

Unclean Hands? Then Scrub Them!
Considering the “Clean Hands” Doctrine before Commencing an Injunction

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I. INTRODUCTION

The “clean hands” principle is an equitable doctrine that acts as a bar to claims for equitable relief where the plaintiff itself has acted inequitably. While it originated in the English Courts of Chancery, the principle has been applied by Canadian courts. As injunctive relief is an equitable remedy, the “clean hands” doctrine is often used to challenge injunction motions where the applicant has acted inequitably in regard to the matter for which it seeks an injunction.

This paper will provide an overview of: (i) the general principles that underlie the “clean hands” doctrine, (ii) the application of the doctrine to injunctive relief, and in particular, *ex parte* injunctions, (iii) jurisprudence in which courts *denied* an injunction on the basis of the doctrine, (iv) jurisprudence in which courts *granted* an injunction where the doctrine was argued, (v) jurisprudence in which the doctrine was applied where it was not specifically pleaded, and (vi) practical considerations for lawyers in assessing whether a client has “clean hands” in deciding whether to commence a motion for injunctive relief.

II. GENERAL PRINCIPLES

The adage most often cited in relation to the “clean hands” doctrine is that “one who comes to equity must come with clean hands.” This broad statement, however, is somewhat misleading. It suggests an expansive power to refuse equitable relief if *any* aspect of the plaintiff’s behaviour is found to be inequitable. In reality, courts have frequently cautioned against the application of the doctrine

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in an overly broad manner. The English Courts of Chancery first articulated a narrow conception of the principle. In *Dering v. Earl of Winchelsea*⁴, the Court stipulated that “...general depravity is not sufficient. It must be pointed to the act upon which the loss arises, and must be in a legal sense the cause of the loss.”⁵

Modern courts have also adopted a narrow view of the doctrine, requiring the moving party’s misconduct to relate directly to the matter for which relief is requested. The leading case of *Hong Kong Bank of Canada v. Wheeler Holdings Ltd.*⁶ reflects this narrow articulation. In that case, the Supreme Court of Canada considered whether the appellant mortgagee could impeach a subsequent mortgage and sell on the basis of contractual terms that prohibited a sale on the mortgage property. While the Court found that the evidentiary foundation of the alleged misconduct was not strong enough to support the application of the “clean hands” doctrine, it confirmed that a plaintiff’s hands are “unclean” only when the remedy it asks for stems *directly* from an underhanded purpose or depravity.⁷

III. APPLICATION TO INJUNCTIONS

The “clean hands” doctrine is frequently relied upon to challenge a moving party’s request for injunctive relief. In considering whether injunctive relief should be denied on the basis of the “clean hands” doctrine, the court will first consider whether the test for injunctive relief has been satisfied.

In *R.J.R. MacDonald Inc. v. Canada (Attorney General)*⁸, the Supreme Court of Canada established that the moving party must satisfy a three part test in order to be granted an injunction:

1. Is there a serious issue to be tried?
2. Will the applicant suffer irreparable harm if the injunction is not granted?

⁴ 29 E.R. 1184.

⁵ *Ibid* at para 271.

⁶ *Hong Kong Bank of Canada Ltd. v Wheeler Holdings Ltd*, [1993] 1 SCR 165.

⁷ *Ibid* at para 33.

⁸ [1994] 1 S.C.R. 311.

3. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits?⁹

Mixed into the review of this three-part test is the court's consideration of whether the moving party has applied to the court with "clean hands". While there is no precise formula for the stage of the test at which the doctrine should be considered, courts most frequently engage in a "clean hands" analysis when assessing the third branch.

i. Ex parte injunctions

While the "clean hands" doctrine may apply to any motion for injunctive relief, it is of particular importance in *ex parte* injunctions. In *ex parte* injunctions, the applicant may bring a motion without notice to the opposing party. In these circumstances, courts will only grant injunctive relief on rare occasions.¹⁰ Additional duties of disclosure apply in this context.¹¹ Specifically, *ex parte* applicants must make full and frank disclosure, failing which the *ex parte* order may subsequently be set aside.

Full and frank disclosure has been defined as the duty to disclose all matters which are "...within [the applicant's] knowledge or would have been discovered by proper inquiries and which are material to the proceedings at hand and tend in favour of an absent party."¹² Importantly, a matter is regarded as "material" if it is a factor which the court may take into account in exercising its discretion to grant the injunction.¹³

⁹ *Ibid.*

¹⁰ Rule 39.06, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

¹¹ I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Toronto: ON, Carswell Co., 2007) at p.495.

¹² *Ibid.*

¹³ *Ibid.*

In *R. v. Consolidated Fastfrate Transport Inc.*¹⁴, the Ontario Superior Court of Justice held:

“A *Mareva* injunction is a discretionary equitable remedy. It will only be granted to a person ‘who has clean hands.’ It is on this basis that the requirement for full and frank disclosure rests ... Fairness to both sides is a consideration.”¹⁵

This heightened duty of disclosure in *ex parte* applications arises in part from public policy considerations “...in the sense that it is intended to prevent abuse of the procedure of the court by a person who has a special advantage in view of the absence of the other party.”¹⁶

On an *ex parte* application, if the plaintiff is found to be guilty of failing to disclose any material information, the application may be dismissed.¹⁷ Furthermore, if the court issues an injunction, and failure to disclose is later brought to the attention of the court, the order may be set aside.¹⁸

IV. SUCCESSFUL APPLICATION OF THE “CLEAN HANDS” DOCTRINE

The jurisprudence in which the courts have denied the moving party’s motion for injunctive relief on the basis of the “clean hands” doctrine establishes that there must be a clear and direct link between the misconduct alleged and the relief requested in order to find that the moving party has “unclean hands.”

In *Therrien Estate v. 140134 Ontario Limited*¹⁹, the Ontario Superior Court of Justice denied the plaintiff’s motion for injunctive relief on the basis that he did not come to court with “clean hands.” The plaintiff represented himself as the trustee for his brother’s estate. He brought an application for an injunction to prohibit the corporation, in which the estate owned shares, from disbursing proceeds.

¹⁴ (1995) 24 O.R. (3d) 564.

¹⁵ *Ibid* at para 131.

¹⁶ *Supra* note 7 at p.497.

¹⁷ *Ibid* at p.496.

¹⁸ *Ibid*.

¹⁹ 2008 CarswellOnt 6577.

However, the applicant failed to disclose to the court that (i) the Will that had named him as trustee had previously been challenged, and (ii) several years earlier, the Court directed him to surrender his certificate of appointment as estate trustee.

In addition to the applicant not having authority to bring the application, the Court determined that he did not come to court with “clean hands” by virtue of his failure to disclose material facts. Accordingly, the plaintiff’s motion for injunctive relief was denied.

Similarly, in *MortgageBrokers.com v. Mortgage Brokers City*²⁰, the moving party sought an interim injunction in order to prevent the defendants from using trade-marks which they argued would likely be confused with their own trade-marks. In response, the defendants argued that the plaintiff had not come to court with “clean hands”. The plaintiff had breached the licensing agreement that it had entered into with the defendants by withholding certain commissions. The Court agreed that by withholding commissions, the plaintiff had resorted to self-help and, accordingly, could not expect the court to provide injunctive relief. For this reason alone, the Court dismissed the injunction.

In another case involving allegations of defamation, *Pichler v. Meadows*²¹, the Court denied an injunction to prevent the defendant from publishing or republishing five articles published on the defendant’s website. The plaintiff owned an internet media consulting firm and a transsexuality website. The defendant operated a series of websites to advertise escort services and sexual and gender counselling. The defendant published articles that attacked the plaintiff as a “mentally ill transvestite man who attacks transsexual women in Toronto”. The plaintiff submitted that these statements were defamatory and sought an injunction requiring the removal of such articles. During the course of the injunction, it was revealed that the plaintiff had previously published articles about the defendant, one entitled “Usama bin Laden Seen in Toronto, Ontario with Local Escort with the legend (this article is for entertainment purposes only)”. Below the

²⁰2010 CarswellOnt 2954.

²¹ 2010 ONSC 1863.

header, two photographs appeared, one of bin Laden and one of the defendant. In the absence of an explanation by the plaintiff about why the article had been published, the Court drew the inference that it was gratuitous and malicious. The Court also observed that it “is the same complaint that the plaintiff now makes about the defendant’s publications.”²² As a result, the Court found that the plaintiff had not come to court with “clean hands” and, for that and other reasons, denied the injunction.

V. UNSUCCESSFUL APPLICATION OF THE “CLEAN HANDS” DOCTRINE

The jurisprudence in which courts have dismissed a defendant’s “clean hands” challenge to a plaintiff’s motion for injunctive relief is indicative of judicial restraint from engaging in an overly expansive application of the doctrine.

In *Massa v. Saulim*²³, the plaintiff sought injunctive relief on the basis that the defendant had tricked him into participating in a fraudulent product distribution scheme. In response, the defendant argued that the plaintiff did not have “clean hands” because he himself had attempted to avoid paying taxes on the products being shipped. The Court dismissed the defendant’s challenge, finding that the “inequity must be done to the defendant himself” and that it is insufficient to rely on some form of generalized misconduct.

Similarly, in *Sherwood Dash Inc. v. Woodview Products Inc.*²⁴, the Court granted an injunction, dismissing the defendant’s “clean hands” challenge. The plaintiff in that case sought to enforce a non-competition covenant in an employment contract. It brought an *ex parte* motion to restrain the defendant from competing against them. The injunction was granted, but then subsequently suspended. The plaintiff moved for an order reinstating the injunction. In response, the defendant argued that the relief should not be granted, in part, because the plaintiff had falsified certain research development grant applications, and thus, had “unclean hands.” The Court dismissed the defendant’s challenge because the alleged wrongdoing did

²² *Ibid.*, at para. 49.

²³ 2013 ONSC 7520.

²⁴ 2005 CarswellOnt 7191.

not taint the enforcement of the non-competition clause, which was the subject matter of the injunction.

Importantly, the Court stated, “judges of the Courts of Equity do not deny relief because the claimant is a villain or wrongdoer; rather, judges deny relief when the claimant’s wrongdoing taints the appropriateness of the remedy being sought from the court.”²⁵

V. “CLEAN HANDS” DOCTRINE APPLIED WHERE IT WAS NOT SPECIFICALLY PLEADED

In *Royal Bank v. Boussoulas*²⁶, the Ontario Divisional Court affirmed that the doctrine of “clean hands” may be applied even if it is not specifically pleaded by the opposing party. In that case, the Divisional Court upheld the trial judge’s finding that, although all of the elements for granting an injunction had been satisfied, the Court’s equitable discretion to deny injunctive relief could be exercised.

The case arose from a loan in the amount of \$4 million advanced by RBC to the defendants. When the defendants defaulted on the loan, RBC sought an interim and interlocutory *Mareva* injunction, alleging that the defendants had engaged in fraud. The defendants denied these claims and, in addition, argued that the Court should not grant an injunction because RBC had made unsubstantiated claims of fraud. The Court was highly critical of RBC’s claims, stating that its pleadings were “gorged with allegations of fraud”²⁷. It denied the injunction on the basis that RBC’s decision to advance unfounded allegations of fraud and to overstate its case was inconsistent with coming to court with “clean hands.”

On appeal, the Divisional Court affirmed that RBC’s allegations of fraud were egregious and overreaching. RBC argued that the defendants did not plead the “clean hands” doctrine and therefore were precluded from relying upon it to defeat the injunction. The Divisional Court disagreed, stating:

²⁵ *Ibid* at para 52.

²⁶ 2012 ONSC 2070.

²⁷ *Ibid* at para 19.

“..the discretionary factors associated with equitable relief are always in play and this issue does not have to be pleaded. In other words, it would not have come as a surprise and it should not have come as a surprise that a Court with an equitable discretion will exercise its discretion in accordance with the historic principles of equity...”²⁸

In light of this, lawyers should be cognizant that regardless of whether the “clean hands” doctrine is pleaded by the responding party, it ultimately falls within the discretion of the court to decide whether, having regard to all equitable considerations (whether pleaded or not), an injunction should be granted.

VI. PRACTICAL CONSIDERATIONS

The “clean hands” doctrine is an important tool in the litigator’s arsenal. As the cases discussed in this paper demonstrate, it is a powerful weapon but only if it is used correctly. It can also be a plaintiff’s *Achilles* heel if it is not dealt with appropriately when applying to the court for equitable relief.

As a practical matter for lawyers, when a client demands an injunction, the question of whether the client has “clean hands” must be seriously considered before commencing an injunction. Injunctions can be expensive and time-consuming to prepare. In addition, an unsuccessful injunction motion may result in significant cost consequences. A thorough assessment of the client’s conduct in respect of the matter in question is not only advisable but of paramount importance.

“Unclean hands” will not necessarily preclude injunctive relief, particularly where the conduct at issue is unrelated to the relief requested. In addition, other equitable factors will be considered by the court that may counter-balance the existence of “unclean hands”, including the value of an undertaking as to damages and the seriousness of the breach or conduct for which injunctive relief is sought (e.g. misappropriation of funds or trade secrets). Like many areas of law, the

²⁸ *Ibid* at para 44.

application of the “clean hands” doctrine is not black and white and there are no bright-line rules. The success or failure of applying the “clean hands” doctrine turns on the facts. As Justice Sharpe once stated, “Canadian judges have tended to eschew general statements of principle when deciding interlocutory applications and emphasis has been placed on the desirability of a healthy measure of discretion.”²⁹

In the result, when determining whether to commence an injunction, counsel should assess not only whether their client has “clean hands” but how this factor might be weighed in the context of other equitable and non-equitable considerations. If the client is guilty of unclean hands that is directly related to the injunctive relief requested, lawyers should not only advise the client of the risks of proceeding with an injunction but, if possible, should consider addressing and explaining the impugned conduct to the court at the time of seeking the injunction to avoid adverse inferences or other consequences. This is particularly important in the case of *ex parte* injunctions. In short, if the client’s hands are unclean, then scrub them!

²⁹ Justice Robert Sharpe, *Injunctions and Specific Performance* (Aurora, ON: Canadian Law Book, 1992) p.27.

