INTERIM RELIEF: NATIONAL REPORT FOR ENGLAND AND WALES

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This paper examines the English and Welsh (hereafter England and English) civil justice system. It does so in order to answer a series of questions concerning the nature and efficacy of those interim measures available in England.

I INTERIM MEASURES AVAILABLE IN ENGLAND

English civil procedure provides a variety of interim measures ie, those whose aim is to provide short-term, temporary, relief pending trial and final judgment.[1] These measures can broadly be divided into two specific types, albeit the only thing they have in common is that they are not intended to finally determine any issue in the claim or the claim in general. The first type of measure seeks to protect the substantive legal or equitable rights in issue in a claim pending final determination. In doing so they require the court to determine, albeit provisionally, where the balance lies between two competing claims.[2] The second type is simply facilitative in that they enable litigants to obtain information or evidence relevant to the claim. These measures do not affect substantive rights, but rather assist the

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1 Detailed discussion of the various forms of interim relief available in England can be found in: Lord Justice Jackson, *Civil Procedure 2018* (Sweet & Maxwell, 2018) vol 1, pt 25 (Commentary to *CPR* pt 25), vol 2, s 15 (interim remedies) ('*The White Book 2018*'); Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 3rd ed, 2013) ch 10, 15.26ff; Neil Andrews, *Andrews on Civil Processes* (Intersentia, 2013) vol 1, chs 10, 21. For a detailed discussion of injunctive relief see J D Heydon, M J Leeming and P G Turner, *Heydon, Leeming & Turner: Equity Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2014) ch 21.

2 See Zuckerman, above n 1, 393-4.

court's ability to determine questions regarding those rights. Using Zuckerman's terminology, the former can be referred to as 'Protective Orders', the latter as 'Process Orders'.[3] Examples of the former are: interim injunctions; interim declaration; and freezing injunctions. Examples of the latter are: orders for the provision of information about property or assets; search orders; and orders for the inspection of relevant property.

The full, although non-exhaustive, range of interim orders available is set out in Part 25 of the *Civil Procedure Rules 1998* (UK) ('*CPR*').[4] The *CPR* govern English civil process. Part 25 provides as follows:[5]

> 25.1
> (1) The court may grant the following interim remedies —
> (a) an interim injunction;
> (b) an interim declaration;
> (c) an order –
> (i) for the detention, custody or preservation of relevant property;
> (ii) for the inspection of relevant property;
> (iii) for the taking of a sample of relevant property;
> (iv) for the carrying out of an experiment on or with relevant property;
> (v) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and
> (vi) for the payment of income from relevant property until a claim is decided;
> (d) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under sub-paragraph (c);
> (e) an order under section 4 of the *Torts (Interference with Goods) Act 1977* to deliver up goods;
> (f) an order (referred to as a 'freezing injunction') –
> (i) restraining a party from removing from the jurisdiction assets located there; or

[3] Ibid 394.

[4] SI 3132/1998 (as amended). The fact that a specific interim remedy is not listed in Part 25 does not detract from the court's ability to grant it under its inherent jurisdiction: see *The White Book 2018*, above n 1, vol 1, [25.1.1]; *CPR* r 25.1(3).

[5] This paper focuses on an explication of the main interim orders, further details of those not covered here can be found in *The White Book 2018*, above n 1, vol 1.

(ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;

(g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction;

(h) an order (referred to as a 'search order') under section 7 of the *Civil Procedure Act 1997* (order requiring a party to admit another party to premises for the purpose of preserving evidence etc.);

(i) an order under section 33 of the *Senior Courts Act 1981* or section 52 of the County Courts Act 1984 (order for disclosure of documents or inspection of property before a claim has been made);

(j) an order under section 34 of the *Senior Courts Act 1981* or section 53 of the *County Courts Act 1984* (order in certain proceedings for disclosure of documents or inspection of property against a non-party);

(k) an order (referred to as an order for interim payment) under rule 25.6 for payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay;

(l) an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund;

(m) an order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if he does so, the property shall be given up to him;

(n) an order directing a party to prepare and file accounts relating to the dispute;

(o) an order directing any account to be taken or inquiry to be made by the court; and

(p) an order under Article 9 of Council Directive (EC) 2004/48 on the enforcement of intellectual property rights (order in intellectual property proceedings making the continuation of an alleged infringement subject to the lodging of guarantees).[6]

The various interim remedies have equally various origins. The court's power to grant interim injunctions, for instance, originated in equity: see, for instance, *Hogg v Kirby* (1803) 8 Ves Jr 215, 225. It is now statutory, see *Senior Courts Act 1981* (UK) s 37(1). Others have

[6] And see the power to make an award of security for costs under *CPR* r 25.12.

a statutory, common law or procedural basis.[7] Importantly, from the perspective of procedure being able to develop to meet changing circumstances, the categories of interim remedy are not closed. The court retains the power to develop procedure to create novel interim orders. The two most recent examples of the use of this creative power were the creation of freezing injunctions[8] or orders and search orders.[9] Both originated from the court's equitable jurisdiction; both now however have a statutory basis.[10]

II THE CRITERIA UNDER WHICH THE VARIOUS MEANS OF INTERIM RELIEF ARE GRANTED

Interim remedies can either be granted on an *ex parte* (without notice) or *inter partes* (with notice) basis.[11] Where an application for such a remedy is made on an ex parte basis the applicant is placed under a duty to make 'full and frank disclosure' to the court in seeking the order. This requires the applicant to provide the court with information on relevant matters that both go in favour of and against the application being granted.[12] Applications for such orders

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7 For instance, the basis upon which interim payments can be ordered is statutory, under *Senior Courts Act 1981* (UK) s 32 and *County Courts Act 1984* (UK) s 50. The basis upon which security for costs can be ordered arises under rules of court, see *CPR* r 25.13(2)(c).

8 Formerly known as Mareva injunctions. They originated in: *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093; *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

9 Formerly known as Anton Piller orders. They originated in: *Anton Piller KG v Manufacturing Processes* [1976] Ch 55.

10 Freezing injunctions under *Senior Courts Act 1981* (UK) s 37(3). Search orders under *CPA* s 7.

11 Where an order is granted on an ex parte basis, which may be for instance where urgency militates against notice being given or where notice would, as in the case of a freezing injunction, enable the party against whom the order is sought to frustrate its purpose prior to it being made.

12 See, for instance, *R v Kensington Income Tax Commissioners* [1917] 1 KB 486; *Memory Corporation Plc v Sidhu* [2000] 1 WLR 1433; *Al-Rawas v Pegasus Energy Ltd* [2007] EWCA Civ 268 [53]: 'it cannot be emphasised too strongly that a judge hearing an application by one party in the absence of the other is forced to rely heavily on the applicant to place before the court all the information in his possession that the judge might reasonably wish to have

are governed by the general application procedure provided by *CPR* Part 23. Interim remedies can be granted both against parties to litigation and against non-parties.[13] They can be granted before proceedings have been commenced, during the pre-trial process, and post-judgment.[14] The general position is that applications for such orders should be made as early as possible in the course of proceedings post-issue.[15] Where an interim remedy is sought prior to the initiation of proceedings it may only be granted in exceptional circumstances, where 'the matter is urgent' or 'it is otherwise in the interests of justice to grant the interim remedy before the claim is brought in the interests of justice'.[16] In circumstances where such a pre-issue order is granted the court ought to give further directions requiring the party in whose favour the order has been made to issue the substantive proceedings.[17] Different criteria, detailed below, apply to the grant of different interim remedies. The various forms of interim remedy are generally viewed as effective. No substantive problems concerning their operation are apparent.[18]

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before him when coming to a decision. The judge needs to have as complete a picture as can be made available and it is the duty of the applicant to ensure that nothing material is withheld.' For a discussion see Zuckerman, above n 1, 471-8.

13 Zuckerman, above n 1, 393.

14 See *CPR* rr 23.2(4)-(5), 25.2; Ministry of Justice (UK), *Practice Direction 25A: Interim injunctions*, Practice Direction to *CPR* pt 25, 28 October 2015 [5] ('*CPR Practice Direction 25A*'). For instance, a freezing injunction can be granted post-judgment to ensure that assets subject to the judgment are not moved out of the jurisdiction: see, Zuckerman, above n Zuckerman, 393-4; *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1984] 1 WLR 1097. Equally, freezing injunctions and search orders may be issued prior to the initiation of proceedings.

15 *CPR* r 25.2(2); Ministry of Justice (UK), *Practice Direction 23A: Applications*, Practice Direction to *CPR* pt 23, 25 March 2014 [2.7].

16 *CPR* r 25.2(2)(b).

17 *CPR* r 25.2(3).

18 That being said there is a continuing debate concerning whether the courts approach the grant of interim injunctions to restrain publication appropriately. For a discussion and further references see Zuckerman, above n 1, 423ff; Peter Devonshire, 'Restraint on Freedom of Expression under the *Human Rights Act*: *Cream Holdings Ltd v Banerjee*' (2005) 24 *Civil Justice Quarterly* 194.

A *Protective Orders*

The main forms of protective order are: interim injunctions; interim declarations; freezing injunctions; interim payments; security for costs; and orders for delivery up.

1 *Interim Injunctions*

Injunctive relief is, in the words of Kerr, 'a judicial process whereby a party [is] required to do a particular thing or to refrain from doing a particular thing according to the exigency of the [order].'[19] The former type of injunction is properly known as a mandatory one ie, one that mandates action. The latter type is a prohibitory injunction. Such relief can be granted on an interim basis. The aim of such relief has variously been described as being intended to 'preserve the status quo' pending final determination of the substantive claim.[20] This rationale has not been without its critics. Zuckerman, for instance, has argued cogently that while this is a superficially attractive rationale, it is based on a misconception that the order relates to a physical state of affairs. Physical states can be maintained in stasis. Interim injunctions however relate to the exercise, or not, of rights: it is not possible or plausible, it is argued, to maintain the exercise, or not, of rights in stasis. It is not because a choice needs to be made between permitting a purported right to continue to be exercised or not: talk of maintaining the status quo elides a policy choice the court has to make in a way that is not made if a physical state is kept in stasis.[21] Given that the court in *Films Rover International Ltd v Cannon Film Sales Ltd* (1987) described an interim injunction as maintaining a 'dynamic status quo', a contradiction in terms if ever there was one, may perhaps be taken as illustrating the force of his critique.[22] Lord Hoffmann gave a more accurate rationale behind the

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[19] W Kerr, *A Treatise on the Law and Practice of Injunctions* (Sweet & Maxwell, 1927) 1. For a detailed discussion of injunctive relief see, Heydon, Leeming and Turner, above n 1, ch 21.

[20] Heydon, Leeming and Turner, above n 1, ch 21; as explained in *Preston v Luck* (1884) 27 Ch D 497; see also John Leubsdorf, 'The Standard for Preliminary Injunctions' (1978) 91 *Harvard Law Review* 525.

[21] See Zuckerman, above n 1, 398ff.

[22] [1987] 1 WLR 670, cited in Zuckerman, above n 1, 403.

grant of interim injunctions in *National Commercial Bank of Jamaica Ltd v Olint Corp Ltd*.[23] As he put it:

> The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.[24]

Originally, the grant of an interim injunction was based on the court's assessment of all the circumstances in the case, an approach that was said to preclude the development of any general rules governing such applications: see *Saunders v Smith* (1838).[25] Interim injunctions were granted where the 'justice of the case' required it: see *Munro v Wivenhoe* (1865).[26] By the 1970s applicants were required to demonstrate, as a prerequisite of such relief, that they had a prima facie case on the merits. This however led to interim injunction applications being used as a form of summary judgment process, with the order made on the application being treated by the parties as a quick and cheaper means of finally determining the claim. This approach was however brought to an end by the House of Lords' decision in *American Cyanamid Co v Ethicon Ltd (No 1)* ('*American Cyanamid*') (1975).[27] That decision, generally, deprecated any assessment of the substantive merits of the underlying action at the interim stage. It provided that the proper approach to the grant of interim injunctive relief was for the court to ask the following questions: first, is there a serious ie, non-frivolous or vexatious, question to be tried; second, if the application is refused would damages to the applicant be an adequate remedy (this included an assessment of the respondent's ability to pay any such damages award); third, if damages would not be an adequate remedy would the respondent be adequately compensated by an award of damages by the applicant if the order was made; finally, whether in all the circumstances, the balance of convenience favoured an award or refusal of an injunction. In assessing this aspect of the test, the court

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[23] [2009] WLR 1405.
[24] Ibid [16].
[25] (1883) 3 My & Cr 711; 40 ER 1023.
[26] (1865) 12 LT 655.
[27] [1975] AC 396.

was to have regard to: the need to preserve the status quo; the extent of any uncompensatable harm to each party if they succeed at trial having lost at the interim injunction stage; and the relative strength of each party's case on the basis of documentary evidence and submissions made at the application hearing.[28]

Since the decision in *American Cyanamid* the courts have repeatedly qualified the test it laid down. In *NWL Ltd v Woods* (1979) the House of Lords held that where an interim injunction would in reality finally determine a claim then there should be an investigation of, and determination by the court of, the merits of the substantive claim.[29] In *Office Overload Ltd v Gunn* (1979), the Court of Appeal held that where the merits of the substantive action were 'plain and obvious' the court should clearly assess them in reaching its decision. This was particularly the case where any factual issues were clear cut or not in dispute, a point which effectively applied the acceptance in *American Cyanamid* itself that the merits could be taken account of where the issue between the parties was a legal one and the answer to it was straightforward. Linked to these points, in *Attorney-General v Barker* (1990) it was acknowledged that the merits were relevant where a respondent's defence to the substantive claim was at best flimsy and at worst non-existent.[30] Furthermore, where the interim injunction is in mandatory form the court is required to secure a higher degree of assurance that the substantive claim will succeed at trial. This requires an assessment of the merits at the interim stage; see *The Seahawk* (1986).[31] Equally, in restraint of trade cases a strong prima facie case on the merits has to be shown.[32] The present position appears to be that the *American Cyanamid* test continues to be valid as a general rule, a point made by the House of Lords in *R (ex p Factortame) v Secretary of State for*

[28] For a detailed discussion and criticism of the *American Cyanamid* test see, variously, Zuckerman, above n 1, 403ff; I R Scott, *Re-assessing American Cyanamid* (2002) 21 *Civil Justice Quarterly* 190; Keay, *Whither American Cyanamid?: Interim Injunctions in the 21st Century* (2004) 23 CJQ 132.

[29] [1979] 1 WLR 1294; and see *Stacey v 2020 Communications* [1991] FSR 49 (Ch D).

[30] [1990] 3 All ER 257.

[31] [1986] 1 WLR 657.

[32] See Zuckerman, above n 1, 403ff for a discussion.

Transport (No 2) (1991).[33] Its deprecation of assessing the substantive merits of the underlying claim was however downplayed: it was not impermissible. As the High Court explained matters in *Series 5 Software v Clarke* (1996), *American Cyanamid* did not exclude consideration of the merits generally; it only sought to put a stop to the courts entering into a mini-trial where there were very complex factual issues in dispute.[34] This would not be the case in most interim injunction applications. The merits thus have a real part to play in many instances, along with the other factors identified in *American Cyanamid*, in determining whether or not an interim injunction should or should not be granted.[35]

2 *Interim Declarations*

Declarations are binding judgments resolving a legal uncertainty that exists for the parties as to the law, rights or as to a question of fact. The power to grant a declaration originated in equity procedure.[36] Until relatively recently the idea that the court could issue an interim declaration was viewed as 'a contradiction in terms'[37] or 'juridical nonsense',[38] on the grounds that it was not possible to have 'a provisional determination of the final rights of the parties'.[39] That position was however put to rest by both *CPR* r 25(1)(1)(b) and, in respect of judicial review proceedings, section 31(1)(b) of the *Senior Courts Act 1981* (UK). In some cases, as noted in the commentary to *The White Book 2018*, an interim declaration can have as great an effect as a final declaration reached at trial. Authoritative guidance concerning the approach courts will take to granting interim declarations has not been specifically given yet. In the absence of specific guidance, it is likely that the proper approach to take will be

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33 [1991] 1 AC 603.

34 [1996] 1 All ER 853.

35 *The White Book 2018*, above n 1, vol 2, [15.1]ff for a further discussion of the test.

36 *Guaranty Trust Company of New York v Hannay* [1915] 1 KB 536.

37 Stuart Sime and Derek French (eds), *Blackstone's Civil Practice 2013* (Oxford University Press, 2013) [4.20].

38 See *Newport Association Football Club Ltd v Football Association of Wales* [1995] 2 All ER 87, 92.

39 Ibid.

akin to that which applies to interim injunctions given the comparable effect that the grant of each engenders.[40]

3 *Freezing Injunctions*

A freezing injunction is one that enjoins a party from dealing with their assets within, and in some cases outside the jurisdiction. It acts *in personem*[41] and is an order that is effective from the moment it is made by the court.[42] It is specifically an order that restrains 'a party from removing from the jurisdiction assets located there'[43] or 'from dealing with any assets whether located within the jurisdiction or not'.[44] Breach of a freezing injunction is a contempt of court, and as such punishable by a fine, imprisonment, or sequestration of assets. As noted earlier it is a relatively recent creation, which now has a statutory basis. Such an order can be brought in support of either proprietary claims ie, in order to protect the claimant's putative rights over an asset, or in non-proprietary claims to ensure that a defendant, or in some limited cases a third party,[45] does not dispose of their own assets or otherwise deal with them in a way to put them beyond the claimant's reach should the claim succeed. In the latter case, the order is one that precludes a defendant from making itself judgment-proof.[46] As with other forms of injunctive relief freezing injunctions may be issued before and during,[47] and as noted above after the conclusion of, the substantive proceedings between the parties.[48] Such injunctive relief can be ordered in support of domestic, foreign,[49] and arbitration proceedings.[50]

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40 *R v Secretary of State for Transport (No 2)* [1991] 1 AC 603; see *The White Book 2018*, above n 1, vol 1, [25.1.15].
41 Andrews, above n 1, 590.
42 *Z Ltd v A-Z and AA-LL* [1982] QB 558, 572.
43 *CPR* r 25.1(f)(i).
44 *CPR* r 25.1(f)(ii).
45 *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231.
46 See, for instance, *Cherney v Neuman* [2009] EWHC 1743 (Ch); *Ostrich Farming Corp Ltd v Ketchell* [1997] EWCA Civ 2953 (10 December 1997)(Millett LJ).
47 In this regard see *Fourie v Le Roux* [2007] 1 WLR 320.
48 *Camdex International Ltd v Bank of Zambia* (No 2) [1997] 1 WLR 632.
49 See *Civil Jurisdiction and Judgments Act 1982* (UK) s 25.
50 Andrews, above n 1, 606ff.

There are a number of criteria that govern the grant of such injunctions. An essential prerequisite for such an order is that the claimant can demonstrate that there is a real risk of dissipation of the asset or assets in question.[51] A claimant cannot utilise a freezing injunction as a means to provide security for judgment; such orders are impermissible. There are a number of 'typical factors' that go to demonstrate, on an objective basis,[52] this requirement. As noted in *The White Book 2018* they are:

> (1) The ease or difficulty with which the respondent's assets could be disposed of or dissipated. It may be easier to establish the risk of dissipation of a bank account, or of moveable chattels, than the risk that the respondent will dispose of real property. (2) The nature and financial standing of the respondent's business, so that the burden on the applicant may be greater if the respondent is a long-established company with a reasonable market reputation. (3) The domicile or residence of the respondent, since the court will be less ready to infer, in the absence of evidence of the use of haven or less transparent jurisdictions for financial dealings, that a respondent who is based in England, and has a home or established business here, will remove or dissipate his assets. (4) Any threat or intention expressed by the respondent about future dealings with his assets. (5) The respondent's behaviour in response to the applicant's claims: a pattern of evasiveness, or unwillingness to participate in the litigation, or raising thin defences, or total silence, may be factors which assist the claimant. (6) Evidence of dishonesty …[53]

Claimants must also demonstrate that they have a good arguable case on the substantive claim to damages. This is a low threshold test.[54] Where, however, they seek a freezing injunction that they intend to serve outside the court's jurisdiction this threshold test is replaced by a more onerous one, requiring the claimant to demonstrate that they have 'much the better of the argument'.[55]

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51 *JSC BTA Bank v Solodchenko* [2011] 1 WLR 888.

52 *O'Regan v Iambic Productions* (1989) 139 NLJ 1378; *Rosen v Rose* [2003] EWHC 309 (QB), and see *The White Book 2018*, above n 1, vol 1, [25.1.25.5].

53 *The White Book 2018*, above n 1, vol 1, [25.1.25.5].

54 As noted by Andrews, above n 1, 592.

55 *The White Book 2018*, above n 1, vol 1, [25.1.25.5]; *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381 [63]: 'The judge below applied the good arguable case test. He treated this as requiring KK to show that it had "much the better of

Freezing injunctions can have either domestic or worldwide effect. The jurisdiction to make a worldwide freezing injunction, and the requirement to seek the court's permission to seek to enforce such an order outside the jurisdiction, was discussed carefully in *Dadourian Group International Inc v Simms (Practice Note)* (2006). It set out the following:

> Guideline 1: The principle applying to the grant of permission to enforce a [worldwide freezing order or 'WFO'] abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.
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> Guideline 2: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.
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> Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.
>
> Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.
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> Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

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the argument". That is indeed how the courts have come to construe that concept when considering whether to order service out of the jurisdiction.'

> Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.
>
> Guideline 7: There must be evidence of a risk of dissipation of the assets in question.
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> Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.[56]

In addition to the substantive questions that the court needs to be satisfied of in respect of freezing injunctions there are a number of relevant procedural provisions. First, in a large number of cases an application for a freezing injunction will be brought on an ex parte basis. This can only be justified if the claimant can demonstrate that the giving of notice would lead to the injunction's aim being defeated ie, notice would enable the defendant to dispose of their assets prior to the order being made. As with other ex parte orders the claimant is, in such circumstances, under a strict duty to both make full and frank disclosure at the application hearing and to provide the defendant with as full a written account as possible of the hearing and the court's reasons for granting the order. The absence of notice to defendants is also generally accompanied by a direction that the application is heard in private; again in order to ensure that the order is not capable of frustration prior to it being, if it is, granted. Secondly, in order to protect the defendant whose right to deal with its own property or property that may ultimately be held to be its property is severely curtailed during the life of the injunction, the claimant is required to give an undertaking in damages to the court. This requires them to make good any loss occasioned to the defendant, or any third party subject to it, by the order.[57] Thirdly, where the order is made on an ex parte basis the matter will be

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[56] [2006] 1 WLR 2499, [25]ff. For a discussion of the relationship between worldwide freezing injunctions and EU law see Zuckerman, above n 1, 499ff.

[57] *CPR Practice Direction 25A* [5].

required to return to the court for a rehearing on an *intra partes* basis within a very short period of time. Fourthly, if the order is granted prior to proceedings, the claimant will be required to take immediate steps to issue the substantive claim. If issued during proceedings, the claimant will be required to prosecute the substantive claim with all alacrity. Claimants cannot simply obtain such an order and then fail to prosecute the substantive claim. A defendant on application, or the court of its own initiative, may seek to vary or set aside any such order in these (and other) circumstances.[58] Finally, the freezing order will not go as far as to apply to all the defendant's assets. Provision will be made to enable the defendant to use such of its assets necessary for defending the substantive claim, for living expenses and other, good faith, liabilities.[59]

4 *Interim Payments*

An interim payment order requires a defendant to pay an amount of money to a claimant prior to trial and final judgment where the claimant's claim is either a damages or debt claim. When the power to make such an order was originally introduced it was confined to personal injury claims. This restriction was however lifted in 1978.[60] The rationale behind this interim order is, as described by Sime, to 'alleviate the hardship that may otherwise be suffered by claimants who may have to wait substantial periods of time before they recover any damages in respect of wrongs they may have suffered.'[61] While this form of interim order is intended to assist claimants, given that, where granted, it is granted prior to any determination of the substantive issue between the litigants, there is a clear need to equally protect the defendant's interests. As an advance payment on a potential judgment award prior to a trial on the merits caution must

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[58] For a discussion see *The White Book 2018*, above n 1, vol 1, [25.1.25].

[59] See Zuckerman, above n 1, 502ff. See Scott Ralston, *Freezing Injunctions in the Court of Appeal: What Safeguards is the Respondent Entitled to Expect* (2010) 29 *Civil Justice Quarterly* 19.

[60] See Andrews, above n 1, 216.

[61] Stuart Sime, *A Practical Approach to Civil Procedure* (Oxford University Press, 13th ed, 2010) 331. As explained by Ralph Gibson LJ in *Ricci Burns Ltd v Toole* [1989] 1 WLR 993 at 1003: 'the underlying purpose [of the interim payment is] the mitigation of hardship or prejudice which may exist during the period from the commencement of the action until trial.'

be exercised given the potential interference with the defendant's substantive rights; with rights that might ultimately be vindicated at trial. In order therefore to protect the defendant's legitimate interests, such interim payments can only be ordered by the court in the strictly limited circumstances prescribed by the *CPR*: the court has no jurisdiction to go beyond the powers, and limits, set by its statutory basis and the relevant rules of court in terms in this regard.[62]

Before the court may make an interim payment order it must be satisfied that 'any [one] of the following conditions' is satisfied:[63]

> (a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;
> (b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;
> (c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim;
> (d) the following conditions are satisfied —
> (i) the claimant is seeking an order for possession of land (whether or not any other order is also sought); and
> (ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for the defendant's occupation and use of the land while the claim for possession was pending;
> (e) in a claim in which there are two or more defendants and the order is sought against any one or more of those defendants, the following conditions are satisfied —
> (i) the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against at least one of the defendants (but the court cannot determine which); and
> (ii) all the defendants are either —

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62 As affirmed in *R (Teleos Plc & Ors) v Customs and Excise* [2005] 1 WLR 3007 [10]-[11], 'The court's power to order interim payment derives from section 32(5) of the *Supreme Court Act 1981* which defines "interim payment"' This statutory provision and the consequent rules were necessary because the court has no inherent power to order an interim payment: *Moore v Assignment Courier Ltd* [1977] 1 WLR 638.'

63 *CPR* r 25.7(1).

(a) a defendant that is insured in respect of the claim;
(b) a defendant whose liability will be met by an insurer under section 151 of the Road Traffic Act 1988 or an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself; or
(c) a defendant that is a public body.

In order to satisfy the court that the claimant is likely to succeed at trial, under *CPR* rr 25.7(1)(c)-(e) a claimant is required to demonstrate to a high standard, according to the civil standard of proof,[64] that they are likely to succeed at trial. In practice this limits the scope to make interim payments to those claims that do not raise complex issues of either fact or law; a point stressed by Zuckerman.[65] Further guidance on the exercise of the power to make an interim payment was given by the Court of Appeal in *HM Revenue and Customs v The GKN Group*.[66]

Where the court determines that an interim payment can be made, it is limited as to the amount that may be awarded; limited in order to protect the defendant who may ultimately be held not to be liable and who runs the risk that the claimant may dissipate the payment prior to trial and judgment. As provided by *CPR* r 25.7(4) and (5) no interim payment may exceed 'a reasonable proportion of the likely amount of the final judgment' and must be calculated by taking account of any issue of contributory negligence raised by the defendant, any set-off or counterclaim.

5 *Delivery Up*

In claims arising under tort of wrongful interference with goods ie, for conversion or trespass to goods such that a defendant takes possession of or sells a claimant's property or removes it from the

[64] See Lloyd LJ in *Shearson Lehman Bros Inc v Maclaine Watson & Co* [1987] 1 WLR 480, 487, 'Something more than a prima facie case is clearly required, but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden.'
[65] Zuckerman, above n 1, 523.
[66] [2012] 1 WLR 2375 at [32]-[53].

claimant's possession where the defendant has no right to do so, the court may provide interim relief the aim of which is to return the property to the claimant's possession pending trial and judgment.[67] This arises via an interim order for delivery up ie, an interim order requiring the defendant to put the property in question into the claimant's or a third party's possession. The basis of this power is statutory. It arises under section 4(2) of the *Torts (Interference with Goods) Act 1977* (UK), which provides that:

> On the application of any person in accordance with rules of court, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for the delivery up of any goods which are or may become the subject matter of subsequent proceedings in the court, or as to which any question may arise in proceedings.[68]

In order for such an order to be made the court must first be satisfied that the claimant has an arguable case that the specified property (which must be clearly identified) is likely to be wrongfully interfered with. Once this relatively low threshold test is satisfied the court has a discretion whether to make the order or not.

In addition to the statutory power under the 1977 Act to order delivery up of goods, the court also has power under its inherent, common law, jurisdiction, *CPR* r 25(1)(1)(c), and s 37(1) of the *Senior Courts Act 1981* (UK) to order delivery up of assets and goods pending trial. This power is one that can be utilised to supplement a freezing injunction ie, once assets are frozen they can then be ordered to be delivered up (or placed in custody or preserved). Guidance was given as to how this type of delivery up order should be made by the Court of Appeal in *CBS United Kingdom Ltd v Lambert*[69] ('*CBS*') (1983). Lawton LJ outlined that in considering whether to make such an order a court should take account of the following considerations:

> First, there should be clear evidence that the defendant is likely, unless restrained by order, to dispose of or otherwise deal with his chattels in

[67] See *Torts (Interference with Goods) Act 1977* (UK) s 1.
[68] As noted above, the relevant rule of court is *CPR* r 25.1(1)(e).
[69] [1983] Ch 37.

order to deprive the plaintiff of the fruits of any judgment he may obtain. Moreover, the court should be slow to order the delivery up of property belonging to the defendant unless there is some evidence or inference that the property has been acquired by the defendant as a result of his alleged wrong-doing. In the present case, for example, the inference is that the motor vehicles which the defendants own could only have been purchased out of the proceeds of sale by the defendants of articles which infringe the plaintiffs' copyright. The inference is also that, if the defendants are forewarned or left in possession of the motor vehicles, those vehicles will be sold and the proceeds of sale dissipated or hidden so that the plaintiffs would be deprived not only of damages but also of the proceeds of sale of infringing articles which belong to the plaintiffs.

Secondly, no order should be made for the delivery up of a defendant's wearing apparel, bedding, furnishings, tools of his trade, farm implements, live stock or any machines (including motor vehicles) or other goods such as materials or stock in trade, which it is likely he uses for the purposes of a lawful business. Sometimes furnishings may consist of objets d'art of great value. If the evidence is clear that such objects were bought for the purposes of frustrating judgment creditors they could be included in an order.

Thirdly, all orders should specify as clearly as possible what chattels or classes of chattels are to be delivered up. A plaintiff's inability to identify what he wants delivered up and why is an indication that no order should be made.

Fourthly, the order must not authorise the plaintiff to enter on the defendant's premises or to seize the defendant's property save by permission of the defendant. In *Anton Piller KG v. Manufacturing Processes Ltd* [1976] Ch. 55 Lord Denning MR emphasised that the order in that case, at p. 60:

> '... does not authorise the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. ... It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: It brings pressure on the defendants to give permission. It does more. It actually orders them to give permission - with, I suppose, the result that if they do not give permission, they are guilty of contempt of court.'

. . .

Fifthly, no order should be made for delivery up to anyone other than the plaintiff's solicitor or a receiver appointed by the High Court. The court should appoint a receiver to take possession of the chattels unless

> satisfied that the plaintiff's solicitor has, or can arrange, suitable safe custody for what is delivered to him.
>
> Sixthly, the court should follow the guidelines set out in *Z Ltd v A-Z and AA-LL* [1982] QB 558 in so far as they are applicable to chattels in the possession, custody or control of third parties.
>
> Finally, provision should always be made for liberty to apply to stay, vary or discharge the order.[70]

The guidance set out in *CBS* is as applicable to the exercise of the discretion under the 1977 Act as it is to the other bases upon which delivery up can be ordered.

6 *Security for Costs*

The costs of English civil litigation are, generally, borne by the losing party; English procedure operates a costs-shifting rule. There is generally no mechanism whereby parties can obtain any security that the losing party will be in a position to pay any such costs at the conclusion of litigation. Exceptionally however a claimant, and only a claimant,[71] can be required to provide security for the potential costs of the litigation, for which they might be liable in the event that their claim fails. Such security is not paid to the defendant in advance of trial and judgment, but rather is paid into court. Where such an order is made the claim will not be permitted to proceed until the security is given; repeated failures to comply with an order to give security may ultimately result in the claim being struck out.[72]

An order for security for costs can only be made if conditions set out in *CPR* r 25.13(2) are met. The first condition is that, in all the circumstances, it is just to make the order. The second condition requires the defendant to demonstrate that one of a number of specific criteria is present. Those criteria are that:

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70 [1983] Ch 37, 44-5.
71 *CPR* r 25.12(1).
72 See *Radu v Houston* [2006] EWCA Civ 1575.

(i) a specific statutory provision permits such an order to be made (*CPR* r 25.13(1)(b) (ii));

(ii) the claimant is neither resident in England and Wales nor a State within the terms of the Brussels and Lugano Conventions or EC Regulation 44/2001 (*CPR* r 25.13(2)(a));

(iii) the claimant is a company or other such body corporate, irrespective of where it is incorporated and 'there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so' (*CPR* r 25.13(2)(c));

(iv) the claimant has either failed to set out their address in the claim form, given a false address or changed their address as a means to avoid the consequences of the litigation ie, to avoid any potential costs award (*CPR* r 25.13(2)(d)-(e);

(v) the claimant is a nominal claimant and there is reason to believe he or she will not be able to satisfy a costs order (*CPR* r 25.13(2)(f)); or

(vi) the claimant has taken steps to make it difficult to enforce any costs order against their assets (*CPR* r 25.13(2)(g)).

It should be noted that even where one or more of the specific criteria in *CPR* r 25.13(2) is or are made out it must still be just in all the circumstances for the court to make the order. If, for instance, it is apparent that the claimant has a strong case on the merits it is unlikely that the court will be satisfied that it is just to make the order: see, for instance, *Al-Koronky v Time Life Entertainment Group Ltd* [2006] EWCA Civ 1123.[73]

[73] For a detailed discussion of the discretionary aspect of the grant of such orders see, *The White Book 2018*, above n 1, vol 1, [25.13.1]ff.

B *Process Orders*

The main forms of process order are: search orders; orders relating to the preservation and inspection of property; information orders; disclosure orders; orders for preparing and filing accounts.

1 *Search Orders*

A civil search order enables an applicant to go onto a respondent's premises and inspect property and, if necessary, ensure property and documents are removed from it into safe custody. The order does not, however, permit forcible entry. It requires the respondent to permit entry, in which aspect it can be said to have the character of a mandatory injunction.[74] The central aim of this order is to protect and preserve evidence that is otherwise likely to be destroyed, and as such – like a freezing injunction – is generally applied for on an ex parte basis. The courts have over a number of years refined the criteria applicable to such applications. These have been conveniently summarised by Zuckerman as follows:

> (1) There must be a strong prima facie case of a civil cause of action. The court will closely consider the merits of the claimant's case before granting a search order.
> (2) The claimant must establish that there is a serious danger (not just a mere possibility) that evidence will be destroyed or will disappear and that such evidence is of major importance and not merely marginal. The fact that a respondent can be shown to have behaved improperly will not always justify an order. There must be a real reason to believe that the respondent will disobey an injunction for the preservation of the evidence in question.
> (3) There must be clear evidence that the defendants had in their possession incriminating documents or things.
> (4) The harm likely to be caused by the execution of the order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of the order. This precondition must be particularly observed where the order involves the seizure of trading stock or the perusal by the claimant of confidential commercial documents.[75]

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[74] Entry onto the premises is limited to the applicant and their solicitor and the search is overseen by a lawyer independent of the parties, see further Andrews, above n 1, 611.

[75] See Zuckerman, above n 1, 805; see also Andrews, above n 1, 612ff.

2 *Orders Relating to the Preservation and Inspection of Property*

A variety of orders can be made under *CPR* r 25.1(1)(c) and (d) concerning the preservation, custody, and inspection of property, as well as the taking of samples and performing experiments on property. These are supported by a specific power that enables the court to authorise entry onto property for the purposes of carrying out these substantive interim process orders. The only general criteria specifically applicable to such applications is that the subject matter of the order must be a physical object.[76]

3 *Disclosure Orders*

A number of orders that facilitate the provision of evidence can be granted as interim relief. Such orders can either be standalone ones or, like an order requiring a defendant supply information concerning their assets to a claimant, are ancillary to a protective order under *CPR* r 25.1(1)(g), in that case the grant of a freezing injunction.[77] Where an order made under r 25.1(1)(g) is concerned it will only be granted if the court is persuaded that it is 'just and convenient to do so' and that it is not being used speculatively.[78]

The two main interim disclosure orders are those which can be made against non-parties, requiring the disclosure of documents or inspection of property, and those pre-action disclosure orders under *CPR* rr 25.1(1)(j) and (i) respectively. In respect of both, the criteria for the grant of such an order is provided in *CPR* r 25(5), which

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[76] *Tudor Accumulator Co Ltd v China Mutual Steam Navigation Co Ltd* [1930] WN 200, as discussed in Sime, above n 61, 414.

[77] In such a case the decision to grant the order will depend on the decision to grant the substantive, protective order; see Zuckerman, above n 1, 489. Where however the disclosure order under *CPR* r 25.1(1)(g) is made prior to an application for a freezing injunction being made the applicant will be required to demonstrate that they are taking steps to issue and pursue such an application: Zuckerman, above n 1, 499-500.

[78] *Parker v C.S. Structured Credit Fund Ltd* [2003] 1 WLR 1680; *Lichter & Schwarz v Rubin* [2008] EWHC 450 (Ch).

provides that the order can only be made where the evidence in support of the application demonstrates that 'in relation to the proceedings or anticipated proceedings, that the property – (a) is or may become the subject matter of such proceedings; or (b) is relevant to the issues that will arise in relation to such proceedings.'[79]

In respect of the latter, such an order can also only be granted where the substantive provisions governing pre-action disclosure, as set out in *CPR* r 31.16(3) are met.[80] This means such an order may only be made where: both the applicant and the respondent are likely to be a party to the proceedings when issued; if the proceedings had already commenced the respondent would be under a duty to disclose the sought after material under an order for standard disclosure; and it is desirable to make the order so as to dispose of the anticipated proceedings fairly, assist the resolution of the dispute, and save costs.[81] As explained in *Phoenix Natural Gas Ltd v British Gas Trading Ltd* (2004), even where these jurisdictional criteria are met, the court must still exercise a discretion whether to grant the order.[82] Given that the normal period for compulsory disclosure is during the post-issue pre-trial stage of litigation such orders will only be granted exceptionally.[83]

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79 *CPR* r 25.5(3).

80 For an outline see John Sorabji, 'Fact-Finding in Tort Litigation: Discovery, Disclosure, Proof-Taking' (2013) 2 *International Journal of Procedural Law* 295.

81 *Bermuda International Securities Ltd v KPMG* [2001] Lloyd's Rep PN 392; *Black v Sumitomo* [2002] 1 WLR 1562. As with any pre-action order it will also only be granted in cases of urgency or, as is more likely in cases under this provision, where it is in the interests of justice to do see, see *CPR* r 2 5.2(2).

82 [2004] EWHC 451 (Comm).

83 Ibid [2]: 'The jurisdictional requirements, it is fair to say, set a relatively low threshold but the general position is that pre-action disclosure is not to be given simply because those threshold requirements have been reached. Leaving aside obvious examples such as medical records or their equivalent as provided for in various protocols in the rules in particular kinds of dispute, by and large the concept of disclosure being ordered at something other than the normal time is presented as requiring something to justify departure from the norm at any rate where the parties at the pre-action stage have been acting reasonably and is therefore only to be given in exceptional cases.'

III ARE THERE ANY CONTROVERSIES WITH RESPECT TO INTERIM MEASURES?

There are no current controversies concerning interim remedies in England. Recently there was however a serious controversy concerning the use of interim injunctions; so serious that it became a matter of Parliamentary, governmental and judicial concern, which culminated in the appointment of an investigation by a committee established by and under the chairmanship of the, then, Master of the Rolls and Head of Civil Justice, Lord Neuberger in 2010 (the Neuberger Committee).[84] This controversy concerned the development and perceived widespread use of so-called super-injunctions, a term unknown to English law prior to 2009.[85]

The term 'super-injunction' is suggestive of a new form of injunction, which in some way is more powerful in its effect than a standard form of injunction. It was, and is, however no such thing. It was not a new type of injunction, although as the Court of Appeal acknowledged in *Nutuli v Donald*, it had the 'nomenclature of novelty'.[86] Essentially a super-injunction is an interim injunction that not only prohibits behaviour concerning the substantive claim, but also renders the fact of the proceedings and injunction itself secret. To achieve the latter it will typically contain a number of features: an order closing the court file; an order anonymising the parties; and, most importantly an order prohibiting communication of the fact of the proceedings and the injunction. It was the last feature that rendered a so-called super-injunction a super-injunction.[87]

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[84] The present author was a member of that Committee. For details see The Committee on Super-Injunctions, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (May 2011) i-iii <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf > ('*Neuberger Report*').

[85] As noted by Tugendhat J in *Terry v Persons Unknown* [2010] 1 FCR 659 [24].

[86] [2010] EWCA Civ 1276 [47].

[87] *Ntuli v Donald* [2010] EWCA Civ 1276, [43]ff. For a detailed account of the nature of a super-injunction see *Neuberger Report*, above n 84, 6ff.

Given its novelty however a degree of confusion arose as to the exact scope of super-injunctions. Some viewed any interim injunction that anonymised parties' names as super-injunctions, which would have brought any interim injunction in, for instance, family proceedings and proceedings concerning children within their ambit. There were also some suggestions that they could encompass a prohibition on parties subject to an injunction communicating details concerning the injunction to a Member of Parliament, which was said to breach Article 9 of the *Bill of Rights 1689*;[88] these latter form of the super-injunction for a short while were called by some 'hyper-injunctions'. In respect of this latter form of injunction, the Neuberger Committee found that there were and had not been such injunctions and that no court injunction could, or could purport, to breach Article 9.[89] In order to clarify the issue, the Committee in the light of the case law, clarified the nature of a super-injunction in the following way:

> the term **super-injunction** can properly be defined as follows:
> an interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and, (ii) publicising or informing others of the existence of the order and the proceedings (the 'super' element of the order).
>
> This is to be contrasted with an **anonymised injunction**, which is:
> an interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated.[90]

Four further important points need to be made concerning this form of interim injunction. First, like freezing injunctions and search orders, they were generally obtained on an ex parte basis. The rationale being, as with these established forms of interim relief, that if those to be made subject to the order were aware of the application steps would be taken to frustrate. This was particularly important given the substantive nature of the injunction, which I outline below.

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88 1 Wm & M sess 2, c 2 ('*Bill of Rights 1689*').

89 *Neuberger Report*, above n 84, 67f. The issue of communications with MPs was however more complicated, not least as it did not necessarily engage Article 9 of the *Bill of Rights 1689*.

90 *Neuberger Report*, above n 84, 20 (emphasis in original).

Secondly, they did not simply bind the respondent to the proceedings. One of the features of any interim injunction is that, unlike a final injunction, it binds any third party who is given notice of it.[91] Again this was particularly important in the context of super-injunctions given the substantive nature of the proceedings. Thirdly, where the applications for such orders were made on an *inter partes* basis in the first instance, or at rehearing following an initial ex parte hearing, there was a reported tendency on the part of the respondent to agree to the order ie, the super-injunction was granted by consent of the parties. The rationale for this arose from what can reasonably be suggested was an appreciation by the respondent that in terms of the substantive scope of the injunction the order, if determined at trial, would be made. Finally, and contrary to the proper approach to be taken to interim injunctions, the orders were in many cases treated by the court and parties as essentially final injunctions; by the applicants in order to take advantage of the fact the injunction would bind third parties, and by the court due to a failure on its part to ensure that the order contained provision for the proceedings to return to court by a certain date.

Taken together these features worked together to produce a situation where interim injunctions were being obtained at one-sided hearings that bound potentially anyone and in so doing barred those who were subject to it informing anybody of the fact of the order on a permanent basis. Given this it was unsurprising that concerns arose that a form of secret justice was in the process of being developed in England. As Zuckerman put it, a form of process English civil justice had not previously permitted was being created, one that permitted – or perhaps better, required – 'an "entire legal process (to be) conducted out of the public view … (the) very existence (is then) kept permanently secret under pain of contempt."'[92]

[91] Under what is known as the *Spycatcher principle*, see *Attorney-General v Newspaper Publishing Plc* [1988] Ch 333, 375, 380. And see *Neuberger Report*, above n 84, 18.

[92] Adrian Zuckerman, 'Super Injunctions — Curiosity-Suppressant Orders Undermine the Rule of Law' (2010) 29 *Civil Justice Quarterly* 131, 134, cited by *Neuberger Report*, above n 84, 16.

The rationale behind the development of super-injunctions was straightforward. It was the contention that given the nature of the substantive proceedings publicity concerning the fact of them and of the injunction itself would undermine the injunction's efficacy. Complete secrecy was said to be necessary in order to render the substantive injunction effective. This arose because the particular, although not exclusive, focus of super-injunctions were proceedings that sought to protect an individual's claim to privacy and confidentiality against a newspaper's desire to publish a story concerning their private life. Typical examples were injunctive relief sought by football players that sought to prohibit the popular press from printing stories concerning their extra-marital affairs. The most well-known cases were those that concerned super-injunctions sought by, and for a period obtained by, John Terry, captain of Chelsea and the England national team, and Ryan Giggs of Manchester United. Proceedings concerning the former brought the issue of super-injunctions clearly into the public spotlight, while the latter notoriously led to the breach of the terms of the injunction to name Ryan Giggs[93] as the beneficiary of the order under cover of Parliamentary by members of the Houses of Parliament.[94]

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[93] See further *Giggs v News Group Newspapers Ltd & Anor* [2012] EWHC 431 (QB).

[94] The following are examples of the injunctions that formed the focus of concern; very few were in fact true super-injunctions. The vast majority were in truth no more than standard anonymised injunctions: *X & Y v Persons Unknown* [2006] EWHC 2783 (QB); *Terry v Persons Unknown* [2010] 1 FCR 659; *DFT v TFD* [2010] EWHC 2335 (QB); *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429; *AMN v HXW* [2010] EWHC 2457 (QB); *Gray v UVW* [2010] EWHC 2367 (QB); *Ntuli v Donald* [2010] EWCA Civ 1276.
KJH v HGF [2010] EWHC 3064 (QB); *XJA v News Group* [2010] EWHC 3174 (QB); *CDE & FGH v MGN Ltd & LMN* [2010] EWHC 3308 (QB); *POI v The Person Known as 'Lina'* [2011] EWHC 25 (QB); *Hirschfeld v McGrath* [2011] EWHC 249 (QB); *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; *MNB v News Group* [2011] EWHC 528 (QB); *Goldsmith v BCD & Khan v BCD* [2011] EWHC 674 (QB); *ZAM v CFW & TFW* [2011] EWHC 476 (QB); *Ambrosiadou v Coward* [2011] EWCA Civ 409; *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439; *MJN v News Group Newspapers Ltd* [2011] EWHC 1192 (QB); *CTB v News Group Newspapers Ltd & Thomas* [2011] EWHC 1232 (QB).

The development of such orders was particularly troubling for a number of reasons. First, they brought into sharp relief an ongoing debate concerning the relationship between the right to privacy and confidentiality and freedom of expression, and particularly press freedom. England has historically had no general right of privacy. Following the enactment of the *Human Rights Act 1998* (UK), the article 6, 8 and 10 rights were incorporated into English law. There was particular media concern during the Act's passage through Parliament that the introduction of article 8 would result in the development of a general right of privacy, which would consequently be used to undermine press freedom. That concern was supposed to be addressed by the incorporation of what would become s 12 of the 1998 Act; a section which imposed a higher threshold criteria on the courts when there was a question of injunctive relief that would have an adverse effect on the freedom of speech.[95] They thus heightened tensions concerning an already fraught public policy debate.

Secondly, they marked a significant derogation from norms of procedural justice. The orders were granted without notice to defendants. More importantly, they were granted without notice to any of the third parties who would later be bound by them. This was particularly troubling because the third parties were in many cases the real focus of the injunction. The defendant would, for instance, be an individual selling a, possibly their, story to a newspaper. In many cases the defendant would actually be a person unknown, because, for instance, they had obtained the private or confidential information improperly and there would be no intention, or possibility, of actually serving the injunction upon them. In all such cases to stop publication of the information the injunction would need to enjoin the media from publishing the story. But the media would not be joined as either defendants to the proceedings or served as interested parties. The first the media would know about the proceedings would be upon service of the injunction upon them. The orders were thus predicted upon profound derogations from due notice requirements, equality of arms, effective participation, and adversarial process. These derogations were not, it was strongly argued, mitigated in any genuine sense by the prospect of an *intra*

[95] For a discussion of this issue see *Neuberger Report*, above n 84, 1-6.

parties rehearing of the application. They were not because in reality such a hearing effectively put the onus on the subject of the injunction to persuade the court not to continue the injunction.

Thirdly, the orders derogated from the public's article 10 rights and in many cases they were doing so by consent of the parties ie, the courts were permitting parties to waive rights that were not held by them without any scrutiny of that waiver. Fourthly, the injunctions formed a stark breach of the fundamental, constitutional principle of open justice. As such they posed a real risk of undermining fair process, of allowing arbitrary process to develop, to undermine confidence in the judiciary and ultimately undermine the rule of law.[96] Fifthly, they were bringing comity between the courts and Parliament into question. The general position is that where there are live court proceedings the Parliamentary authorities try to ensure that discussion in Parliament does not prejudice those proceedings and the integrity of the legal process and court orders. Concerns held by a number of parliamentarians however saw this position breached on a number of occasions. Comments were made in Parliament that breached the terms of the injunctions to name the individuals who had obtained them. Such action, while protected by parliamentary privilege, is inimical to the rule of law.

Against this background and these issues the Neuberger Committee considered the nature of such injunctions and what procedural steps could properly be taken to both protect the integrity of interim injunctive relief while ensuring that the problems identified were cured.[97] It did not however enter into the debate concerning the substantive legal issue ie, the development, or alleged development, of a general right of privacy. In the result it concluded that the vast majority of orders perceived to be super-injunctions were not such orders; in fact it could only find evidence of there having been two genuine super-injunctions. The majority were simply anonymised injunctions. Secondly, it emphasised that while

[96] For a discussion see *Neuberger Report*, above n 84, 7ff.

[97] The conclusions are summarised at the outset of the *Neuberger Report*, above n 84, iv – vi.

open justice was a constitutional principle it was not an absolute one, but could be derogated from where such derogation was strictly necessary to further the effective administration of justice. In nearly all cases however anonymisation would be as far as was strictly necessary to maintain the integrity of injunctive relief. The 'super' element of a super-injunction could only be justified accordingly in short-term cases akin to those needed in freezing injunction cases ie, to ensure the order was not frustrated prior to service of the order. Thirdly, parties could not consent to waive the public's right to receive information concerning proceedings. Fourthly, to ensure that all parties to proceedings and all courts fully understood the correct approach to take to interim injunctive relief, official guidance was to be issued concerning the proper process, which was to include a requirement that judgments be issued in any injunction case and that such proceedings were to be actively case managed such that all such orders contained a provision to return to court to bring the proceedings to trial and final judgment. The Guidance was issued in August 2011 as the Practice Guidance on interim non-disclosure orders.[98] Fifthly, to ensure that a clear picture was publicly available of the amount of such injunctions, details of their number and type were to be collected and published officially.[99]

The Neuberger Committee's Report resolved the various concerns. Its recommendations were implemented, the Practice Guidance being endorsed by the courts.[100] Collection and publication of the number and amount of such injunctions has been particularly instructive. Since data collection began there has only been one genuine super-injunction granted. It endured for approximately a week, when on its return hearing it was set aside on the basis that it was granted in error due to a failure to follow the Practice Guidance, which had not been drawn to the court's attention. Since then no super-injunctions have

[98] See Master of the Rolls, *Practice Guidance: Interim Non-Disclosure Orders* (1 August 2011) <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/practice-guidance-civil-non-disclosure-orders-july2011.pdf>.

[99] Further conclusions were also reached concerning the relationship between Parliament and the courts.

[100] See, for instance, *Spelman v Express Newspapers* [2012] EWHC 392 (QB).

been reported to have been granted.[101] The Report and its recommendations effectively brought to an end both the concerns regarding the development, or rather this mis-development, of interim injunctive relief and, as a consequence, the concerns regarding them. It was however a salutary lesson.

IV ARE THERE ANY FORESEEABLE DEVELOPMENTS IN THE AREA OF INTERIM RELIEF?

Given the fact that the various forms of interim relief are all well established, it is doubtful in the extreme that there will be any developments in so far as their operation is concerned. Equally, it is doubtful that there will be any other developments concerning interim relief.

[101] See the statistics published as Ministry of Justice, *Civil Justice Statistics Quarterly, England and Wales*, October to December 2017 (provisional) (1 March 2017)<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684410/civil-justice-statistics-quarterly-oct-dec-2017.pdf>. For a summary of the statistics for 2011-2016, see, Ministry of Justice, *Civil Justice Statistics Quarterly, England and Wales,* October to December 2016 and annual 2016 (provisional) (2 March 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/595664/civil-justice-statistics-quarterly-oct-dec-2016.pdf>.