UNDERTAKING TO PAY DAMAGES IN AN APPLICATION FOR INJUNCTION;

ESSENCE AND CONSEQUENCES

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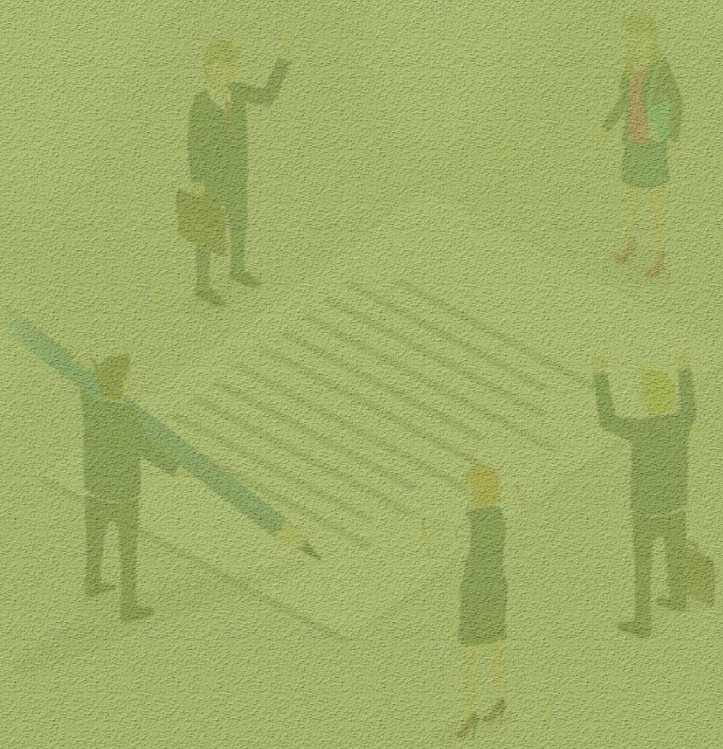

The position of the law seems settled when it comes to what is to be considered in determining whether or not to grant an application for injunction. The discretion whether to grant an injunction falls within the equitable jurisdiction which the court is called upon to exercise based on the facts presented to it. Primarily designed to maintain status quo, restraining injunctions are granted pending the determination of an application at *inter partes* hearing or the determination of a substantive suit. The courts have however over the years laid down the principles to be followed in determining an application for injunction. Central to these principles is an undertaking to pay damages.

Undertaking to pay damages occupies an important place when considering an application for an injunction. An undertaking to pay damages has been described as the "price" to pay for an injunction, and if a party obtains an injunction, he must pay the price. The purpose is to indemnify the respondent or indeed a third party for any loss/injury caused by the injunction if the court eventually finds that the injunction ought not to have been granted in the first place. As a matter of law, no order for injunction should be made on notice unless the applicant gives a **satisfactory** undertaking as to damages save in recognized exceptions. **See Kotoye v CBN & Ors.** The rationale for the undertaking to pay damages is the same regardless of the duration or type of injunction- interim, interlocutory or even mareva. Failure to give an undertaking to pay damages in itself does not invalidate an injunction. It only makes it liable to be set aside - where a court of first instance fails to extract an undertaking as to damages an appellate court ought normally to discharge the order of injunction on appeal.

The court has no power to compel an applicant for an injunction to give an undertaking as to damages. It can only withhold the injunction where no undertaking has been given. It is also important to mention that an undertaking to pay damages is not given to a party; it is given to the court and non-performance of it is contempt of court and not breach of contract. The court therefore retains the discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so. **See Hoffman-La Roche v Secretary of State for Trade and Industry (1974) 2 All ER 1128**.

An applicant for an injunction must not only show a willingness to give an undertaking in damages; he should also be able to depose to an affidavit to indicate (a) that he is prepared to give an undertaking in damages; and (b) the means at his disposal, or who would guarantee him to be able to meet such an undertaking. It will be completely worthless to extract an undertaking from a person who is incapable of satisfying that undertaking. **See Ita v Nyong (1994) 1 NWLR Pt. 318 P. 56.** This must have guided the decision of the Court of Appeal in **SPDC v Saakpa & Ors** (CA/PH/481/2009). The judgement was delivered on 26 April 2012.

In that case, the Respondent had obtained judgment in excess of N5Billion against the Appellant, but the appellant appealed the judgment. While the appeal was pending, the Respondent filed an application for mareva injunction. By that application, the Respondent sought (amongst others) to restrain the Appellant from disposing some of its oil assets worth several billions of Naira pending the determination of the appeal. In the affidavit in support of the application for mareva injunction, the Respondent gave an undertaking "*to indemnify the appellant/respondent in damages, if it later turns out that the order sought for herein was improperly obtained.*" Interestingly, in the paragraph that follows, the Respondents stated;

> ***"That we the respondents/applicants are <u>farmers whose source of livelihood has since the year 2000 been destroyed and devastated</u> by the crude oil spillage from the appellant/respondent's (SPDC) facilities for about 11 years now a<u>nd have lived without any income</u> from the said very vast farmland nor any form of compensation from the appellant/respondent (SPDC). The Appellant/respondent (SPDC) has till date refused to clean up and remediate the aforesaid impacted land." (Underlining is for emphasis)***

In refusing the application for mareva injunction, the court relying on **Leasing Co. Nig. Ltd v. Tiger Ind. Ltd (2007) 14 NWLR 1054 P.346 at 381** held as follows;

> ***"It does appear to me, and I am in agreement with learned senior counsel for the respondent on this, that an undertaking as to damages given by a person without any source of livelihood is empty and bare. An order of Mareva injunction cannot be granted based on such an empty undertaking as to damages."***

What the court is saying here is clear; an undertaking to pay damages should go beyond a mere deposition in an affidavit. Given the likely implications/loss that may arise from the grant of an injunction that the court later finds ought not to have been granted, the court must be satisfied that the applicant has the means by which to compensate any loss incurred by the target of the injunction flowing from the undertaking. This is an issue which a court dealing with an application for injunction should practically consider.

Where a court decides to enforce an undertaking as to damages, the quantum of damages payable is not discretionary. It is assessed on an enquiry into damages. The assessment is made on the same basis as damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant, that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction. **Hoffman-La Roche v Secretary of State for Trade and Industry (Supra)**

In **Onyemelukwe v Attamah (1993) 5 NWLR Pt 293 page 350** the Plaintiff instituted the action claiming ownership of the land in dispute. He subsequently filed an application for an interim order at an *ex parte* hearing seeking amongst others an order to restrain the Defendant from entering or carrying on any activity on the said land. The trial court granted the application and further ordered the Plaintiff to pay the sum of "*N100.00 (One Hundred Naira) as damages if their application for interlocutory injunction proves to be frivolous*." The Defendant's application to discharge the *ex parte* order of injunction was refused. The Defendant then appealed to the Court of Appeal. The Court of Appeal allowed the appeal – the *ex parte* order of injunction was set aside. Of interest however is the pronouncement of the court per Uwaifo JCA (later JSC) where he stated as follows;

> ***"……Apart from the fact that this shows a misunderstanding of what an undertaking in damages should be the amount stated is contemptuous to say the least, and certainly most unlikely to inspire confidence in any right-thinking person as to the basis for that kind of 'award'. It should be realised that an undertaking in damages is meant to realistically meet any damages which may afterwards be determined to have been sustained by the defendant……The undertaking will not therefore contain any specific sum." (Underlining is for emphasis)***

The Court of Appeal was of the same opinion in **Anike v Emehulu (1990) 1 NWLR Pt 128 Page 603.** In that case, the trial court at an *ex parte* hearing granted an interim injunction restraining the defendant from entering or erecting any further structure on the land in dispute. The trial court however did not see the need to make an undertaking as to damages a condition for the grant of the injunction as in its opinion, the defendant did not disclose by affidavit evidence the nature of the building he intended to erect on the land. This provoked the admonition of the Court of Appeal where Uwaifo JCA (later JSC) speaking for the majority stated as follows:

> ***"It follows that it was premature for the trial judge to wish to know more about the nature of the building the appellant intended to erect on the land at the time he was considering the application brought by the respondents for an interim injunction before he would order an undertaking. He was therefore in error not to have made the grant of that injunction conditional upon an undertaking."***

The court then explained further that:

> ***"When an undertaking is given in a case of this nature it is not predicated on what damages are known before hand that the defendant is likely to suffer as a result of the injunction. Such damages are usually not ascertainable in advance and cannot be made a wholly arbitrary figure." (underlining is for emphasis)***

In a recent case before the High Court of Lagos State, the court did not appear to be aware of this advice of the Court of Appeal. In that case, the court granted a mareva injunction (at an *ex parte* hearing) restraining the Defendant from withdrawing a total sum in excess of N16 billion naira or any part of it standing to the credit of the Respondent in two of Nigeria's commercial banks. The court also ordered that the order of injunction be served on the two banks. The court stated further that "*the applicant shall however pay damage (sic) if it is discovered that the order was wrongly granted*" and then ordered the applicant to enter into an undertaking to pay

the sum of N5,000,000 (Five Million Naira) as damages to the respondent if it is found that the interim injunction was wrongly granted.

With due respect, the authors believe that the court in that case was wrong to have "determined" in advance the quantum of the damages the defendant may suffer if the court finds that the injunction ought not to have been granted. The amount fixed by the court was clearly arbitrary - it was without a basis. This, with due respect, appears to be another display of "***a misunderstanding of what an undertaking in damages should be".*** In the opinion of the authors, the amount stated is "***contemptuous and most unlikely to inspire confidence in any right-thinking person as to the basis for that kind of award***".

Enforcement of Undertaking to pay damages.

An undertaking to pay damages is an enforceable promise to compensate the defendant where the injunction in discharged or the substantive case fails. As stated above, the quantum is not ascertainable in advance - it is based on an inquiry which the court may make afterwards if it finds that the defendant has, by reason of the order, sustained any damages. In deserving cases, a court will order such an inquiry and where the defendant is able to establish that it has indeed suffered damages owing to the injunction, an award of damages would be made to compensate the defendant.

Like any other obligation with legal consequences, an undertaking to pay damages must not be given lightly – utmost caution must be applied. An applicant for an injunction must therefore be sure of the strength of its case lest it is exposed to an award of damages. This was the case of the applicant for an injunction in the Australian case of **Love v Thwaites [2014] VSCA 56**.

In that case, the appellant's land was compulsorily acquired by the respondent. A portion of the acquired land was required for the construction of a bridge. The contract for the construction of the bridge was awarded. The terms of the contract required the respondent to provide the whole of the land reserved for the construction. The appellant refused to surrender possession of his portion of the land. Instead, it applied for an interlocutory injunction and gave an undertaking as to damages. On 6 March 2003, the court granted an interlocutory injunction restraining the respondent from demolishing or disturbing the appellant's property. The appellant's case failed at trial and the court on 8 July 2009 discharged the injunction.

Following an inquiry as to damages incurred by the respondent as a result of the injunction, the appellant was ordered to pay the sum of $3,420,389.70 together with interest in the sum of $2,427,258.47. He was not happy with the decision - he appealed against it. The appeal was dismissed. In what appears to be a charitable warning, the court stated that:

> ***"……the consequences that have flowed from the failure of Mr Love to make out his case at trial have been significant. In my view, these consequences provide a salutary lesson to practitioners and their clients to appreciate***

> ***the conditions governing the grant of an interlocutory injunction. The usual undertaking carries serious risks; it would be wholly erroneous to view it as no more than a ritual or a formality"***

The decision of the court in the Love case should serve as notice to practitioners and litigants that have developed the habit of approaching court for an injunction on the weakest ground, in the glaring absence of any legal backing while casually offering an undertaking to pay damages.

There is however a dearth of reported cases where Nigerian courts have had to pronounce on damages arising from the grant of an injunction that turned out ought not to have been granted. The paucity of judicial authority notwithstanding, the time has come for litigants to seek appropriate legal redress against indiscriminate (ab)use of injunctions. A party should not be allowed to unduly take advantage of the machinery of justice at the expense of another – nobody should be made to fall victim of a wrongly granted injunction (albeit backed by an undertaking as to damages) motivated by an improper use of the process of the court. A beneficiary of a wrongly granted injunction must make good the loss(es) suffered by the restrained party. As noted by the court in the Love case:

> ***"A party seeking an equitable remedy is required to 'do equity' and this is the origin of the requirement that the party giving an undertaking as to damages submit to such order for payment of compensation as the court may consider to be just."***

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