

INTERIM REMEDIES - CPR PART 17

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An Overview of Interim Remedies

In general, interim remedies are equitable remedies that have been fashioned through the jurisprudential development of principles of equity over centuries of English legal practice. In some instances, these remedies have been given statutory force through legislation and rules of court, which provide a procedural basis upon which to apply for such orders.

Importance in Civil and Commercial Practice

In civil and commercial practice, which accounts for a large portion of judicial time before the courts of the Eastern Caribbean Supreme Court ("ECSC"), a majority of claims filed do not go to a trial. Most claims are either settled or resolved without the necessity of a trial. Indeed, in cross-boarder or multi-jurisdictional litigation in particular, where the main dispute is usually litigated elsewhere, often time it is not intended by the parties that a claim filed in one of our jurisdictions should reach trial. Most of these matters, which typically involve large sums of money or property of great value, are heavily contested, sometimes all the way to the Privy Council, on the basis of multi-pronged applications for interim relief.

Reliance upon these remedies, which may be granted at any stage of the proceedings, from pre-claim to post judgment, is now fairly commonplace in our civil and commercial practice, and have been the subject of significant judgments of our Supreme Court.

Powerful Tools in the Court's Arsenal

Interim remedies are, and have become more increasingly, powerful tools in the court's arsenal, and that of the litigant. They are often decisive of some or all of the main issues in the litigation. Their significance to the court in attempting to do justice between parties to the litigation, cannot be overstated.

Interim remedies are of particular importance to the court's overriding objective of dealing with cases justly and ensuring that matters are dealt with expeditiously, which is of critical importance in large commercial matters.

Protective and Preventive Remedies

Interim remedies take the form of protective remedies, their purpose being to preserve the status quo while the litigation is proceeding, as in the case of

injunctions; or preventive remedies, to secure the position of a litigant not only during the action but post judgment. An example of the latter, is the appointment of a receiver over the property and income the subject of the dispute between the parties to the litigation pending trial and judgment (see *Audubon Holdings Ltd. v. The Treasure Island Company Ltd et al Claim 227/2002 unreported Rawlins J (as he then was) dated 17th March 2003*; and also *Kyrgyz Mobil Tel Ltd et al v. Fellowes International Holdings Ltd – BVI Civil Appeal 25 of 2005*; and *First Montana Services LLC et al v. Best Concrete Corporation et al Claim 53/2007 (Anguilla) unreported George-Creque J*).

Interim remedies are used to facilitate the taking of accounts and payment of monies found due, in the preservation of property and other assets pending determination of disputed claims thereto, and in restraining dissipation of property and assets or their removal from the jurisdiction. Certain of these remedies, such as disclosure and tracing orders, are most useful in locating and taking control of assets which have been wrongfully taken or siphoned of and are required to be brought under the protection of the court, pending determination of issues relating to ownership, sharing and distribution.

The basket of interim remedies available to the courts is quite plentiful. They range from interim injunctions and interim declarations to disclosure and inspection orders, from taking accounts of monies and assets to making interim orders for damages and interim costs orders, from preservation orders to appointing receivers over assets or a business the subject of the dispute.

Over the years, some of these remedies have been further developed and refined through landmark decisions of the courts crafted to meet new or significantly different factual circumstances and the challenges associated with unraveling complex fraudulent transactions and dishonest schemes, concocted or conceived to cheat unsuspecting parties out of their assets and property.

Binding Non-Parties and Securing their Costs

It is usual for non-parties to the litigation to be bound by or required to comply with (some types of interim orders, as in the case of discovery and disclosure orders made in aid of *mareva* injunctions (see *Bankers Trust Co. v. Shapira [1980] 1 WLR 1274*) and tracing orders where the non-party may be required to answer certain interrogatories (as in *Bekkor Ltd. V Bilton [1981] 1 Q.B. 923* and *PCW (Underwriting Agencies) Ltd v. Dixon [1983] 2 AER 158*).

In these instances, entities such as banks and other financial institutions, are made parties to the litigation in a 'secondary' capacity, in that no particular claim or allegation of wrongdoing is made against them; the so-called "discovery defendants". As against primary defendants, issues of self-incrimination can arise. However, the general rule is that this is no ground for objecting to an order for interrogatories to be administered.

Where an order binds a non-party or “discovery defendant”, issues of confidentiality of information and communications can arise which the court may have to resolve upon application, before compliance with the order is effected. However, the position seems to be that in cases of fraud the duty to disclose overrides any claim of confidentiality as between the wrongdoer and the innocent party.

Further, when making an interim order which requires a non-party or discovery defendant to do something within a specified period, such as disclosure of documents and information, the court is obliged to make proper provision in the order itself for the applicant to reimburse the costs reasonably incurred by such persons in complying with the terms of the interim order, including the costs of obtaining legal advice and, if necessary, representation.

This usually takes the form of an order for the applicant to pay the reasonable costs and expenses incurred by such person in complying with the interim order. However, it is not usual for there to be a companion order for security for such costs, as is the case with an undertaking in damages. It is my view, that an order for payment of the expenses associated with compliance ought, in most instances, to be buttressed by an order for security by payment into court, as it is not uncommon for applicants for interim relief to have no assets within the jurisdiction, leaving the party complying having to go back to court for an order for payment of their costs, which often are disputed by the applicant and their counsel. It is suggested that this is an aspect of the procedure which could be addressed under Part 17 or by practice direction.

Extraterritorial Effect

Interim remedies are available to all litigants before the courts, be they individual or corporate. In some instances, interim orders may have extraterritorial effect, as for example world-wide mareva injunctions and orders appointing receivers, subject to recognition by the foreign court and the taking of enforcement steps there. This is made more easier where the party against whom such an order is made, is properly before the court (as in the case of a company domiciled within the jurisdiction of the court) and therefore subject to the coercive powers of the court to compel compliance with its orders, which require some act to be done or step to be taken or not taken in another jurisdiction, as in the case of anti-suit injunctions.

Ex-Parte Applications

This is an aspect of the practice relating to interim orders, some of which are framed in very wide terms and have far reaching effects, that have become of increasing concern to practitioners and their clients in particular. The starting point must be a close examination of the relevant provisions of CPR, particularly Parts 17.3(2) and 17.4(3) & (4), as compared with the practice adopted by practitioners when making such applications and the court’s handling of them.

In many instances interim orders, such as *mareva* injunctions and disclosure orders, are made *ex parte* based upon allegations of fraud or other wrongdoing in the affidavit evidence, and on the assertion of the urgency of the application or the need not to forewarn certain parties. In some instances, these allegations are made without the fullest of evidence or disclosure by the applicant. Nevertheless these orders, some of which are draconian in effect, can adversely affect innocent parties, and may also prejudice defendants and their businesses, all of whom are usually required to either comply immediately or within a few short days, under penalty of being in contempt of court.

Often applicants and their attorneys seek interim remedies initially on an *ex parte* basis. However, that approach must now be considered the exception rather than the rule, as is manifest from an examination of CPR **Parts 17.3 and 17.4** in particular. The duty and onus placed on a litigant and his lawyer who comes *ex parte* for such relief, is a heavy one which must be taken seriously and with which there must be strict compliance¹. However, in proper circumstances, it is not only necessary but prudent for such remedies to be sought without notice to the other party. This is particularly useful where there is genuine urgency or where the element of surprise is essential so as to not defeat the purpose or object of the relief sought. Consequently, obtaining interim remedies on an *ex parte* basis is quite common in matters involving allegations of fraud or misappropriation of assets of the type that can be easily moved to avoid or defeat an injunction or preservation order, such as shares in a company.

Urgency

Urgency is one of two bases upon which a court may entertain an application for interim relief made without notice. It is an area which is abused by practitioners.

Rule 17.3(2) requires the court to be satisfied by the evidence filed in support of the application for interim relief (the affidavit evidence), that “***there are good reasons for not giving notice***”.

Rule 17.4(4)(a) provides that the judge can make such an order *ex parte* where satisfied that “***in a case of urgency no notice is possible***”. This means that there must be a case of genuine urgency which renders it not possible for notice of the application to have been given to the defendant. It seems to me that, in our member countries, such instances would be very infrequent as invariably the other party is either resident in or have a corporate domicile within the jurisdiction, and hence giving notice of such an application can readily be effected either by personal service or some other acceptable means, such as facsimile.

¹ *Astian Group Limited and another v TNK Industrial Holdings Limited and Others*, unreported, ECCA, 22 March 2004 (Ralwins JA); *IPOC International Growth Fund v LV Finance Growth Limited and Others*, unreported, ECCA, 19 September 2005,

Often times, a certificate of urgency is filed with the application. This is not a requirement under Part 17 (and perhaps it should be made so), but is a remnant of the practice developed under the Rules of the Supreme Court. Some certificates of urgency are deficient in their content and may not speak at all to the actual reasons for urgency, much less how those factors rendered it not possible to give notice of the application. The end result is that, apart from circumstances where the second basis for not given notice is operative, that is, to do so would defeat the purpose of the application, there are many applications for interim relief which were dealt with on an ex parte basis not in keeping with Rule 17.4(3), which requires 3 days notice.

Duty to Give Full and Frank Disclosure

This is a major duty placed upon an applicant who proceeds without giving notice to the defendant. It is a well-established common law duty and not one expressly provided for in Part 17 of CPR. There is much learning about the specific requirements placed upon an applicant and their counsel in discharging that duty when proceeding ex parte. Likewise, these requirements are not spelt out in CPR. The possible consequences where there has been proven material non-disclosure, are also well known. It does not result automatically in the discharge of the order, and even where that is the result, the court may, in an appropriate case, make a fresh order of the same or similar consequence in order to protect the interest of the parties pending trial.

It seems to me that the combined effect of **Rules 17.3(2) and 17.4(3)&(4)**, is that, once properly applied, the courts should be dealing with much fewer cases involving allegations of material non-disclosure, as most applications would be heard upon notice and the other party would have the opportunity to present its side of the case. Of course, in genuine cases where notice could not or ought not to be given, the issue of material non-disclosure could still arise when the matter is dealt with inter partes.

However, under **Rule 17.4(4)** an order made without notice can only be granted for a maximum of 28 days and by **Rule 17.4(5)(a)** the court is required to “**fix a date for further consideration of the application**”. The combined effect is that, unlike the practice under the former Rules of the Supreme Court where the onus was on the defendant to show why the interim order ought not to be continued, under CPR the application comes up on the adjourned date for further consideration and the onus is on the applicant to show why the order ought to be made or continued in light of all of the evidence, unless its continuation is not objected to by the defendant and the court considers the order ought to be continued. (see *Anne L. Manfre et al v. Edward Smith, Claim 135/2001 (Antigua) per Mitchell J at para. 18*)

The Forum Challenge

In claims involving foreign parties or foreign assets or founded on a contract made outside the jurisdiction (which may or may not have a choice of law or forum clause), it is not unusual to have the claim itself, and hence any application for an order granting interim relief, met with a jurisdictional challenge based either upon the inherent jurisdiction of the court to dismiss or stay proceedings, or on the basis that the court does not have jurisdiction or ought not to exercise jurisdiction in the particular matter see **CPR 9.7(1)**. Thus *forum* challenges (or *forum non conveniens applications*) in international commercial litigation are quite common and have been the subject of many instructive judgments of our courts, both at the first instance and appellate levels.

The Commercial Court

The advent of the Commercial Court, to be based in the BVI (hopefully by early next year), is a most important development. It will bring commercial matters under a specialist court dedicated to the disposition of cases which fall within the broad definition of "commercial" matters. This new court, a division of the ECSC, will not only enhance access to justice in complex commercial matters, but will further enable and facilitate the use and timely consideration of case-appropriate interim relief and the fine-tuning and development of the law and procedure for applying for interim remedies, particularly in cases of that type.

Statutory Basis

The Supreme Court Act in each of the 9 member jurisdictions of the ECSC, provides a statutory jurisdictional basis for our courts to grant equitable relief, including interim remedies. Essentially, the jurisdiction in civil matters is to be exercised by the High Court in accordance with the provisions of the said Act, any other law, the rules of court and, where there is an absence of any special provision, in conformity with the law and practice administered for the time being in the High Court of Justice in England. The Act also speaks specifically to the application of principles of equity and its priority where there is a conflict with the common law. There are also specific provisions in the Act relating to the grant of injunctions, appointment of receivers and orders of mandamus.

CPR Part 17

In general, Part 17 sets out the procedure for applying for interim remedies. However, it should be noted that while Part 17.1 lists certain specific interim remedies, it is not intended to and is by no means exhaustive of the kinds of interim remedies or reliefs available to the court. (*per Mitchell J para. 17 Anne Manfre et al v. Edward Smith Claim 135/2001 Antigua*)

The Remedies - Part 17.1

The interim remedies enumerated in Part 17.1 include orders for interim injunctions and declarations, the preparation and filing of accounts, the provision of information relative to the location of property and assets including property or assets relevant to any freezing order applied for, interim costs orders and interim orders for payment of damages or part of a debt, the inspection detention and preservation of property, payment of income derived from property pending decision on the claim, the sale of perishable property, taking of a sample of relevant property, the payment of monies into court in exchange for the delivery-up of certain property to a party pending the outcome of the proceedings, for a freezing order directed to prevent the dissipation of any asset or property or its removal from the jurisdiction, for delivery-up of goods and for a "search order" providing for the entry of a person upon certain property for the purpose of preserving evidence.

The Chief Justice may issue a practice direction augmenting the procedure for applying for interim remedies, Rule 17.1(5).

The Application - Parts 17.2 and 17.3

An application for interim remedies can be made at any stage of the proceedings. It may be made before the claim, in which case the applicant must satisfy the test of urgency or that such relief is otherwise necessary in the interest of justice. The application may be made *ex parte* if there are good reasons for not giving notice to the other party. If the court decides to grant such remedy on an *ex parte* basis, the court must go on to require an undertaking from the applicant to file and serve the claim within a specified period. An application for interim remedies may be made even after judgment has been given.

Any party to the proceedings, be they claimant or defendant, may make an application for interim remedies, although in the case of the defendant not before filing an acknowledgement of service, unless the court orders otherwise. This makes good sense as a defendant must be required to state, at the earliest opportunity in the proceedings, whether they admit or deny the claim in whole or in part. This can be of importance in determining what interim remedies would be appropriate, if any, upon application of either party. It is important to note that this requirement does not prevent a challenge by a defendant to the court's jurisdiction or an application for the court not to exercise jurisdiction, both of which must also be made only after filing an acknowledgement of service **CPR 9.7(2)**.

An application for interim remedies must be supported by affidavit evidence, unless the court orders otherwise. If the application is made without notice to the other parties, the affidavit must give the reasons why notice has not been given².

² CPR 17.3(3)

Interim Injunctions etc - Part 17.4

Rule 17.4 sets out the further procedures relative to applications for some of the interim remedies listed in 17.1, namely: freezing orders, search orders, interim injunctions, an order authorizing a person to enter a property for the purpose of carrying out an order made for a person to provide information about the location of property or property the subject of a freezing order, and an order for detention, custody or preservation of relevant property. Where application is made for any of these particular interim remedies, the applicant must give and the court must require an undertaking in damages. It is not uncommon for the court to also require that undertaking to be fortified by property or payment into court. These sums can be quite substantial as in *Kyrgyz Mobil Tel Ltd et al v. Fellowes International Holdings Ltd. supra* where the Court of Appeal ordered the receiver to provide security in the sum of \$2,050,000 (10% of the alleged purchase price for the shares) under Part 51.4(4).

The general rule is that applications for any of these interim remedies to which Rule 17.4 applies, must be made upon 3 days notice to the other side. However, the remedy may be granted ex parte for a period not exceeding 28 days where the matter is one of urgency and the giving of notice is not possible or to give notice would defeat the purpose of the application. In each such case, the court must fix a date for further consideration of the application and a date on which the injunction will terminate, unless a further order is made. The applicant is then required to serve the application, evidence in support, the interim order made and notice of the date and time of the hearing for further consideration of the application, on the respondent not later than 7 days before the hearing date. Any application for extension of an interim order must be made upon notice to the respondent, unless the court orders otherwise.

The requirement that an interim order obtained on an ex parte basis shall not exceed 28 days validity, that a date must be set for the further consideration of the application inter partes and that any application for extension of the order must be made on notice to the respondent, are new requirements instituted by the CPR. The previous rules regime placed the burden of seeking relief from an order, even one obtained on an ex parte basis, on the respondent. It is interesting to note that while the CPR as a whole bears close resemblance to the English CPR, the English Rule on interim remedies does not include any such provision. (see ***Anne L Manfre and Others v Edward St. Clair Smith (as receiver of American International Bank in receivership), unreported, ESCS, Antigua, 1 April 2004***)

Interim Payments- Parts 17.5 to 17.7

Applications for orders for interim payment of damages or debt or of costs are governed by Rules 17.5 to 17.7. These rules permit multiple applications for interim payments to be made. Notice of such application must be served 14 days before the hearing and supported by evidence on affidavit. The rules require certain information to be included in the affidavit evidence, such as the

documentary evidence relied on to assess the amount of damages or the monetary award that, in the opinion of the claimant, is likely to be awarded.

An application for interim payment of damages is a most useful tool to any litigant, particularly one whose financial resources are slim and who are faced with a major financial burden in obtaining necessary medical treatment in a personal injury matter or in meeting the costs of continuing legal representation. A court will make an order for interim payment of damages or costs only where the liability for such is clear. In this regard, the relevant common law principles have been adopted in our CPR.

Thus **Part 17.6(1)** deals with the conditions and other matters to be satisfied by an applicant for interim payment of damages or debt or costs. The court will make an order for interim payment where the defendant has admitted liability for the damages or some other monetary sum, or the claimant has obtained an order for an account and payment of the sum certified as being due to him or the claimant has obtained judgment for damages to be assessed or for any sum of money, including costs to be assessed.

Where the court is satisfied that if the matter went to trial the claimant would obtain judgment for a substantial amount of money or costs, it may make an order for interim payment. Likewise where the court is satisfied in a claim for possession of land that the defendant would be liable to pay rent for the use and occupation of the land, it may make an order for interim payment.

Personal Injury Claims – Part 17.6(2)

An order for interim payment of damages may also be made in personal injury claims where the defendant has the means and resources to make an interim payment or is insured in respect of the claim or is a public authority. Where there are two or more defendants to such a claim, the court may make an order for interim payment where it is satisfied that at trial the claimant will obtain judgment for substantial damages against at least one of the defendants.

In determining such an application, the court must take account of contributory negligence, where applicable, and any relevant set-off or counterclaim, and may not order more than a “***reasonable proportion of the likely amount of the final judgment.***”

Review of order for Interim Payment – Part 17.7

An order for interim payment may be reviewed by the court which made the order and the order adjusted, varied or discharged as the circumstances may dictate. An application for review is a most useful tool and may be made by either the claimant or defendant.

Case Management Powers – Part 17.8

Finally, upon hearing an application under Part 17, the court has available to it all its case management powers under Parts 25 and 26 and, in particular, may make an order for an early trial of the claim or any part of it. Indeed, applications for interim remedies may be made at a case management hearing by either party or the court may make such orders as it sees fit, (CPR 26.2); for example, certain issues may be disposed of summarily (CPR 25.1(e)).

Concluding Remarks

It can be seen that interim remedies are an important aspect of the practice in civil and commercial litigation. The most usual applications for interim orders are for some type of injunctive relief, discovery of documents and information, and preservation of property and assets within the jurisdiction. However, there are several other types of interim relief which are available to the litigant and the court in appropriate cases, and which may have the desirable effect of reducing or narrowing the issues for trial (both factual and legal) or obviating the necessity for a full trial, thereby saving court time and costs.

It behoves lawyers in the OECS, particularly in this global economy and the increasing international nature of the practice in civil and commercial litigation, to make themselves more acquainted with the basket of interim remedies available and the possible benefits of them, strategically and substantively, to their clients in such litigation.

The CPR also addresses other remedies or steps which may be most useful to the litigant prior to trial. These include applications for default judgment, judgment on admissions, summary judgment, security for costs and, in defamation cases, for a ruling as to the meaning of the words the subject of the claim for defamation (CPR 69.4). These all have the effect of shortening or expediting the proper disposition of a claim in keeping with the court's overriding objective.

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