Interim injunctions

To what extent have the requirements for interim (formerly known as 'interlocutory') injunctions laid down by the House of Lords in *American Cyanamid Co.* v *Ethicon Ltd* [1975] AC 396 been followed by subsequent cases?

CAUTION!

■ This essay question requires a discussion of the way in which the leading case, ***American Cyanamid Co.* v *Ethicon Ltd***, changed the rules relating to interim injunctions, and the further development of those rules in subsequent cases. It is one of those colourful areas where Lord Denning MR robustly defended a certain position, and where other developments have occurred in particular fields.

■ One of the difficulties in dealing with a question of this sort in an exam is what to put in and what to leave out. You could spend all the allotted time dealing with search orders and freezing injunctions. It is preferable, however, to deal with the central issue: that is, should the defendant be required to establish a prima facie case? Then show, by example, the extent to which this point has moved from the position established in the leading case.

ANSWER PLAN

- Position prior to ***American Cyanamid***
- Changes brought about in ***American Cyanamid***
- Problems with this approach
- Examples of statutory modifications in **Human Rights Act 1998** and employment law legislation which operate as exceptions
- Special factors taking cases outside ***American Cyanamid***

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- Search orders
- Freezing injunctions

SUGGESTED ANSWER

The House of Lords in ***American Cyanamid Co.*** **v** ***Ethicon Ltd*** **[1975] AC 396** established new criteria for the granting of an interim (formerly known as an 'interlocutory') injunction.[LJ(1]

Prior to ***American Cyanamid*** it had been necessary for the plaintiff to show a prima facie case before the injunction would be granted[LJ(2]. See, for example, ***J. T. Stratford & Son Ltd*** **v** ***Lindley*** **[1965] AC 269**. In addition, it had to be shown that the balance of convenience supported the grant. So, if the plaintiff could show that damage would be suffered which could not be compensated by an award of damages at the trial, then, once a prima facie case was made out, the injunction would be granted. This meant that frequently the issues which were to be heard at the trial of the action were rehearsed at the hearing of the motion for the injunction.

In ***American Cyanamid***[LJ(3] the House of Lords disapproved of the court conducting a trial on affidavit evidence, when the essential purpose of an injunction is to preserve a party's position until trial. They decided that it was no longer necessary to establish a prima facie case at the interim proceedings. Provided that it could be shown that there was a serious question to be tried, then the remedy would be granted. Subject to this, the main test was the balance of convenience between the parties. The balance of convenience would be tested primarily by the adequacy of damages. If the balance of convenience was not clearly established then the status quo would be maintained. There is only one qualification made, which is that in individual cases special factors might have to be considered. The House of Lords

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did not classify these special factors.

One of the difficulties encountered with this approach is that frequently the claim never comes to trial. [LJ(4]Litigation is expensive, and a party against whom an injunction has been made may feel sufficiently discouraged to settle or drop the case. So the decision to grant the injunction at the interim hearing may dispose of the claim and the issues may never be fully aired. Under the former position, this did not matter. If a prima facie case had to be made out, then the evidence would be presented and cross-examined.

An example of this occurs in trade disputes. The strength of the workers' case often lies in their ability to withdraw their labour. If an injunction is sought barring them from strike action then, on the ***American Cyanamid*** principles, the balance of convenience will invariably be in favour of the employer. This was recognised in the **Trade Union and Labour Relations (Consolidation) Act 1992**, and the court is to have regard to the likelihood of the defendant establishing the defence of immunity to tortious liability.

A further statutory modification to the principles in ***American Cyanamid*** is made in the **Human Rights Act 1998**.[LJ(5] Where an interim injunction is sought to restrain publication before the trial, this may potentially affect the right to freedom of expression protected under **Art. 10** of the **European Convention on Human Rights**. Thus, **s. 12** of the Act provides that publication before trial should not be restrained unless the court is 'satisfied that the applicant is likely to establish that publication should not be allowed'. In any event, even if **s. 12** is satisfied, the 'balance of convenience' argument may still prevail (***Douglas and Zeta-Jones* v *Hello! Ltd*** **[2001] 2 WLR 992, [2001] 2 All ER 289**).

However, these statutory modifications to the ***American Cyanamid*** principle are

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exceptions. Criticism of the application of the principle has been left to the judges in later cases.

In ***Fellowes & Son* v *Fisher* [1976] QB 122**, the Court of Appeal had differing views on the application of the ***American Cyanamid*** principles. The majority of the court refused an injunction to prevent a breach of a restrictive covenant in an employment contract, on the ground of the balance of convenience. Lord Denning MR, however, refused the injunction on the ground that no prima facie case had been made out. He stated that ***American Cyanamid*** did not apply because the facts of ***Fellowes & Son* v *Fisher*** fell within one of the exceptional cases outlined by Lord Diplock where special factors could be considered.

In ***Hubbard* v *Pitt* [1976] QB 142**, Lord Denning MR again took a different approach from the rest of the Court of Appeal. An injunction was granted by the majority of the court to restrain protesters obstructing access to the premises of an estate agent. The majority took the view that there was a serious question to be tried and the balance of convenience supported the grant. They did not require that a prima facie case should be made out. Lord Denning MR, dissenting, argued that a prima facie case was required and that the case fell outside ***American Cyanamid*** because 'special factors' applied. These 'special factors' related to freedom of speech and the right to demonstrate.

Thus Lord Denning MR has relied on the reference to 'special factors' to take cases outside ***American Cyanamid*** and rely on the former rule that a prima facie case must be established.[LJ(6]

Other cases where special factors have prevailed include ***Smith* v *Inner London Education Authority* [1978] 1 All ER 411**. Here the defendant was a public body and it was held that in such cases the interests of the general public must be

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considered. In libel cases where the defendant intends to plead justification, an interim injunction is unlikely to be granted on ***American Cyanamid*** principles.

Trade disputes are dealt with by statute. The **Trade Union and Labour Relations (Consolidation) Act 1992** provides that the defendant in an application for an interim injunction may prove a prima facie defence under the statute. In ***NWL Ltd* v *Woods* [1979] 1 WLR 1294** Lord Diplock observed that ***American Cyanamid*** was not dealing with a case where the grant or refusal of the injunction would dispose of the action. He stated that in such a case the consideration of the balance of convenience should take into account the likelihood of success had the case gone to trial.

There are two areas in which there have been important developments in the field of interim injunctions. These are search orders and freezing injunctions, formerly known as ***Anton Piller*** and ***Mareva*** orders [LJ(7)](named respectively after ***Anton Piller KG* v *Manufacturing Processes Ltd* [1976] Ch 55** and ***Mareva Compañía Naviera SA* v *International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509**).

Search orders have been described as being of a 'Draconian nature' permitting a claimant to enter the defendant's premises and inspect evidence which it is believed may be removed or destroyed. They are available without notice so that the defendant is not forewarned. Ormrod LJ laid down three conditions, the first of which was that the claimant must have an extremely strong prima facie case. This is an exception to the ***American Cyanamid*** principles. Search orders are mandatory in nature. The courts are less willing to grant a mandatory order without an indication of the strength of the claimant's case.

Freezing injunctions are available to prevent a defendant moving assets or otherwise disposing of them in order to make the pursuit of the main claim fruitless.

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The claimant must have a legal or equitable right to protect and have a good arguable case.

The jurisdiction to grant search orders and freezing injunctions is now contained in the **Senior Courts Act 1981**, **s. 37**.

Thus, there are various situations where the principles in ***American Cyanamid*** have been refined or distinguished to meet the particular case.

LOOKING FOR EXTRA MARKS?

- As with all essay questions, the way to a high mark is to launch into a critical analysis of the case law. You would not be asked a question of this sort if the case law were straightforward.
- This also is a question which could be encountered as an assessed essay, in which case you will have much more scope to expand the examples and refer to the literature, e.g., Christine Gray, ‘Interlocutory Injunctions since Cyanamid’ [1981] CLJ 307.

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