated for by damages and lastly, if in doubt, then on a balance of convenience." ⁶⁰

Mustafa J.A. thus unsuspectingly fell into Spry V.P.'s vague formulations of the conditions as summed up in the East Africa Industries Cases and echoed in Giella's case viz. that ' a plaintiff has to show a prima facie case with a probability of success. It is most regrettable that Mustafa J.A. chose not to elucidate why the conditions should not be applied as guidance as to the conditions thereto instead he chose to roundly condemn Cyanamid without qualification or justification. In fact Mustafa J.A.'s judgement is so full of shortcomings that it

represents poor judicial reasoning and a classic misrepresentation of the position in Kenya. This is borne out by his failure to recognise that the plaintiffs were not suing for breach of contract and only required an interlocutory injunction to prevent their contractual rights being interfered with. His second error is to understand the rule established in Jiwa Hesham vs Zenab⁶¹ that damages are not an adequate recompense for breach of contract for sale of land for which breach specific performance is grantable and is granted.

The latter part of Mustafa J.A.'s statement logically and quite correctly in principle and practice states that at the hearing of the application a court can't decide on probability of success or as to whether there was part performance. Yet American Cyanamid case which Mustafa J.A. rejects without indicating its de-mertis (if any) says exactly what Lord Diplock stated in the latter part of his judgement. So that his denial of American Cyanamid is legally untenable and unconvincing. Mustafa J.A. while castigating the trial judge for having decided that there was no prima facie case and stressing that his decision was premature yet in the same breath he stated that the probability of success as a condition and then purported to deny the validity of American Cyanamid. Evidently Spv V.P.'s exposition in the East African Industries case is more lucid and cogent than Mustafa J.A.s.

In Jethabai vs Fischer⁶², Madan J.A. *while* paid lip-service to the prima facie case rule by insisting that the court was wrong to attempt to find a probability of success as a wrong approach. Madan

Well what are these for?

Just Madan

J.A. felt the requirement that the applicant must show a prima facie case could not be said to be a necessary condition for the granting of temporary injunction. This is the equivalent at least conceptually of the approach of American Cynamid case viz that the court should be satisfied that there is a serious question to be tried as laid down by Lord Diplock.

In Taws Ltd vs Akbar Khan⁶³ case which involved the respondent who had been employed as a sales representative with an agreement inter alia, in which undertaking the defendant was bound that he would not engage in a similar business in the whole of Kenya for a period of two years after the termination of his services with the plaintiffs. Pursuant to this agreement he would not directly or indirectly solicit orders of the goods the plaintiff dealt with. After the agreement expired and the defendant left the employ of the plaintiffs the latter alleged that he was breaching the above undertakings. Sachdeva J. ^{Sought} ~~sort~~ ^{refuse} in the decisions of Giella's case and the East African Industries case which he relied on to fortify his decision in not considering the conditions as stated in American Cynamid. In rejecting the conditions set by the American Cynamid case on the grant of interlocutory injunctions he justified it on two fronts viz that it was contrary to the court of Appeal decision in Giellas case of which he was bound and secondly that it had created problems in England as stated by Lord Danning in a judgement. He did not elucidate about the 'problems' or cases he was referring to neither did he distinguish it from the present case.

In the case of intended expulsion from a Union membership in Mwamba R.F.U. vs Kenya Rugby Football Union⁶⁴ Masime J. granted an interlocutory injunction after full arguments and holding that the purported expulsion was null and void. Although in so doing he recited the three basic conditions as set down in the East African Industries and Giella's cases.

There has been considerable development locally in the judiciary since Giella was decided and the coming of American Cynamid. Indeed the position has not remained static since the overt rejection of American Cynamid in Salims⁶⁵. The progress though covert is quite significant in the dynamic approach it has preceeded from. This has culminated in the polite rejection of the conditions as stated by Spry V.P. in Giella's case and Mustafa J.A. in Salims case respectively and instead the adoption of the American Cynamid decision by implication. Mustafa J.A.'s judgement that was so full of cracks has been torpedoed by Madan J.A. with whom Miller and Potter JJA agreed. The court of appeal in Kenya in a precedent setting decision has candidly but firmly reversed the position which had been referred to as well settled conditions as stated by the former court of Appeal for East Africa. This has been done in Wairimu Mureithi vs City Council of Nairobi⁶⁶. This was an appeal against an order refusing an interlocutory injunction whose object, was to restrain the defendants or their servants from demolishing a Kiosk built by the plaintiff at Jericho open air market or harassing the plaintiff, her agents or servants in relation to the kiosk until the determination of the suit or until further order of the court.

After quoting the three conditions as stated by Mustafa J.A., the Kenya Court of Appeal said that in order

"to elucidate the position further from their view" they would respectfully borrow the following words from the speech of Lord Diplock" in the American Cyanamid case which the court of Appeal "see no cause to differ",

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverably in the action if the uncertainty was resolved in his favour at the trial... if damages recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them no interlocutory injunction would normally be granted, however strong the plaintiffs claim appeared to be at that stage"⁶⁷

This passage was reproduced by Madan J.A. from Lord Diplock's speech in American Cyanamid⁶⁸ as stating the correct principles to be followed in Kenya. Following Lord Diplock's formula and applying it to the case before the court Madan J.A. dealt with the application as follows.

" I would deal with the condition concerning the question of irreparable harm if the injunction is not granted. In this case the space allotted to the plaintiff... was in a new temporary market and terminable by the defendant at any time at... the plaintiffs occupation thereof would also have been correspondingly terminable by the defendant at any time at its discretion. Unless there was a change in policy as to which no evidence has been referred to by the plaintiff that the plaintiff would not have got a permanent title to the site for the kiosk. Therefore the plaintiff would not suffer an irreparable injury"⁶⁹

He further went on to hold that the

defendants were unquestionably in a position to pay any damages that may have been awarded to the plaintiff.

This case is significant to note in that inter alia nowhere does the court of Appeal examine or expect evidence on which to assess whether a prima facie case with a probability of success had been made out. Nor is the balance of convenience instead upon ^{imposed} as a condition. Thus by proceeding to follow the principles set out by Lord Diplock while so consciously maintaining silence on the three conditions set out in his judgement Madan J.A. in memorable judicial tact rejected the former assertions that the three conditions are the pre-requisites for the granting of interlocutory injunctions. In fine style Madan J.A. politely says that Mustafa J.A. and Spry V.P. are wrong as Lord Diplock is right. This case of Wairimu Mureithi marks a commendable departure from the chains imposed by Spry V.P. and reimposed by Mustafa J.A. in their respective judgements in Giella's case and Salim's case respectively.

The High Court in its own right has joined albeit obliquely the Kenya Court of Appeal on holding that it is wrong to say that the American Cyanamid is wholly irrelevant in Kenya Cotran J. has held in one case that there is little difference between "a prima facie case with a probability of success" and "a serious question to be tried"⁷⁰. The High Court and the Court of Appeal seem to be now agreed that the minimum condition is that the question must not be frivolous or vexatious i.e. it must be a serious question to be tried. Cotran J. in the foregoing case stated,

"The question as to whether the defendant's packet is so similar to that of the plaintiff as is likely to confuse or deceive the average customer in a village shop or in a city supermarket, if I were to answer this question now, I will virtually be deciding the case. But suffice it to say at this stage

of the proceedings and upon the material before me. I am satisfied that the applicant in the words of the first condition in Giella's case "has shown a prima facie case with a probability of success" and I stress a probability and no more, or in the words of the American Cyanamid case has shown that there is "a serious question to be tried"⁷¹ (emphasis mine). In other words the High court has explained that an applicant to get a temporary injunction has to establish his case to any one of two standards viz a prima facie case with a probability of success or secondly if a serious question to be tried has been shown. This is another novel approach of apparently merging the two tests as suitable to individual cases to deviate from the rigours and injustice imposed on the reliance of a single test of a prima facie case with a probability of success as espoused by Spry V.P. and re-emphasized by Mustafa J.A. respectively in their judgements.

Cotran J. who seems to be of the same school of thought on this issue as Madan J.A. has in another case ⁷² granted an interlocutory injunction after holding that the appellant had not shown a prima facie case with probability of success. Even though it is conceded that in this case it was granted pending appeal to the Court of Appeal. While as stated earlier Masime J. in Mwamba's⁷³ case has granted an injunction after full arguments and holding that the purported expulsion was null and void.

The probability of success it can be said is not a rule or minimal condition ie there is no onus on the applicant to establish a prima facie case with a probability of success as courts are not

in a position to make any estimate as to the odds and this discretion would be stultified if clogged by such rules which would defeat the purpose of temporary relief. As courts often do grant temporary relief without having the means of forming any opinion as to the rights thereby to be preserved. Mwamba's case provides a reminder that the plaintiffs chances of success are not required to meet any particular standard before an injunction is granted with Masime J. there stating that its clearly a discretionary matter and that East African courts have only provided guidelines on the exercise of that discretion but particular circumstances of each case must be considered.

In a relatively (considering the chaotic situation regarding file of cases in the High Court registry) recent in High Court case Ayev Construction ^{and} vs Meier vs J K Kamere and another.⁷⁴ This was an action claiming a temporary injunction couched in a prohibitory form in favour of the plaintiffs to inter aliadeliver certain machinery and BMW car to the plaintiffs which were being allegedly held illegally by the defendants. Although the facts as stated by the affidavits were numerous and unclear the trial Judge Hancox J. adopted the reasoning of Lord Diplock in American Cynamid wholly. While quoting extensively⁷⁵ from Lord Diplock's speech he goes on to regretfully note that

"However this decision has been expressingly and one might also be permitted to say incredibly, disapproved (emphasis mine) by the, court of appeal so far as Kenya is concerned, in Salims case where Mustafa J.A said that the earlier case of Giella; should be followed."

While noting this,

factor it did not restrain his Lordship from making his own independent judgement and following the spirit of American Cynamid he went on further to state "

"on the basis of the American Cynamid case; leaving a side for the moment the disapproval thereof in the East African authorities, counsel for the plaintiffs has shown that there is a serious question to be tried"⁷⁶

In the course of his judgement his Lordship went on further to rely on cases in England which even prior to American Cynamid espoused a less rigorous test than a prima facie test.⁷⁷ In fact he relied on this cases extensively to fortify his ultimate ruling in the case which he stated thus

"Being satisfied therefore that there is evidence of oppression duress and that there is at least a serious question to be tried, and it is not a frivolous or vexatious suggestion, I proceed to decide the matter on the basis of the balance of convenience or more correctly inconvenience"

On this basis inter alia he granted the interlocutory injunction as prayed for. It is submitted this is one of the fewer cases where the decision of Spry V.P. and Mustafa J.A. have expressly been rejected in clear terms and that of Lord Diplock in American Cynamid adopted wholly. Despite the form it has apparently taken of a lower court like the High Court refusing to follow an Appellate court decision of which it is supposed to be bound.

The denial in American Cynamid of any supposed rule making the probability of success a condition is striking because it flatly contradicts statements hitherto taken to be authoritative and which had laid down the necessity of a strong prima facie case. In Salims

case however while in one breath the court of Appeal rejects American Cynamid in the next breath the court leaves it inescapably clear that the basic American Cynamid rule that probability of success is not a condition is in fact the rule in Kenya. In fact in Salims case there was no way of knowing the facts. The law and the facts were both in dispute. So while Mustafa J.A. says that a prima facie case is the rule (and therefore has no business with American Cynamid) he says that the judge prejudged the case and that was wrong. He then totally ignores the probability of success and disposes of the case on grounds of their being no irreparable injury. So Salims case illustrates strikingly the danger of making the probability of success a condition. Connel J. in Datoos⁷⁸ case put the matter beyond doubt that in Kenya what is required in order to obtain an interlocutory injunction is an arguable case and not a "likelihood of success". And this arguable case rule" is what the court of Appeal of Kenya has re-affirmed to be the correct when in the Wairimu Mureithi⁷⁹ case.

Lord Diplock makes it clear that the courts estimate of the probability of success is to be barred only where there are conflicts of evidence on affidavit as to fact's or where difficult questions of law calling for detailed argument are involved or where the allegation of the violation of the applicants rights are made on contested facts or where to express an opinion at this stage as to the prospect of success of either party would be embarrassing to the Judge who will eventually try the case.

Although the decision in American Cyanamid does not wholly eradicate the probability of success as a discretionary factor it eliminates it to state that this consideration may be appealed to in certain cases such as where the uncompensatable disadvantages are equally balanced. In so far as it denies the probability of success as a condition to be satisfied, American Cyanamid is to be greatly applauded although criticism can be levelled on its insistence that its a factor never to be considered at all.

Even taking into consideration the fact that in both the Taws⁸⁰ case and Salims case which both while refusing to follow the American Cyanamid approach and stressing importance of the East African Industries case and a passing reference by Sachdeva J. in Taws about the difficulties in the United Kingdom approach created by American Cyanamid the most glaring inadequacy of the said two local judgements is the fact that neither contained any detailed reasons or premises for their refusal to follow American Cyanamid. This inadequacy incriminates those judgements as poorly reasoned and not cogent in the face of the lucid and probative exposition of Lord Diplock on the subject.

3. THE PREVAILING POSITION IN A FEW OTHER COUNTRIES

A. AUSTRALIA

In Australia it has been noted⁸¹ that by the early twentieth century the Australian cases adopted the classical model. But in 1920 differing strands began to emerge and as early as 1924 one Judge in New South Wales, suggested that on an interlocutory injunction in

some cases the merest scintilla of evidence is all that is necessary⁸² but then went on to say that all the facts proved by the applicant and all the inferences drawn in his favour do not make out a prima facie case the application must fail⁸³. Thus a full court of the Supreme Court in New South Wales in 1952 indicated some restlessness with the phrase 'prima facie case' and suggested that it not be taken to mean (as it had in so many cases that the court must be satisfied on the evidence before it that the plaintiff would if no other evidence were tendered succeed.⁸⁴ Although the court appears to have conceded that a probability of success is a necessary ingredient, this must depend on a number of factors including the nature of the right asserted by the plaintiff and its threatened infringement and the opportunity available to him to secure and present in the early stages of a suit evidence of such right and infringement.⁸⁵ The court then reverted to an earlier notion - the question as to whether on the evidence before it the court is satisfied that there is a serious question to be tried⁸⁶ (emphasis mine).

The law in Australia has however been laid down authoritatively by the High Court there in a patent action decision in Beecham Group Ltd vs Bristol Laboratories⁸⁷ In this case the plaintiffs claimed its patents rights over a semi-synthetic penicillin preparation called Ampicillin were being infringed by the defendants introducing a preparation called Hetacillin. Evidence established that this though composed of a different chemical structure when utilised apparently broke down to form Ampicillin. While the defendants argued that this ipso facto did not constitute infringement. In this

case the court Held that there was two grounds to be established before an injunction could be given. First the plaintiff had to establish a prima facie case meaning that if evidence remained as it was there was probability that at the trial the plaintiff would be entitled to relief. Secondly the court had to look at the estate of balance of convenience. In the words of Kitte J. "When it is said that the plaintiff must show a probability of success, that does not mean that he must show it is more probable than not that he will succeed. It is enough that he show a sufficient likelihood of success to justify in the circumstances the preservation of property"⁸⁸.

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The Beecham decision above is an important appellate judgement although it does not appear to have received much attention outside Australia. First it is on common ground with American Cyanamid in recognizing the gross ambiguity lurking in a phrase as amorphous as "prima facie". The notion espoused in the Beecham case is again a return to an earlier standard viz that the case must be more than merely frivolous, it must be a fit subject for equitable intervention in the sense that Equity's assistance is necessarily required to hold the right at issue or the fruits of it in existence without enjoining the court to necessarily reach anything approaching a concluded view of the ultimate merits.

B. MALAYA

Malaya has kept pace with English decisions and the American Cyanamid decision was greatly appreciated in Mohammed Zainuddin bin Puter vs Yap Chee Seng⁸⁹ this was an action for notice of motion (for an order that an interlocutory injunction already granted be

set aside. It would appear from the notice as well as the affidavits that the sole ground of the application that the injunction be set aside was that the plaintiffs had not stated the facts fully and accurately to the court and that the plaintiff had not disclosed all material facts. The court Held that applying the principles in American Cynamid the motion to dissolve the injunction should be dismissed as there was a serious question to be tried and therefore measures should be taken to preserve the status quo. An appeal from this decision was dismissed.

C. CANADA'S POSITION

Prior to American Cynamid the majority of Canadian cases expressed a need for a plaintiff to demonstrate a prima facie case.⁹⁰ A lesser number of cases suggested a requirement of a 'serious question' to be tried "sometimes coupled with words like probability of success)⁹¹ when American Cynamid was reported Canadian Judges particularly in Ontario⁹² exhibited caution in the first reported case after American Cynamid a High Court judge asserted that 'whatever may be the law in England, it certainly appears to me that the test I have outlined (The classical model) is the law of Ontario at the present time.⁹³ In another Ontario case in 1975 the first real discussion of principle appeared; Meudren J. noted some of the academic criticism which had been made of American Cynamid but was still able to hold that whether the classical model or the American Cynamid model was employed the result would be the same in the instant case⁹⁴. But caution well beyond the conventional bounds of judicial restraint was demonstrated more recently by Gibson J. in the federal trial division on refusing

in the absence of a decision by the Supreme Court on the Court of Appeal to depart from the classic model.⁹⁵ An Alberta decision seems to have preceded on the basis that the American Cynamid model and the classical model are one and the same thing⁹⁶. There is now no real room for doubt that Ontario⁹⁷ judges (after some initial wariness) and those in British Columbia⁹⁸ are now firmly in the American Cynamid camp and there is at least one New Brunswick judgement to that effect.

The most significant contemporary Canadian judgement is the decision of an Ontario divisional court in Yule vs Atlantic Pizza Franchise (1968) Ltd¹⁰⁰. This added yet another model to the 'jurisprudence of injunctions'. The case concerned an application for an interlocutory injunction to prevent the termination of a contractual relationship by one of the parties to a contract. Apparently counsel had put it to the court that there were "three tests currently in vogue" (for interlocutory injunctions). The first was said to be a 'multi requisite test' (i.e. the classical model), the second the multifactor model suggested by Lerner J., and the third the American Cynamid approach. Having apparently accepted the correctness of that analysis the court then preceded on the footing that it was open to it to select whichever of those models was most appropriate to the particular case. In the case at hand, the material before the court was in sharp conflict and at all the court could determine was that the claim was not frivolous and that there was a substantial question to be tried. The American Cynamid test was said to be the correct model for this case and should be applicable in most cases.¹⁰¹

In summary its important to note that bearing in mind the haste with which applications may have to be made it would be unjust to insist on a degree of proof of a legal right and its violation which in the nature of things can not properly be assessed by the court as such applications are made purely on affidavits with no oral evidence; cross examination or assessment of the demeanour of witnesses. This in effect puts a very high ^{burden} burden of proof on the applicant, so on this point American Cynamid's judgement should be welcomed by Kenyan courts for it represents what is manifestly an appropriate statement of the principle and practice.

Another significant aspect to be observed is that when a trial judge makes a finding that a prima facie case has not been made and or that it has no probability of success, at this stage he is not competent to decide on this issue in such a prejudicial and restrictive manner. Bearing in mind the fact that he is only dealing with affidavits which in their nature can not be made out to the prima facie case effectively. This is, too early a stage which without the requisite ancilliary evidence a Trial Judge would not be adequately able to decide if case has or does not have a probability of success. Such a decision would be manifestly premature considering the trial is at an interlocutory state and the full hearing is still pending before the courts.

An issue not to be over looked also is that when a trial judge in an interlocutory action holds at that stage that an applicant has not made out a prima facie case and it has no

probability of success. In effect by such holding he puts the Judge who will eventually hear the main suit in an embarrassing situation because the determinant preliminary issue has already been prejudged. So that the ultimate judge hearing this main action may feel constrained by such interlocutory decision of there having been no prima facie case with any probability of success that he might feel hard pressed to agree with this decision rather than the onerous task of disagreeing with it despite any merits therein.

FOOTNOTES TO CHAPTER III

1. Christine Gray; "Interlocutory injunctions since Cynamid"
(1981) Cambridge Law Journal 40(2) 307
2. Ibid at 308
3. Jones Vs Pacaya Rubber Produce Co. (1911) B 445
Dommar Productions ltd vs Bart (1967) I.W.L.R. 740
Smith vs Grigg.
4. Preston vs Luck (1884) 27 Ch. D. 479
5. Smith vs Grigg.
6. 1952 Ch 646
7. Ibid at 671
8. Stratford and Sons vs Lindley 1965 A.C. 269
hereinafter Stratford's case
9. Ibid at 338
10. Ibid at 331 and 342
11. (1967) 2 ALL E.R. 324
12. Supra note 8
13. (1972) Q.B. 84
14. Stratford Supra note 8
15. (1972) 1 ALL E.R. 1023
16. (1973) 1 W.L.R. 349
17. Grant Hammond. "Interlocutory injunctions. Time for
a New Model" (1980) University of Toronto L.J. Vol.
I at 340
18. Ibid at 350
19. (1975) 2. W.L.R. 349, A. Gove in 1975 38 M.L.R.
at 672

20. (1975) 1 ALL E.R. 504
21. Ibid
22. Ibid; at 505 and 509
23. Ibid; at 510
24. Ibid; at 511
25. Ibid; at 510
26. Stratford Supra note 8
27. Foseco International vs Fordath Ltd (1975)
F.S.R. 207; Kwik LOK Corporation vs W.B. Engineers
(1975) F.S.R. 237
28. Fisons Ltd vs E.J. Godwin Ltd (1976) R. & C. 653
29. (1979) F.S.R. 466
30. (1976) 1 Q.B. 122
31. Ibid
32. (1975) 3 W.L.R. 201 at 212
33. Ibid at 201
34. Ibid at 212
35. (1976) 1 ALL E.R. 25
36. (1978) 1 W.L.R. 1061
37. Ibid at 1078
38. (1978) 1 ALL E.R. 411
39. (1975) F.S.R. 421
40. (1979) 1 W.L.R. 1294
41. Ibid at 1306
42. Ibid at 1306-1307
43. Ibid at 235
44. 1984 1 ALL E.R. 223
45. G. Hammond; Supra note 18
46. Supra note 34
47. (1972) E.A. 420

48. Ibid at 421
49. (1973) E.A. 358
50. Ibid at 360
51. (1972) E.A. 22
52. (Emphasis mine)
53. Supra note 52 at 23
54. Supra note 50
55. Supra note 48
56. (1952) 25 K.L.R. 55
57. Supra note 50 at 361
58. See for example: Babu Kamau vs Nairobi City Council
H.C.C.C. 1849 of (1976) unreported; Joseph K Macharia vs
Paul Kariuki H.C.C. 786 of (1976) and Chakava vs Nairobi
City Council H.C.C. 1720 of (1976) both unreported decisions
59. Civil Appeal No 14 of (1979) unreported.
60. Ibid at 13
61. (1966) E.A. 7
62. CA at Mombasa Civ App 5 of (1980) unreported
63. H.C.C. 1815 of (1975) unreported
64. H.C.C. No. 556 of (1981) unreported
65. Supra note 59
66. Civil Appeal No. 5 of 1979 unreported
67. Ibid at e
68. Supra note 21 at 512
69. Supra note 66 at 4
70. Minesota Mining and Manufacturing Co vs Shah and Shah
H.C.C.C. No. 346 of (1980) unreported.
71. Ibid at 2

72. Kibuturi vs Shell H.C.C.C. No. 3398 of 1980
73. Supra note 60
74. H.C.C.C No. 1055 of 1982
75. Supra note 21 at 509 & 510
76. Supra note 74 at 20 & 21
77. Ibid at 21 citing Cotton L.J. in Preston vs Luck (1884) 27 Ch 01197, Donmar productions vs Bart (1967) 2 ALL E.R. 38; Buckely L.J. in Jones vs Pacaya Rubber Produce Co. (1911) K.B. 445
78. Supra note 56
79. Supra note 66
80. Supra note 63
81. Supra at note ~~48~~ 17
82. Davis & CO Vs Grafanola Ltd (1924) 24 S.R. (N.S.W.) 458 at 460 Maughani J.
83. Ibid at 460
84. De Mesne vs A.D. Hunter pty Ltd (1952) 77 W.N.N.S.W. 143
85. Ibid
86. Ibid see also B.P. Australia vs Robinson (1959) 77 W.N. (N.S.W.) 49; Dajori Investment Pty Ltd vs Richards 1967 80 W.N. (N.S.W.) 1098
87. (1968) 118 C.L.R. 618
88. Ibid at 620
89. (1978) Malaysia Law Journal 101 1-40
90. Miller vs Campbell (1903) 11 Man R. 437
91. Brenner & Trustees vs Brenner (1923) 25 O.W.H. 415
92. La Forest & Cochrane vs Carrierre (1921) 21 O.W.N. 265
93. Cradle Pictures (Canada) Ltd vs Penner (1975) 63 D.L.R.

(3D) 440 at 443 per Holland J.

- 94. Toronto Marlboro Junior "A" Hockey Club vs Tanett (1976)
67. D.L.R. (3d) at 214
- 95. Canadian ^JJavelin Ltd vs Sparling (1978) 4 BLR 153 at 178
- 96. Abboha vs Foothills Provincial General Hospital Board
(1976) 65 D.L.R. 337
- 97. Herbert vs Shawnigen Cataracts Hockey Club (1979) 94 D.L.R.
(3d) 153, Turf Care Products Ltd vs Crawford Mowers & Marine
Ltd (1978) 95 D.L.R. (3d) 378 - inter alia.
- 98. Peat Marwick & Mitchell Co Ltd vs Funnel (1977) 39
C.P.R. (2d) 63; Lindsay vs Lindsay (1976) 64 D.L.R. (3d) 761
- 99. Baker vs Gay 1978 40 C.P.R. (2d) 160
- 100. 1978 17 Ont. R. (3d), 505
- 101. Ibid at 513

C O N C L U S I O N

It can be observed that Lord Diplock's principles represent an attempt to deal with the problems raised by interlocutory injunctions. It should be recognised also that it may not be practicable or desirable to lay down rules or principles to control the exercise of a court's discretion in granting this equitable remedy. As has been echoed by Lord Denning⁽¹⁾ (for) the interlocutory injunction is available in such a wide range of cases that it seems unlikely to create rules that are appropriate to all of them.

There is an argument advanced that since the order in the interlocutory proceedings may well finally dispose of the case this situation is not adequately catered for in the American Cyanamid case (principles). This view now doesn't seem quite valid in view of Lord Diplock's subsequent decision in N.W.E. vs Woods⁽²⁾ In which case he suggested modification of the American Cyanamid principles in this type of case. Showing that he is prepared to acknowledge this limitation of his earlier stated principles. Although his commitment to the basic principles is ~~unwavering~~ ^{Unwavering} and undaunted as evidenced in a recent case in which he reprimanded the first instance judge for "his disregard of the guidance given by the House in Cyanamid."⁽³⁾

In fact the restrictions imposed by the American Cyanamid principles are not stringent; for these principles the tests that determine the outcome of applications for interlocutory injunctions are very flexible they all provide opportunities for the judge to make his decision according to his view of the merits, they are so indefinite that their application cannot compel any particular solution to any particular case. A judge should be able to reach the same conclusion by applying the American Cyanamid principles as he would have reached by the previous approach. So the difference between the Pre-Cyanamid situation where the discretion of the judge was acknowledged and where his decision on the grant or refusal of an interlocutory injunction was based initially or solely on his view of the merits and the post-Cyanamid situation where the discretion of the judge is circumscribed by an elaborate framework of principles, where examination of the merits is excluded except as a last resort is superficial, a difference of appearance rather than of substance. of approach rather than result.⁽⁴⁾

Although there is a vague general exception of special circumstances" in American Cyanamid little use has been made of this exception. In general courts and particularly the court of Appeal in England have albeit unwillingly at first gone along with the change stipulated by the House of Lords. The worst fears of commentators haven't been realised⁽⁵⁾ and there have been no further cases justifying the concern that possible effects of Hubbard vs Pitt⁽⁶⁾ would be greater use of injunctions in the civil liberties area.

In Kenya judgements focussing on the grants of interlocutory injunctions in the most part haven't give any detailed reasons or conclusive explanation why, on merit the American Cyanamid approach should not be adopted. Among these have been Salims⁽⁷⁾ case and Taw's⁽⁸⁾ case. This is so notwithstanding the binding nature of precedents of the court of Appeal which ordinarily should be followed on pain of being reversed if not followed on appeal.

Generally the approach of East African Courts to decisions of foreign courts on any body of law or principles (forming the basis of East African or Kenyan Law) is clear and is illustrated by the statement of Newbold J.A. (as he then was) in the historic case of Dodhia vs National Grindlays Bank⁽⁹⁾ He stated, inter alia "Its beyond dispute that this court (The East African Court of Appeal) is the final court of Appeal for East Africa and decisions of the Privy Council or any English court or any foreign court are not binding on it, unless (its) the decision of the Privy Council on an appeal from any East African state in so far as the decision sets out what is English Law..... its however a matter for individual states to decide what is the law of these countries".

Perhaps in arguing for the American Cyanamid approach to be applied to Kenya, it would be prudent to draw from the wisdom of Lord Denning. In Nyali vs Attorney General⁽¹⁰⁾, where he recognized that the common law can't be applied in foreign lands without considerable qualification - He likened this to the English Oak which he said similarly just as with the oak, so with the English Common Law it couldn't be transplanted to the African tropics and be expected to retain its tough character. His Lordship went on to state what he referred to as off-shoots viz subtleties, technicalities and refinements which he stated should be cut away so that (these) people in far off lands could have a law that they could understand and respect.

Biological burning

He said the common law can't fulfil these qualifications except with considerable qualifications, which he felt the judiciary were well placed to facilitate. This in my view is the Modus Operandi the American Cynamid approach could be received in that is that it could be modified as and when necessary to suit the local conditions in Kenya.

The minimum conditions required for the granting of temporary injunction can then be said to be that the applicant must present an arguable case that the defendants act or omission is wrongful or which has been expressed judicially as there exists a case to be tried "or a triable issue" or "a real issue" or "the claim is not frivolous or vexatious." The legal position is to be determined by the Judge as to whether there is to not an arguable case before him but the condition doesn't demand proof of a prima facie case with a probability of success as has been given a timely restatement by Lord Diplock in American Cynamid.

The statement of Mustafa J.A. in Salims case that the conditions for the grant of an interlocutory injunction are now well settled in East Africa, and I can see no reason to depart from them; would now appear to be jurisprudentially incorrect and not representative of the prevailing position. Understandably his judgement has not stood the test of time since he first stated. Indeed the case of Wairimu Mureithi⁽¹¹⁾ where Madan J.A. exploded this myth and cast aspersions on the prima facie test stated in Salim's case where, in which former case he held that an arguable case would suffice. This together with the extremely bold and explicit rejection of the prima facie test and cases supporting it, which was put on record by Hancox J. in the Avey, Meier vs Kamere,⁽¹²⁾ case where his Lordship adopted the spirit and principles of American Cynamid in total, in a decision that hasn't been challenged in anyway. This is indeed the most emphatic rejection of Salim's case and the prima facie test on record. It is to be highly commended. Another notable in road into the unjust vigours perpetuated by the prima facie test and cases thereto is the approach taken by Cotran J. when he held⁽¹³⁾ that there is little difference between "a prima facie case" and "a serious question to be tried" in effect he sought a merger of the two approaches in itself an innovative move which gives further credence to the letter and spirit of American Cynamid.

Maybe to the strict adherents of the prima facie test it would be a convenient meeting ground of compromise between the two approaches, if only to maintain an apparent, if not real change of approach to the American Cynamid one.

Further clarification of this position in Kenya may be provided in a pending case of Three Steers Hotel Ltd. vs Talakshiz and others.⁽¹⁴⁾ This is a pending case in the court of Appeal, and is an appeal from a ruling of the High Court where Simpson J. (as he then was) in a case where the plaintiffs were claiming to be owners and tenants of the said Hotel. The company was suing the defendants for an injunction restraining them from continuing in possession of the Hotel and for an account to be taken of receipts while in control of the Hotel. A previous injunction had been vacated by consent and the plaintiffs were now applying for a fresh injunction on the same terms as that vacated by consent on the facts, Simpson J. (as he was then), held inter alia, "on the contradictory and unsatisfactory evidence before me and I am not prepared to say that the plaintiff has a probability of success in the suit." It was from this ruling that the appellants now appealed upon grounds inter alia that the final judge ~~erred~~^{erred} in law and on facts in holding that the appellant didn't have a probability of success in the suit.

Although the facts are deceptively unremarkable the true significance of the case is that it is reliably⁽¹⁵⁾ learnt from leading counsel in the case appearing for the appellants that they have asked for a Bench of five Appellate judges to constitute the coram. The Appellants counsel will in argument be persuading the Kenya Court of Appeal to overrule its previous decision and adopt and follow the American Cynamid approach to the grant of interlocutory injunctions in this country. The request for a Bench of five Appellate Judges is to facilitate a majority decision and appears to be speculating on the possibility of the Court of Appeal overruling its own decisions made in the cases of East African Industries, Gjellas case and more recently in Salim's and Taw's case inter alia. The court will be asked to state the correct position on this subject which is now steeped in confusion and controversy.

Although it wouldn't be wise to pre-empt the court's decision in the pending appeal it would be safe to predicately speculate that in view of the ^{overwhelming} ~~overwhelming~~ support the American Cynamid approach has in the bar⁽¹⁶⁾ which is based on the widespread dissatisfaction of the prima facie test and cases supporting it. This factor together with both the direct and indirect support the American Cynamid case has received in judicial circles;⁽¹⁷⁾ both indicate that it is more probable than not that the Kenyan Court of Appeal will be persuaded to authoritatively decide once and for all that the decision in American Cynamid and Lord Diplocks dictum there to, should be followed in so far as it is practicable.

For now this is the light at the end of the tunnel for which the legal profession is waiting for the court of Appeal to illuminate. Till this appeal is heard the position prevailing is that depending on individual judges it appears possible, depending on their personal opinions or inclinations on the subject; the law and cases thereto, to decide on utilising either of the two approaches or even both as has been done by Catran J, in granting an interlocutory injunction. But the necessity for a uniform and authoritative view of the Kenyan position is still lacking and is greatly imperative, in the words of Lord Denning; Master of the Rolls "what is the argument on the other side only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both."⁽¹⁸⁾ And as he has stated elsewhere;

"Nothing must be left undone."⁽¹⁹⁾

FOTENOTES TO CONCLUSION

1. Hubbard vs Vosper (1972) 1 All E.R. 1023
2. (1979) 1 W.L.R. 1294
3. Potters vs N.U.J. (1980) 1 R.L.R. 404
4. Gray C.; 'Interlocutory Injunctions since Cynamid'
1981 Cambridge Law Journal 1981 vol 40(2) 307 at 338
5. Hammond, R.G., 'Interlocutory injunctions Time for a new
model' (1980) University of Toronto Law
Journal vol I at 278
6. (1976) 1 Q.B 142
7. H.C.C.C. Civil Appeal No.14 of (1975) unreported.
8. H.C.C. Civil Appeal 1815 of (1975) unreported.
9. (1970) E. A. 195 at 199.
10. (1955) 1 All E.R. 646 at 653.
11. H.C.C. Nbi. Civ. App. 55 of (1979) unreported.
12. H.C.C. 1055 of (1982) unreported.
13. H.C.C. 346 of (1980) unreported.
14. Civil Appeal No.11 of (1982) appeal from ruling in
H.C.C. 315 of (1980) unreported Simpson J.
15. Mr. A. B. Shah of Shah and Parekh Advocates Nairobi.
16. Per views of Mr. A.B. Shah Ibid, Mr. Rustam Hira Advocate;
Mr. Pheroze Nowrojee Advocate and law lecturer in Equity at
the University of Nairobi; Mr. G.K. Kuria Advocate and Law
Lecturer also.
17. See inter alia; Madan J. A. in Wairimu Mureithi supra note 11;
Hancox in Arev & Kamere supra note 12; Cotran J. in Minesote
supra note 13.
18. Packer vs Packer (1954) 15 at 22.
19. Lord Denning, The Discipline of the Law Epilogue at 316.
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4. Petit; Equity and the Law of Trusts (4th Edition Butterworth
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