Case Note

INTERLOCUTORY INJUNCTIONS AND THE USUAL UNDERTAKING AS TO DAMAGES: AIR EXPRESS LTD. v ANSETT TRANSPORT INDUSTRIES (OPERATIONS) PTY. L

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It is plain that the decisions to commence or defend commercial litigation are generally economic ones. The plaintiff and the defendant each weigh the likely costs and benefits and act accordingly. That costs will likely go against the unsuccessful party is a powerful element in any such calculus.

However a less well appreciated element in that calculus relates to interlocutory injunctions. Plainly it is often important that the status quo be preserved pending the ultimate determination of the case. This policy does not call for examples, but it has a price. The courts will almost invariably require an undertaking to be given to the court by the party at whose instance the interlocutory injunction is granted that it will abide by any order of the court as to damage, if the court is later of the view that the other parties (usually the defendants) have sustained any damage, by reason of the order.

On the one hand, to disregard the undertaking in seeking interlocutory injunctions is foolhardy, yet on the other hand, as the High Court judgments in *Air Express Ltd.* v. *Ansett Transport Industries (Operations) Pty. Ltd.*[2] ("the Air Express Appeal") and in the case at first instance ("the Air Express Case") show the undertaking is not as potent as many seem to think.

It is perhaps now appropriate to summarize some of the main points to emerge from the Air Express Appeal which has clarified much of this area:—

(a) litigation causing loss in the absence of evidence of lack of good faith is not compensable; and
(b) in the light of this the party seeking the benefit of the undertaking must show that any loss he has suffered, including the loss of a chance, is attributable to the injunction in that if it had not been granted it is more probable than not that the loss would not have occurred.

Whilst these conclusions baldly stated appear somewhat banal their application presents a striking contrast with the application of the modern law of negligence as will appear hereafter.

In the Air Express Case, Aickin J., the trial judge, in with respect, a masterly and comprehensive investigation of the area,

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1. (1980–1981) 33 A.L.R. 578 affirming *Ansett Transport Industries (Operations) Pty. Ltd.* v. *Halton, Interstate Parcel Express Co. (Aust.) Pty. Ltd. and Air Express Ltd.* (1979) 25 A.L.R. 639.
2. Ibid.

considered certain other points as well. Some of these may be conveniently summarized as follows:—

(a) whilst the undertaking is equitable and it cannot be rigidly delimited so far as questions of remoteness of damage are concerned, the authorities show that the correct approach is to award damages on the contractual basis, therefore what the party seeking the injunction has notice of in relation to the circumstances of the other parties will be peculiarly relevant;

(b) it is no reason not to enforce the undertaking that the law was doubtful, however if the law is changed during the course of the litigation so that the interlocutory injunction which would have previously ultimately have been made permanent is dissolved, semble that this should be taken into account in calculating damages; and

(c) applying *Tucker* v *New Brunswick Trading Co. of London*[3] it is proper for parties against whom the injunction is not directed to be able to rely on undertakings required to be given in their favour on the granting of the injunction, provided of course damage can be shown to flow from the injunction.

It is appropriate to look at the facts and their background. A feature of Australian commercial aviation is "the two airlines policy". Successive Commonwealth governments have been able to maintain the duopoly by prohibiting the importation of aircraft with significant commercial potential. This prohibition is then relaxed in favour of governmentally chosen operators. This policy has been held to be safe from Section 92 of the Constitution guaranteeing the freedom of interstate commerce. As in the foreseeable future no significant Australian aircraft industry is likely to emerge, the policy seems safe from constitutional attack. The policy finds expression, in part, in agreements, among the two favoured airline operators, Ansett and T.A.A., and the federal government.

Against this background, in mid-February 1977, the federal government announced its intention to allow Air Express Ltd. and another company to import new aircraft. Air Express Ltd. operated an air freight service principally between certain ports in Tasmania and Melbourne, Victoria. Its aircraft were aged; imported into Australia at times before the two airline policy had reached its present stringency. Their swift replacement was a priority, if the company were to compete successfully.

Ansett formed the view that this proposal was in breach of the abovementioned agreement and moreover was illegal in that, by oversight, the office of the persona designata capable of relaxing the prohibition no longer existed. Ansett secured an interlocutory injunction against the federal government and a senior public servant preventing the issue of the import licences.

Shortly thereafter Air Express Ltd. and another applied to be made parties to the litigation and have the "usual undertaking" extended to include them. The applications were successful.

3. (1890) 44 Ch.D. 249.

The federal government attended to the fact that no office existed capable of relaxing the import prohibition, the day before the hearing of its demurrer to Ansett's claims before the full High Court. By a majority, the Commonwealth's demurrer was allowed, but this was not known until the end of December 1977. The interlocutory injunction had remained until then — a period of more than ten months since it was granted.

Air Express Ltd. then proceeded to seek damages on the basis of the undertaking, identifying certain losses which it appeared flowed from the inability to import the aircraft. These losses were by no means trivial and as Aickin J. decided, an inquiry to see if damages should be paid was clearly necessary.

Aickin J. formed the view that Air Express Ltd.'s claim should be rejected, because his Honour held that it was the commencement of the litigation that caused the losses, not the injunction. His Honour grounded this conclusion on the unlikelihood of a government official issuing an import license, because this would pre-empt the court's determination and also if the case were ultimately decided against the Commonwealth then the damages likely to flow from a breach of the Commonwealth's agreement with Ansett and T.A.A. would be exceptionally large, because once aeroplanes come into Australia, section 92 of the Constitution would ensure the Commonwealth could not prohibit their use.

In reaching this conclusion his Honour referred to a singularly apposite New Zealand authority, *Newman Brothers Ltd.* v. *Allum, S.O.S. Motors Ltd. (in liquidation) (No.2).*[4] There it was held that damages occasioned when a road transport licensing authority did not hold inquiries to decide whether a licence should be permitted to be transferred, did not flow from the granting of an injunction restraining such inquiries, but rather flowed from the litigation as the licensing authority in the court's opinion would have been highly unlikely to proceed until the court's decision was known.

In the Air Express Appeal this question came before a bench composed of four justices. Barwick C.J. and Gibbs J., as he then was, sustained Aickin J's determination on this basis. Stephen J. took the view that Aickin J's decision could not be sustained on this basis, because what the conduct of the Commonwealth would have been in the absence of evidence was merely surmise, not a permissible inference from the facts, nevertheless since the onus lay on the party seeking the benefit of the undertaking to show that the injunction was the sole cause of damage and that onus had not been discharged, Aickin J's judgment was to be sustained.

Mason J. dissented taking substantially the same view as Stephen J., save that His Honour was of the view, in substance, that the onus of showing that it was the litigation and not the injunction that caused the damage, when the damage could be shown to flow from the failure of the acts restrained to occur, rested with the defendant and here the onus had not been discharged.

In the result, in cases where the government or a governmental

4. [1935] N.Z.L.R. 17.

agency is the party against whom an interlocutory injunction is directed, it can be expected that any other party affected by the injunction, for instance a person seeking a licence or an approval or to register documents, will be unlikely to successfully avail himself of the usual undertaking.

Plainly this will alter the calculus in much commercial litigation, which more and more is concerned with public law questions. This is not necessarily a bad thing, only time will tell. As Sir Garfield Barwick pointed out, there is a certain anomaly, but one which His Honour hastened to add was too well established to be challenged, in requiring the payment of damages when the only "fault" of the party seeking the injunction is precisely that.

After all, unlike costs, it is hardly the actions of the litigant that are the proximate cause of loss, particularly in a jurisdiction which adheres to the principles for granting interlocutory injunctions enunciated in *Beecham Group Ltd.* v. *Bristol Laboratories Pty. Ltd.*[5] and not those expressed in *American Cyanamid Co. v Ethicon Ltd.*[6].

As Sir Garfield Barwick hints the courts must always be careful not to, in substance, "bar the court door" to litigants.

5. (1968) 118 C.L.R. 618.
6. [1975] A.C. 396.