THE
CAMBRIDGE LAW JOURNAL

VOLUME 58, PART 1 MARCH 1999

CASE AND COMMENT

INTERIM RELIEF IN THE PUBLIC LAW CONTEXT

THE remedial aspects of judicial review illustrate in particularly vivid form the divergent nature of public and private law proceedings. The prerogative orders—mandamus, certiorari and prohibition—are available only via judicial review. Leave is required for judicial review but not for private law actions. By contrast with the private law writ procedure, judicial review must be brought promptly and within three months. In judicial review, a remedy can still be denied to the applicant who establishes a substantive case. As the Law Commission made clear in its Report *Administrative Law: Judicial Review and Statutory Appeals,* "[j]udicial review often involves values and policy interests, which must be balanced against and may transcend the individual interests, which are normally the subject of litigation between private citizens" (Law Com. No. 226, para. 2.1).

The Divisional Court's decision in *R.* v. *Ministry of Agriculture, Fisheries and Food, ex p. Monsanto plc* [1998] 4 All E.R. 321 illustrates a further remedial distinction, relating to the circumstances in which interim relief will be granted where a public law issue is at stake. The respondent Ministry had, in 1974, granted Monsanto approval to produce a herbicide called Roundup—which, by 1996, had become the best-selling herbicide in the world. The Ministry's approval was based on data which Monsanto had supplied concerning Roundup. In October 1996, Monsanto's right to control this data expired, and the Ministry used it to grant provisional approval (known as "me too approval") to a rival manufacturer, Clayton, for a competing herbicide known as Rhizeup. Monsanto sought judicial review of this and other "me too approvals", arguing that the Ministry had breached Council Directive (EC) 91/414 by relying on the old Roundup data rather than data gathered using contemporary scientific and technical knowledge. Having

https://doi.org/10.1017/S0008197399211014 Published online by Cambridge University Press

obtained a reference to the European Court of Justice, Monsanto sought interim relief—in the form of a stay of the operation of the approval of Rhizeup—pending the return of the case to the Divisional Court.

In *American Cyanamid* v. *Ethicon Ltd.* [1975] A.C. 396, Lord Diplock stipulated that in determining whether to grant an interim injunction, a court should first satisfy itself that the plaintiff's claim was not "frivolous or vexatious; in other words, that there is a serious question to be tried" (at p. 407). The plaintiff must have a "real prospect of succeeding in his claim for a permanent injunction at the trial" (at p. 408). If this could be shown, then the court should weigh the plaintiff's need for protection against "injury by violation of his right for which he could not be adequately compensated in damages recoverable . . . if the uncertainty were resolved in his favour at trial" against the defendant's need for protection against "injury resulting from his having been prevented from exercising his own legal rights" for which adequate compensation would not be available under the plaintiff's undertaking in damages if the case ultimately went the defendant's way (at p. 406). The adequacy of damages for each party, together with "many other special factors" which vary according to the "particular circumstances of individual cases" would enable the court to determine whether the "balance of convenience" favoured the granting or refusal of interim relief (at p. 409).

Lord Diplock's reference to "special factors" is not confined to—but has particular resonance in—the public law context. In *Smith* v. *Inner London Education Authority* [1978] 1 All E.R. 411, the Court of Appeal accepted that the *American Cyanamid* principles applied where a litigant sought an interlocutory injunction to prevent a local authority from exercising its statutory powers or performing its duty towards the public. None the less, Browne L.J. suggested obiter that "where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account"—as a "special factor"—"the interests of the public in general to whom those duties are owed" (at p. 422). This approach was approved by the House of Lords in *R.* v. *Secretary of State for Transport, ex p. Factortame (No. 2)* [1991] 1 A.C. 603, 673, and Lord Goff suggested that in determining whether to grant an interim injunction against a minister to prevent the enforcement of a statute which violated the litigant's EU law rights "the court should not restrain a public authority . . . unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken" (at p. 674). A similar approach is evident in *M.*v. *Home Office* [1994] 1 A.C. 377, where—in ruling that courts could grant interim and final injunctions

https://doi.org/10.1017/S0008197399211014 Published online by Cambridge University Press

against officers of the Crown in cases involving domestic as well as EU law rights—Lord Woolf asserted that this jurisdiction should be exercised only "in the most limited circumstances" (at p. 422). And, in *Scotia Pharmaceuticals International Ltd.* v. *Department of Health* [1993] C.O.D. 408, the Divisional Court considered, *inter alia,* the likely impact of interim relief on public administration, the fact that the applicant had acted reasonably and promptly, and the time and difficulty which might be involved in extracting damages under Cases C-6/90 and C-9/90, *Francovich & Bonifaci* v. *Italy* [1991] E.C.R. I-5357 (see also Case C-46/93, *Brasserie du Pecheur* v. *Germany* [1996] E.C.R. I-1029).

It is now settled that the *American Cyanamid* principles apply both to stays of proceedings and interim injunctions (*R.* v. *Secretary of State for Education and Science, ex p. Avon County Council* [1991] 1 Q.B. 558; *R.* v. *Inspectorate of Pollution, ex p. Greenpeace* [1994] 1 W.L.R. 572), so the crucial issue in *Monsanto* was, in Rose L.J.'s words, "precisely how should those principles be applied in a public law case" (at p. 324). The answer was that although *American Cyanamid* applied,

> this must be in the context of the public law questions to which the judicial review proceedings give rise. Such proceedings are, generally speaking, intended to provide swift relief against abuse of executive power. They are neither intended for, nor well suited to, inhibiting commercial activity, particularly over an indefinite, substantial, period of time. (at p. 329)

On the facts, Monsanto's application for interim relief failed, whether using *American Cyanamid* or the lower "risk of injustice" test propounded by Hoffmann J. in *Films Rover International Ltd.* v. *Cannon Film Sales Ltd.* [1987] 1 W.L.R. 670. There was a serious issue to be tried. However, Monsanto had no sustainable claim for relief based on inadequacy of damages: for there was no evidence that it would suffer loss if a stay was refused, whereas damages were unlikely adequately to compensate Clayton if its case was vindicated at trial. Several public interest factors were relevant to the balance of convenience: there was a presumption against granting interim relief where this would restrict free competition; Rhizeup did not threaten the Directive's objectives in relation to health or the environment; the "me too" procedure had cost Clayton a substantial sum of money; until formally set aside, a decision of a public body (here, the Ministry) should be respected—a principle which would be disregarded if it was stayed *before* the Court of Justice heard the case; and the purpose of the licensing provisions was to serve the public interest rather than to protect private commercial interests. Thus, even where damages were *not* an adequate remedy for an

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applicant, interim relief might still properly be refused in public law proceedings—in apparent contrast with the approach in private law.

Monsanto also highlights an ongoing difficulty concerning the proper ambit of stays and interim injunctions. In *Avon County Council* (above), Glidewell L.J. ruled that stays could be used not just to halt court proceedings, but also to prevent decisions of ministers and other public law bodies from taking effect until their legality had been confirmed via judicial review—a role which might seem more naturally suited to the interim injunction. The Privy Council took a more orthodox view in *Ministry of Foreign Affairs, Trade and Industry* v. *Vehicles and Supplies Ltd.* [1991] 1 W.L.R. 550, categorising a stay as "an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached" and asserting that it involved a "fundamental misunderstanding" to apply a stay to an executive decision already made (at p. 556). Neither case was cited in *Monsanto,* but by carrying out the full balance of convenience test, the Divisional Court was implying that on the right facts it might have granted a stay preventing the application of the Ministry's approval decision—an approach consistent with *Avon County Council.* The difficulty here is that *Avon County Council* was decided before *M.* v. *Home Office,* and might be defended by arguing that by giving a wider role to the stay, the court mitigated the injustice caused by the unavailability of an interim injunction. Depending upon how broadly the post-*M.* jurisdiction to grant interim injunctions is interpreted, however, it is now an open question whether such a defence is sustainable.

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DOWN HILL—ALL THE WAY?

WHEN suit was brought against the police in the name of the Yorkshire Ripper's final victim, alleging that they were negligent in failing to catch him sooner, every single one of the nine judges who heard the claim decided that it should be struck out (*Hill* v. *Chief Constable* [1989] A.C. 53). The House of Lords gave two reasons: first, that no duty was owed to the victim because the police were in no special relationship either with her or (unlike the case where Borstal boys wrecked a yacht while on the run from their dozy warders) with the criminal; secondly, that it was contrary to public policy for any such claims to be brought against the police in respect of their handling of criminal investigations.

In *Osman* v. *Ferguson* [1993] 4 All E.R. 344 the first ground in *Hill* was arguably inapplicable, since the police were aware of the identity of both the criminal—a deranged schoolmaster—and his

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