ERINFORD INJUNCTIONS: KEEPING YOUR APPEAL ALIVE

by Chan Mun Yew and Dyana Parmar

Losing an injunction application in the High Court does not have to be the end of the road. An appeal may follow, but it takes time. Meanwhile, the other side may be free to take the very step you sought to prevent, whether that is proceeding with a winding-up petition or receiving payment under a bank guarantee.

An Erinford injunction can bridge that gap. It is a temporary court order that keeps matters as they are (or in legal terms, 'preserves the status quo') until the appeal is decided. It takes its name from the English case of **Erinford Properties Ltd v Cheshire County Council [1974] Ch 261**, where Megarry J, having refused an injunction, granted a limited one pending appeal. The guiding principle was that the court should ensure that an appeal, if successful, is not rendered nugatory[1].

The Federal Court in **Subashini a/p Rajasingam v Saravanan a/l Thangathoray and Other Appeals [2008] 2 MLJ 147** recognised the Malaysian courts' power to grant such relief and likened an Erinford injunction to a stay of execution pending appeal[2].

WHERE AND WHEN TO APPLY

As with a stay of execution, the application is ordinarily made to the court whose decision is being appealed, usually before the same judge who refused the original injunction. Timing is critical. The application should be made immediately after the decision, often orally on the same day, together with a request for an interim order to maintain status quo until the formal application can be fully heard.

ISN'T IT INCONSISTENT FOR THE SAME JUDGE TO GRANT IT?

No. This is the most common objection, and the courts have consistently rejected it. The two applications ask different questions. The original application asks whether the applicant has established a case for the injunction sought.

An Erinford injunction application asks whether the successful party should be free to act on the decision while an appeal is pending. As Megarry J explained, judges are not infallible. A judge may remain confident in the decision yet recognise that it could be overturned, and that the comparative effects of granting or refusing an injunction pending appeal may justify preserving the status quo[3].

Respondents also often argue that nothing has changed since the original decision. The Court of Appeal described a similar argument as devoid of any merit, because an Erinford injunction application is not a review of the earlier ruling, but asks whether the present position should be left undisturbed until that ruling has been tested on appeal[4]. That said, the absence of new circumstances is not completely irrelevant. In **Kilang Kosfarm Sdn Bhd v Kosma Nusantara Bhd [2002] 5 MLJ 662**, the High Court refused relief where the

[1]Erinford Properties Ltd v Cheshire County Council [1974] Ch 261 at 268; [1974] 2 All ER 448 at 454.

[2]Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147 (FC) at [28]–[29] and [175]–[176].

[3]Erinford Properties (n 1) at 267G - 268C; Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd [2003] 3 MLJ 178 (HC) at 182; Spectra Chemicals (M) Sdn Bhd v Trimech Engineering (M) Sdn Bhd [2009] 1 LNS 1724 (HC).

[4]Subashini a/p Rajasingam v Saravanan a/l Thangathoray (No 2) [2007] 4 MLJ 97 (CA) at [7]–[8], approved by Abdul Aziz Mohamad FCJ in Subashini (FC) (n 2) at [177]–[178].

Erinford injunction would have had the same practical effect as the injunction already refused and nothing had changed to shift the balance of convenience[5].

WHAT MUST BE SHOWN?

An Erinford injunction is discretionary and is never granted as of right. Drawing upon *Erinford Properties*, the Malaysian courts have identified these key considerations[6]:

(a) the appeal would be rendered **nugatory**, i.e. pointless, if the injunction is not granted;

(b) the **balance of convenience** favours preserving the status quo, and **damages** would not be an adequate remedy; and

(c) the appeal is **not frivolous**.

(a) Will the appeal be pointless?

This is often the main battleground. The practical question is whether success on appeal would still provide meaningful relief. Courts have considered whether an applicant would face any obstacle to enforcing a judgment in its favour. Where damages would provide adequate relief, the respondent's ability to satisfy such a judgment may weigh against a finding that the appeal would be rendered nugatory[7].

Bank guarantee and performance bond disputes, where Erinford applications are especially common, show two contrasting approaches in the High Court:

- In **Cobrain Holdings Sdn Bhd v Expertise International A&I (M) Sdn Bhd & Ors [2015] 11 MLJ 339**, the court focused on the act of payment itself. The object of the proceedings was to restrain the call on the guarantee. Without an injunction, the bank would pay before the appeal was heard, and the appeal would be rendered academic. The court rejected the argument that the beneficiary could simply refund the money if the appeal succeeded[8].
- In **Ranhill E&C Sdn Bhd v Thyssenkrupp Industries (M) Sdn Bhd & Anor [2016] 9 MLJ 703**, the court cautioned that the mere fact that an act cannot be undone is not enough. If that alone were enough, every refused injunction would have to be granted pending appeal. Since there is nothing 'sentimental or sacred' about a bank guarantee, the real question is whether that sum can be recovered[9]. Notably, the court in *Ranhill* nonetheless granted the Erinford injunction on the balance of convenience.

Two practical consequences follow. First, evidence of the respondent's financial position, such as its audited accounts, often becomes central. Second, how the original application is framed matters. Where its whole object is to restrain the call itself, payment may leave the appeal academic.

(b) Where does the balance of convenience lie?

The court weighs the harm each side would suffer if the injunction is granted or refused. If the applicant's loss is purely financial and can be compensated later, an injunction is unlikely[10].

Applicants commonly rely on harm that is harder to quantify, including damage to reputation, credit standing and banking facilities. The Court of Appeal has recognised that a call on a performance bond can cause losses that cannot

[5]Kilang Kosfarm Sdn Bhd v Kosma Nusantara Bhd [2002] 5 MLJ 662 (HC) at 671G - 672D.

[6]Kilang Kosfarm (n 5) at 669-670; Spectra Chemicals (n 3).

[7]Kilang Kosfarm (n 5) at 673A-B.

[8]Cobrain Holdings Sdn Bhd v Expertise International A&I (M) Sdn Bhd & Ors [2015] 11 MLJ 339 (HC) at [57]–[59].

[9]Ranhill E&C Sdn Bhd v Thyssenkrupp Industries (M) Sdn Bhd & Anor [2016] 9 MLJ 703 (HC) at [67]–[69].

[10]Cocoa Processors Sdn Bhd v United Malayan Banking Corp Bhd & Ors (No 2) [1988] 3 MLJ 497 (HC) at 498.

be adequately compensated and put a contractor's reputation at stake[11]. In *Ranhill*, the court gave weight to the hardship the applicant would face in having to provide fresh security to its own bank[12]. However, other courts have found that once a call has been made and the dispute was already in the open, any further reputational damage from payment is marginal[13]. Either way, general assertions of harm carry little weight and specific evidence is needed.

On the other side of the scale, a beneficiary will emphasise its contractual bargain. An on-demand performance bond is designed to operate on a "pay now, argue later" basis, and the High Court has held that, once unconscionability is not shown, the balance of convenience tilts towards releasing the performance bond sum as agreed[14]. Where nothing has changed since the original refusal, the court may see no reason for the balance of convenience to shift[15].

The likely duration of the restraint also matters. Because the injunction lasts only until the appeal is decided, the courts are more willing to grant it where the appeal is scheduled to be heard soon. In both *Cobrain Holdings* and *Ranhill*, the fact that trial was a few months away was a factor in favour of the injunction[16].

(c) Is the appeal frivolous?

The applicant need not persuade the judge that the appeal is likely to succeed. That would effectively require the judge to say his or her own decision was wrong, which would leave little room for an Erinford injunction at all. For this aspect of the application, the applicant need only establish that the appeal is not frivolous[17].

Where the main action has already been decided, the High Court has held that the merits of the appeal should not be considered at all, consistent with the approach taken on stays of execution[18].

UNDERTAKING AS TO DAMAGES

Applicants should expect to give an undertaking to compensate the other side if the injunction later turns out to have been wrongly granted.

While some earlier High Court decisions suggested that no undertaking is needed where the application is heard inter partes, the Court of Appeal has recently restated that an undertaking is the general rule for all interlocutory injunctions, subject to the court's discretion to dispense with it[19].

CONCLUSION

An Erinford injunction helps preserve the practical value of an appeal, so that success does not become a pyrrhic victory. It is, however, a discretionary remedy that is not granted automatically. Whether seeking or resisting an injunction, parties should act promptly and place clear evidence before the court of the consequences of granting or refusing it.

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[11]Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442 (CA) at [106] - [107].

[12]Ranhill (n 9) at [76]–[77].

[13]Envipure Sdn Bhd v Esstar Vision Sdn Bhd [2018] MLJU 534 (HC) at [11(c)].

[14]Malaysian Resources Corporation Berhad v HSBC Bank Malaysia Berhad & Ors and another suit [2019] MLJU 813 (HC) at [152].

[15] Kilang Kosfarm (n 5) at 671G–672D.

[16]Cobrain Holdings (n 8) at [60]–[61]; Ranhill (n 9) at [77]–[78].

[17]Erinford Properties (n 1) at [268C]; Spectra Chemicals (n 3).

[18]Envipure (n 13) at [16]; Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (FC) at [19] – [22]

[19]Wawasan Raya (M) Sdn Bhd & Anor v MARC Service Residence Management Corp [2025] 3 MLJ 214 (CA) at [38](5)(a) and (c).