Interlocutory Injunctions:

An Overview

Paul J. Hayes

The Victorian Bar

Leo Cusson Institute

Tuesday 5 April 2011

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INTERLOCUTORY INJUNCTIONS: *AN OVERVIEW*

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1.1.1 Generally

Injunctions have been described ad infinitem in equity texts since time immemorial, but perhaps no better than the leading Australian authors on the topic as set out below:

"An injunction is an order of an equitable nature restraining the person to whom it is directed from performing a specified act or thing"[1]

or more succinctly,

"Court orders forbidding or commanding the person to whom they are addressed to do something"[2]

An "interlocutory" injunction is an injunction granted at any time during which a cause of action is pending hearing (in some cases even before process has been initiated by a plaintiff) and accordingly by it's very nature, is provisional or temporary, until the case can be finally determined on it's merits. Its primary purpose therefore is to preserve the status quo between the parties until judgment is delivered.

By reason of the legal hurdles which must be overcome by an applicant for the grant of an interlocutory injunction, used properly, the application for and the subsequent grant of an interlocutory injunction can operate as a powerful weapon in a plaintiff's hands to enable it to bring about a successful resolution of a civil dispute either by decision or resolution. Alternatively, an ill-considered or poorly prepared application for the grant of interlocutory relief of this nature will not only back-fire on the applicant at the interlocutory hearing, but may also in the event of the relief sought being refused by the court at this interlocutory

[1] Spry, *"Equitable Remedies"* Law Book Co, Fifth Edition at p 322.
[2] Meagher Gummow & Lehane, *"Equity – Doctrines & Remedies",* Butterworths, Fourth Edition, at p 703.

level, expose flaws in a plaintiff's principal case, some of which may be fatal. In such a scenario, the possibility of the plaintiff resolving the dispute on terms to its satisfaction, following an unsuccessful interlocutory injunction application, may be significantly impaired.

The purpose of this paper therefore is to acquaint the reader with the basic principles and procedures applicable to the either bringing, or responding to, an interlocutory injunction application.

1.1.2 Federal Court of Australia

The jurisdictional basis for the power to grant an interlocutory injunction in the Federal Court is found in section 23 of the *Federal Court of Australia Act* 1976 and Order 25 of the *Federal Court Rules*. The powers available to the court by virtue of section 23 can be exercised in any proceeding over which the court ordinarily has jurisdiction, unless the jurisdiction is conferred in terms which expressly or impliedly deny the exercise of such powers.[3]

Application in the case of existing proceedings is made by way of Notice of Motion and supporting affidavit.

In order to arrange an urgent hearing for an interlocutory injunction, a call should be placed to the court registry, whereupon a Registrar will allocate a Judge to hear the application. [4]

1.1.3 Supreme Court of Victoria

Section 37 of the *Supreme Court Act* 1986 and orders 37A, 37B and 38 of the *Rules of the Supreme Court*, establish the jurisdictional and procedural basis for the grant of an injunction in the State of Victoria.[5]

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[3] See: *Patricks Stevedores Operations No. 2 Pty Limited & Others v Maritime Union of Australia & Others* (1998) 195 CLR 1.

[4] See also: Federal Court of Australia *Practice Note No. 10 of 1994* which sets out the procedure to be followed specifically for Search/Anton Pillar applications.

[5] See also: Supreme Court of Victoria *Practice Note No. 2 of 2006* (Anton Pillar Orders) and *Practice Note No. 3 of 2006* (Mareva and Freezing Orders), which directs how parties should approach the Court with Mareva and Anton Pillar applications.

Application in the case of existing proceedings is made by way of Summons and supporting affidavit, in matters commenced by Writ. Where proceedings are foreshadowed and have not been issued and the application is one of extreme urgency, the simplest means of invoking the process of the court is by way of Originating Motion and supporting affidavit.[6]

In the Supreme Court, matters of this nature are heard in the Practice Court before a Judge. Where the application is urgent, a call should be made to the Associate to the Practice Court Judge in order to arrange for the matter to come before the court. Otherwise, the matter is listed before the court by the registry on the filing of the Summons.[7]

Also, where a matter is listed in the Commercial List, urgent applications for interlocutory injunctive relief can be entertained by the appropriate List Judge (by arrangement with the Judge's associate), either on a Friday morning in the directions list, or otherwise when the business of the court permits.[8]

1.1.4 County Court of Victoria

Interlocutory injunctions can be granted in the County Court, where the grant of relief is ancillary to the principal relief sought in the originating process over which the court has jurisdiction. (ie. an application for Mareva relief with respect to the property of a defendant to a pending County Court proceeding).

The court's jurisdiction to entertain such applications is found in section 31 of the *Supreme Court Act* 1986 which invests the County Court of Victoria (and the Magistrates Court of Victoria) with "incidental" equitable jurisdiction.[9]

Likewise, the appropriate manner of procedure is by way of Summons and affidavit.

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[6] See also: Order 4, Rules 6 & 8 of the *Rules of the Supreme Court*.
[7] See also: *Practice Notes* [1984] VR 320 and [1994] 1 VR 86 with respect to urgent applications.
[8] Supreme Court of Victoria, *Practice No. 4 of 2004* at paragraph 4.1.

1.1.5 Magistrates Court (Federal/State)

Again, like the County Court, an interlocutory injunction can be granted in the Federal and Victorian Magistrates Courts where the grant of relief is ancillary to the principal relief sought in the originating process over which the court has jurisdiction.[10]

1.2 Standard "Prohibitive" Injunctions

The most usual interlocutory injunction sought is one that restrains another party from doing a particular act or thing.

Most commonly, in the course of civil/commercial causes are interlocutory injunctions which are sought to restrain:

- Directors acting in breach of a company's constitution or the *Corporations Act* 2001;
- A trustee acting in breach of a trust;
- A party acting in breach of a contract (ie. a restraint of trade); or
- A party acting in breach of a confidentiality undertaking.

The primary consideration in the grant of such an interlocutory injunction is, subject to the satisfaction of the pre-requisite legal criteria (or "organising principles")[11], as discussed in Part 2 below, is as stated above, to preserve the "status quo" between the parties until the principal proceedings can be finally determined at trial.

1.3 Mandatory Injunctions

The alternative to the prohibitive injunction is a mandatory injunction, which requires someone to perform some overt or positive act.[12]

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[9] See also: Section 49 of the *County Court Act* 1958. For Mareva and Anton Pillar orders, see County Court of Victoria *Practice Note Civil No. 1 of 2007* and *Practice Note Civil No. 2 of 2007*, respectively.

[10] See: Sections 10, 15 & 18 of the *Federal Magistrates Court Act* 1999 and Part 5 of the *Rules of the Federal Magistrates Court*; Section 31 of the *Supreme Court Act* 1986; Section 100(1)(b) of the *Magistrates Court Act* 1989 and Order 20 of the *Magistrates Court Rules*.

[11] See: *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 per Gleeson CJ and Crennan J at [19], referring to Doyle CJ's statement to this effect in *Lakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440 at 442 to 443.

[12] See: *Sydney Consumers' Milk and Ice Co Ltd v Hawkesbury Dairy and Ice Society Ltd* (1931) 31 SR (NSW) 458.

Mandatory injunctions are rarely granted on an interlocutory basis, principally because requiring someone to go out of their way to perform a specific act will usually place a considerable disturbance on the "status quo" between the parties in the intervening period between the application and the hearing.

Until recently, the bar has been set higher for the grant of a mandatory injunction, than injunctions, which are prohibitive in nature (as discussed in Part 2 below). Previously, for the grant of a mandatory injunction, an applicant was required to demonstrate the following:[13]

(a) a strong prima facie case for which damages would not be an appropriate alternative remedy;
(b) there is very high likelihood it will sustain damage in the event of the injunction not being granted;
(c) the defendant has shown a contumelious disregard for the rights of the applicant in committing the conduct underpinning the applicant's right of action;
(d) the grant of the injunction will not cause the defendant undue hardship in the circumstances; and
(e) the injunction sought is in precise terms and capable of performance.

However, in *Bradto Pty Ltd v State of Victoria*[14], Maxwell P and Charles JA[15], expressed a desire that there be a single test applied to all cases where an interlocutory injunction is sought, irrespective of whether the interlocutory injunction sought was mandatory or prohibitive in nature, by reason of the inherent flexible and adaptive characteristics of the equitable remedy of an injunction. Specifically, their Honours stated:

> *"… the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong', in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial."*

Notwithstanding the Victorian Court of Appeal's fresh "lower risk of injustice" approach to mandatory interlocutory injunctions in *Bradto*, (consistent with the High Court's subsequent attempt to establish a unifying doctrine for the grant of interlocutory injunctions by its

[13] See: *Dataforce Pty Ltd v Brambles Holdings Ltd* [1988] VR 771 at 776. See also: *State of Queensland v Australian Telecommunications Commission* (1985) 59 ALJR 562; *Redland Bricks Ltd v Morris* [1970] AC 652 and *Economy Shipping Pty Ltd v Fischer Constructions Pty Ltd* [1969] 2 NSWR 97.
[14] [2006] VSCA 89.
[15] Ibid at [33] to [35].

reference to the "organisational principles" in *ABC v O'Neill*), it is still suggested that in real terms, the threshold for the grant of a mandatory injunction will still in most cases remain higher than a standard prohibitive injunction.[16]

Although the discretion remains with the court, a mandatory injunction will not likely be granted where the applicant has a right of specific performance, nor where sought in aid of the enforcement of a statutory right where the appropriate remedy is mandamus.[17]

The rare circumstances in which mandatory injunctions are granted on an interlocutory basis are for example where a delinquent trustee is required to repay monies to the trust, where such monies are in it's possession and/or control and which were derived as a consequence of a breach of trust, or in cases involving serious contraventions of Section 46 of the *Trade Practices Act* 1974.

1.4 Freezing/Asset Preservation Orders (Mareva Injunctions/Orders)

It is a sad reflection of the times in which we now live that "Mareva" injunctions/orders are becoming a more common and necessary occurrence in the course of civil proceedings in order to restrain unscrupulous defendants from placing their assets beyond the reach of a plaintiff, in order to frustrate such plaintiff's chances of executing on any judgment it may receive, in the event of it succeeding on it's case against that defendant.

The jurisdictional basis for the grant of a Mareva injunction/order arises from the court's inherent jurisdiction (which in Victoria, unlike New South Wales[18], is undefined in the *Supreme Court Act* 1986), to be able to do all such things necessary in the interests of justice.[19] In the specific case of a Mareva injunction/order, it's origins are found in the court's power to prevent the frustration of it's own process, as happens in the case of a defendant removing it's assets from the court's jurisdiction with the intention of depriving a potentially successful plaintiff of the fruits of a judgment in it's favour.[20]

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[16] A useful discussion reconciling the decisions of *ABC v O'Neill* and *Bradto*, is offered by Graeme Clarke SC of The Victorian Bar, in his paper entitled "Interlocutory Injunctions in Intellectual Property Cases: Principles and Practice", *Vicbar Commbar CLE Program*, March 2007 (at paragraphs 40 to 43), where the author convincingly argues that the broader "lower risk of injustice" approach of the Victorian Court of Appeal in *Bradto*, can (and indeed should) be applied consistently within the High Court's "organisational principles" in *ABC v O'Neill*.

[17] See: *Burns Philp Trust Co Ltd v Kwikasair Freightlines Ltd* (1963) 63 SR (NSW) 492 and *Harold Stephen & Co Ltd v Post Office* [1977] 1 WLR 1172.

[18] See section 23 *Supreme Court Act* 1970 (NSW).

[19] See: *National Australia Bank Ltd v Dessau* [1988] VR 521.

[20] See: *ABC v Lenah Game Meats* [2001] HCA 6, (2001) 208 CLR 199 and *Patrick Stevedores Operations No. 2 Pty Ltd v. Maritime Union of Australia* [1998] HCA 30, (1998) 195 CLR 1. See also: Taylor, G. and Wright D.,

The principles upon which a Mareva injunction/order are granted are an extension of those principles applicable to the ordinary grant of an interlocutory injunction discussed in Part 2 below.

The plaintiff must in addition to proving a "good arguable case" and satisfying the court as to "balance of convenience" factors must also establish that there exists a real "risk" or danger of the defendant concealing or disposing of, or removing from the court's jurisdiction, it's assets, in order to frustrate any opportunity the plaintiff may have upon the outcome of the trial, in the event of it receiving a judgment in it's favour, to recover against that judgment.

The onus of proving "risk" rests with the applicant plaintiff. The risk must be real, that is more than a suspicion.[21] Further, in proving risk, a plaintiff need not establish that the defendant's assets are being "absolutely" placed beyond its reach, where the plaintiff is able to lead evidence that the defendant is dealing with its assets in such a manner as to prejudice the later enforcement of any judgment or order of the court[22]. Risk though may be presumed by the court, where the plaintiff's cause of action is one in fraud (or some other form of contumelious conduct on the part of the defendant) and the affidavit material in support of the Mareva application is able to demonstrate a "good arguable case" on the issue of risk.[23]

It must also not be overlooked that given the grant of a Mareva injunction/order arises in the court's equitable jurisdiction, the remedy is discretionary.[24] A Mareva injunction/order should not be granted lightly.[25]

"Privacy, Injunctions and Possums: An Analysis of the High Court's Decision in Australian Broadcasting Corporation v Lenah Game Meats" [2002] MULR 36; (2002) 26 *Melbourne University Law Review* 707; Supreme Court of Victoria *Practice Note No. 3 of 2006* (Mareva and Freezing Orders) and *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyds Rep 509.

[21] See: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623; *Pearce v Waterhouse* [1986] VR 603 at 606; *Construction Engineering (Aust) Pty Ltd v Tambel (Australasia) Pty Ltd* [1984] 1 NSWLR 274 and *J.D. Barry v M&E Contracting Pty Ltd* [1995] VR 187.

[22] *Australian Iron & Steel Pty Ltd v Buck and Others* (1982) 2 NSWLR 889 at 893.

[23] See: *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325-326.

[24] See: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380; *Beach Petroleum NL v Johnson & Another* (1993) 11 ACLC 75; *Glenwood Management Group Pty Ltd v Mayo* [1990] VR 49; *National Australia Bank Limited v Dessau* [1988] VR 521 and *Pearce v Waterhouse* [1986] VR 603. Cf. *Hillpalm Pty Limited v Heaven's Door Pty Limited* [2004] HCA 59.

[25] See: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 and *Pearce v Waterhouse* [1986] VR 603). Nor, should it be used as "a security for a judgment" (See: *Brereton & Ors v Milstein & Ors* [1988] VR 508 and *A.J. Bekhor & Co Ltd v Bilton* [1981] 2 WLR 601).

1.5 Search Orders (Anton Pillar Orders)

The "Anton Pillar" order derives it's name from the case of *Anton Pillar KG v Manufacturing Processes Ltd,*[26] where the court's jurisdiction was stretched to its outer most possible limit and the aggrieved plaintiff was afforded the relief, granted ex-parte, of being able to inspect the defendant's premises and obtain all such documents or objects relevant to it's case, before the initiation of process and before the defendant had the opportunity to dispose of the material prejudicial to it's case, which it would have otherwise been required to disclose to the plaintiff during the course of discovery in the proceedings.

Although not limited to these categories, Anton Pillar orders are primarily sought in cases involving a breach of a plaintiff's intellectual property rights (ie. breach of copyright or trade-mark) or where the plaintiff is pursuing a case in fraud and seeking to recover or trace funds which may have been misappropriated by the defendant.

The jurisdictional basis for an Anton Pillar order is two-fold. Firstly, the court in it's inherent jurisdiction is able to "in the interests of justice" preserve in existence, evidence which will very much be the subject matter of the trial. Secondly, the remedy is capable of being granted where it is ancillary to the principal relief sought.[27]

Broadly, three grounds are required to be established for the grant of an Anton Pillar order. The applicant must:

(a) have a strong prima facie case[28];
(b) be able to demonstrate that it will suffer serious damage (actual or potential) if the order is not granted; and
(c) show clear evidence that the defendant has in its possession;
    (i) the material prejudicial to it's case; and

[26] [1976] 1 Ch 55.
[27] See: *Rank Film Distributors Ltd v Video Corp Centre* [1982] AC 380 and *Copyright Agency v Haines* (1981) 40 ALR 264.
[28] Or now in light of *ABC v O'Neill*, a "serious question to be tried" (in that if the evidence relied upon in support of the application for an interlocutory injunction by the applicant plaintiff, suggested that the applicant plaintiff would enjoy a 'sufficient likelihood of success' at trial), as prescribed by Gleeson CJ and Crennan J in *ABC v O'Neill* at Footnote 11. See also: Gummow and Hayne JJ in *ABC v O'Neill* at [65] to [72] where the requirement of a prima facie case as an element necessary in the grant of an interlocutory injunction, was laid down by the High Court in *Beecham Group v Bristol Laboratories Ltd* (1968) 118 CLR 618 at 622 to 623, was considered by their Honours.

(ii) that there is a real and actual possibility that the material may be destroyed or placed out of reach of the plaintiff, prior to trial, in the event of the material being sought on notice by the plaintiff or the court.

The appropriate method of procedure when making an application (and form of order), is set out in the case of *Long v Specifer Publications Pty Ltd,*[29] however given that the application is made ex-parte, the requirement of candour and full-disclosure on the part of the applicant must be rigorously observed, together with the appropriate measure of caution be taken in the drafting of not only the application, but also the draft order for the court.[30]

1.6 Statutory Injunctions

In addition to the above forms of injunctions, an applicant may have a statutory right to an injunction, where it's rights under the *Trade Practices Act* 1974 or the *Corporations Act* 2001 have been infringed to the extent to warrant the making of an order by the court.[31]

In the consideration of such interlocutory injunctions, the court's process is exercised in accordance with those well-founded equitable principles, which apply to its operation in its discretionary jurisdiction.[32]

2. Bringing the Application

2.1 Instructions/Evidence

The consideration of whether or not to proceed with an application for an interlocutory injunction will often be preceded with breathless instructions from the client, (in many instances, providing you with only some and not all of the facts relevant to their case and

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[29] (1998) 33 NSWLR 545 (especially at 572-574).

[30] See also: Spry*, "Equitable Remedies"* Law Book Co, Fifth Edition at p 560 to 566 as to the service and enforcement of Anton Pillar orders and more importantly, Supreme Court of Victoria *Practice Note No. 2 of 2006* (Anton Pillar Orders)

[31] See: Section 80 of the *Trade Practices Act* 1974 and Section 1324 of the *Corporations Act 2001*. By way of recent example see: *Australian Securities and Investments Commission v Banovec (No 2)* [2007] NSWSC 961, as regards the making of an asset preservation order (mareva order) under s.1323 of the *Corporations Act* 2001.

[32] See: *Australian Securities Commission v Mauer-Swisse Securities and Another* [2002] NSWSC 741; *ICI Operations Pty Limited v TPC* (1992) 38 FCR 248 and *Australian Securities Commission v Cooke* (1997) 15 ACLC 435.

these being usually only the main facts in their, ignoring completely the other side of the argument), with the edict, "we need to get this to court immediately".

In such circumstances it is best to resist your client's (sometimes well-founded) panicked urges and to take a deep breath and calmly consider the nature of the client's problem.

It is suggested that the following five questions be asked:

(a) What is the "outrage" complained of?
(b) What is the client's right/cause of action?
(c) Will the client suffer irreparable injury if the "outrage" is not prevented?
(d) How long will it be before the client suffers irreparable injury?
(e) Where is the equity? (ie. in considering the grant of an interlocutory injunction and balancing the parties interests, what is the lowest risk of an injustice?)[33]

Often when confronted with an "urgent" application, the practitioner will have more time at his or her disposal than perhaps the client initially realises. Accordingly, it is best to use this time to the advantage of the client to prepare the application as best and as fully as possible, rather than satisfy the misguided intention of the client to simply get into court quickly and present the court with only a "half-prepared" application.

As is addressed below, a hastily prepared and misguided application can not only leave your client's application vulnerable to a successful attack from your opponent on its return, but can also have adverse consequences as to the overall cause of action both in terms of outcome and costs.

Matters included in affidavit material filed and served in support of an interlocutory injunction application, can and often are, re-visited at the trial and can be used to discredit the plaintiff's evidence, where these affidavits have been hastily prepared without consideration of the potential end result at trial and are at odds with the evidence being lead from the plaintiff at the hearing. Accordingly, accuracy in the preparation of the material, even where an urgent application is being made in the early stages of the proceedings is paramount.

[33] It is suggested that in the search for where the equity lies between the parties, the approach of Maxwell P and Charles JA in *Bradto Pty Ltd v State of Victoria* is useful tool in this endeavour. Footnotes 14 and 15.

In the preparation of affidavit material, consideration should also be given as to who is the best available deponent. Although hearsay is admissible in interlocutory applications and in the most urgent cases, evidence will often be placed before the court in a "solicitor affidavit" on information and belief, it is preferable, where possible, to lead the evidence from the applicant/appropriate witness direct in admissible form, ensuring of course that such witness is properly proofed and that their evidence is not going to ultimately compromise the principal action.

While interlocutory applications for injunctions are always useful in forcing an overall quick resolution of a dispute, by reason of the court in the consideration of the application embarking upon a preliminary determination of the legal and factual merits of the plaintiff's case, (ie. serious question to be tried/prima facie case – "sufficient likelihood of success")[34], as with any other case, proceedings should not be commenced for the tactical imperative of forcing a "quick settlement". Inherent in this process always lies the danger of the defendant "digging in" thereby forcing a plaintiff to commit to conducting proceedings through to trial, where it may not have had the inclination or resolve to do so at the instigation of the action. The risk in such a scenario being that the plaintiff may be forced to run a matter through to trial where the ultimate prospects of success may not be strong and where the plaintiff has a greater that acceptable exposure to an adverse outcome in terms of final result and costs. Accordingly, the client's ultimate expectation as to the final outcome of the litigation should always be assessed at this early stage of the litigation, even where an application for an interlocutory injunction at first instance may seem justified.

2.2 Preliminary Correspondence – Building a Case

Often, rather than racing off to court, a satisfactory interim compromise can be reached by seeking and extracting from the defendant, a set of well thought out undertakings, whereby the defendant undertakes to the plaintiff to desist from the conduct complained of.

A open letter setting out the facts as instructed (without being overly self-serving) and indicating to the defendant the prejudice being suffered by the plaintiff as a result of the contentious conduct should be forwarded to the defendant (or its solicitor) requiring the defendant to provide undertakings of sufficient comfort to the plaintiff. The undertakings

[34] Footnote 28.

sought shouldn't be more onerous than the situation demands and should be as reasonable as possible.

Such a strategy pursued on the part of the plaintiff, is, where an injunction can be ultimately made on notice, presents little or no risk. If the undertakings are provided then they can always be enforced in the event that they are later breached. Alternatively, if the defendant fails to provide what are reasonably sought undertakings in the circumstances, then this refusal on the part of the defendant can be relied on by the court in the course of a later application for an interlocutory injunction in its discretionary consideration of whether or not to grant the injunction.

2.3 Jurisdiction

When considering the merits of a client's case in quickly deciding whether or not to proceed with an application for interlocutory relief, the correct choice of jurisdiction is critical and extreme caution should be exercised in this regard. This of course will depend upon the nature of the plaintiff's cause of action.

Nothing is more embarrassing for a practitioner to have an otherwise deserving application for an interlocutory injunction thrown out (with costs!), on the simple ground that the application has been brought in the wrong place.[35]

Not only should regard be had to selecting the correct forum within Australia when issuing process, but given the expanding international nature of trade and hence, the international nature of commercial disputes, the correct domestic jurisdiction. When the legal right underpinning the case for an injunction is found within a contract, the standard 'boilerplate provisions' to the contract should never be overlooked, especially the 'governing law' clause, which may dictate that any legal right existing under the contract, may in fact lie abroad, or alternatively, is it is actionable here in Victoria, then consideration must be given to proving the foreign law here in the local proceedings.[36]

[35] See discussion of various jurisdictions in Part 1.1 above.

2.4 The Threshold Legal Requirement

The first hurdle to be overcome in bringing an application for interlocutory relief is for the applicant to persuade the court that there is a "serious case to be tried" (or in the case of a Mareva injunction "good arguable case" – see Part 1.4 above) with respect to the substantive legal and factual merits of it's principal cause of action.[37]

In *Hall v The University of New South Wales & Another,*[38] McClellan J, applying the test expressed by the High Court in *Lenah Game Meats*, stated as follows:[39]

> *"The matter falls to be determined as an application for interim relief. The test which the court is to apply has been the subject of repeated consideration by courts over many years. Recently the matter has been again considered by the High Court in the Australian Broadcasting Corporation v Lenah Game Meats Pty Limited [2001] 208 CLR 199 where Justice Callinan said at para 246:*
>
> > *'Because the proceedings are interlocutory the 'court does not undertake a preliminary trial and give or withhold interlocutory relief upon a foreshadowing as to the ultimate result of the case.' Just what measure of success an applicant for an interlocutory injunction must establish is not completely settled. In my opinion the correct test is whether the applicant can demonstrate either a reasonably arguable case on both the facts and the law or that there is a serious question to be tried. These tests, it seems to me, are to the same effect'."*

In an attempt to settle the measure of success required for the grant of an interlocutory injunction, which troubled Callinan J in *ABC v Lenah Game Meats*, the High Court addressed the issue in *Australian Broadcasting Corporation v O'Neill*[40].

As discussed earlier in Parts 1.3, 1.4 and 1.5, Gleeson CJ and Crennan J in seeking to prescribe a uniform test for the grant of all injunctions of an interlocutory nature, stated[41]:

> *"As Doyle CJ said in the last mentioned case [Jakudo Pty ltd v South Australian Telecasters Ltd (1997) 69 SASR 440 at 442 to 443], in all applications for an interlocutory injunction, a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown the balance of convenience favours the grant of an injunction. These are the organising principles, to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed. We agree with the explanation*

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[36] See for example: *Cosmetic Equipment Company Pty Ltd v Mobile Cosmetic Company Pty Ltd* [2007] VSC 194.
[37] See: *Patricks Stevedores Operations No. 2 Pty Limited & Others v Maritime Union of Australia & Others* (1998) 195 CLR 1; *National Mutual Life Limited v GTV Corporation Pty Limited* [1989] VR 74; *Castlemaine Tooheys Limited v South Australia* (1986) 118 CLR 618 and *Australian Coarse Grain Pool Pty Limited v Barley Marketing Board* [No. 1] (1982) 46 ALR 398.
[38] [2003] NSWSC 539.
[39] Ibid at paragraph [12].
[40] [2006] HCA 46.
[41] Ibid per Gleeson CJ and Crennan J at [19].

> *of these organising principles in the reasons of Gummow and Hayne JJ, [[65] to [72]] and their reiteration that the doctrine of the Court established in Beecham Group Ltd v Bristol Laboratories Pty Ltd [(1968) 118 CLR 618] should be followed."*

Gummow and Hayne JJ stated[42]:

> *"The relevant principles in Australia are those explained in Beecham Group Ltd v Bristol Laboratories Pty Ltd [(1968) 118 CLR 618]. This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued:*
>
> > *'The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief… The second inquiry is… whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if the injunction were granted'.*
>
> *By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at the trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation of Kitto J in the course of argument [at 622]. With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal:*
>
> > *'How strong the probability needs to be depends, no doubt, upon the nature of rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks'."*

A "serious question" has also been held to be one where there is a case, which is reasonably arguable, and the argument is not frivolous and is one of substance.[43] Although the High Court in *ABC v O'Neill* now seems to have set the bar on the legal threshold for the grant of an injunction somewhat higher than what has been inferred from past authority on this question.

In the determination of the "serious question", the court must have regard to all of the evidence before it as a whole (although without making findings as to credit on the principal issue), even where the form of the evidence at the interlocutory stage might otherwise inadmissible at the hearing (ie. affidavits deposing as to matters which constitute hearsay).[44]

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[42] Ibid per Gummow and Hayne JJ at [65].
[43] See: *National Mutual Life Limited v GTV Corporation Pty Limited* [1989] VR 74 and *Glenwood Management Group Pty Ltd v Mayo* [1990] VR 49.
[44] See: *Shercliff v Engadine Acceptance Corp Pty Limited* [1978] 1 NSWLR 729.

2.5 Discretionary Considerations

2.5.1 Balance of Convenience

Once the legal basis for the grant of an injunction on an interlocutory basis has been established as discussed in Part 2.4 above, the court in the first of it's two principal discretionary considerations the whether or not the balance of convenience is disposed in favour of the grant of an interlocutory injunction.

There have been numerous formulations of the "balance of convenience" test, which have been stated as follows:

- "the balance of the risk of doing an injustice"[45]

- "the inconvenience and detriment which the plaintiff would be likely to suffer, if denied the grant of an injunction, would outweigh any injury, inconvenience or detriment which the defendant would sustain if an injunction were granted".[46]

- "the balance of justice".[47]

Another approach to determining where the balance of convenience lies was pursued by Lush J in *Slater Walker Superannuation Pty Limited v Great Boulder Gold Mines Limited*[48] whereupon His Honour stated:

> *"There will be situations in which the plaintiff cannot expect to be granted an injunction unless he can show that he can prove positively the existence of his rights and the infringement of them. There will be other situations in which though the plaintiff's proof of his rights or the infringement of them is not strong, an injunction may be granted because to withhold it would do the plaintiff irreparable harm, while to grant it would not greatly injure the defendant. The possible variety of situations is unlimited".*

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[45] See: *ASIC v Mauer-Swisse Securities and Another* [2002] NSWSC 741; *Cayne v Global National Resources* PLC [1984] 1 All ER 225 and *American Cyanamid Co v Ethicon Limited* [1975] AC 396. (See also: *Adam P Brown Male Fashions Pty Limited v Philip Morris Inc* (1981) 148 CLR 170).

[46] See: *Nicholas John Holdings Pty Ltd and Others v Australi*a and *New Zealand Banking Group Ltd and Others* [1992] 2 VR 715 at 723 and *Beecham Group Limited v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

[47] See: *National Mutual Life Limited v GTV Corporation Pty Limited* [1989] VR 74.

[48] [1979] VR 107 at 110 (and cited with approval by Young CJ, Starke and Marks JJ in *Magna Alloys & Research Pty Limited v Coffey & Others* [1981] VR 23).

It is also appropriate, where relevant for the court to take into account the strength of the applicant's case when weighing up the discretionary factors between the parties in determining whether or not it is in the interests of justice for the grant of an interlocutory injunction.[49]

The consideration of the "balance of convenience" will also require the court to take into account:

- the maintenance of the status quo between the parties until trial;
- whether damages are an adequate alternative remedy;
- whether the applicability of any of the over-riding maxims of equity effect the grant of relief; and
- whether the undertaking as to damages by the applicant is sufficient[50].

2.5.2 Status Quo

At the forefront of the court's discretionary consideration is the preservation of the status quo between the parties until the Hearing.

The applicable "status quo" is the state of affairs between the parties upon the issue of the application.[51]

2.5.3 Alternative Remedy of Damages

The availability of damages as an adequate alternative remedy to the applicant will operate against a favourable exercise of the court's discretion in the grant of an interlocutory injunction.

The process to be employed in this consideration is tidily canvassed by Hedigan J, in *Nicholas John Holdings Pty Ltd and Others v Australia and New Zealand Banking Group Ltd and Others*: [52]

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[49] See: *Optus Networks Pty Limited v City of Boroondara* [1997] 2 VR 318 at 330; *Nicholas John Holdings Pty Ltd and Others v Australia and New Zealand Banking Group Ltd and Others* [1992] 2 VR 715 at 723; *Bullock v Federated Furnishing Trades Society of Australasia (No 1)* (1985) 60 ALR 235 and *Hubbard v Vosper* [1972] 2 QB 84.

[50] See for example: *Yellowrock Pty Ltd v Liberty Services Pty Ltd* [2003] VSC 123.

[51] See: *Garden Cottage Foods Limited v Milk Marketing Board* [1984] AC 130 and *Magna Alloys & Research Pty Limited v Coffey & Others* [1981] VR 23.

> *"This involves considering whether or not an award of damages would sufficiently compensate the plaintiff for losses sustained by the defendant's actions in the meantime. If they would, and the defendant is likely to be able to meet them, an injunction should ordinarily be refused, no matter how strong the case appears at the early stage. If they would not, then the contrary hypothesis concerning the defendant's position as to being adequately compensated by the undertaking required having regard to the intervening events, must be considered. It is when there is any doubt about the respective remedies in damages that the balance of convenience has to be determined. If the factors are evenly balanced, it is prudent to preserve the status quo".*

A guide as to when damages might be an adequate alternative remedy can be seen from those cases which address this same question in the context of an order for relief by way of specific performance, which like an injunction, will not be granted where damages exist as an adequate alternative remedy to a plaintiff.

In real terms, damages will generally be considered to be inadequate where the subject matter of the application for an injunction involved say for example, real property, the wrongful appointment of a receiver[53], or rare or unusual goods or chattels[54].

2.5.4 Applicability of Equitable Maxims

Other factors which the court is entitled to consider in the discretionary grant of relief are those factors deriving their origins in equity's maxims.

These include:

- Has the applicant unnecessarily delayed in bringing the application (possibly causing the respondent prejudice which but for the delay could have otherwise been avoided).[55]

- Has the conduct of the applicant been of such a nature to operate against the grant of an interlocutory injunction (ie. lack of candour, unclean hands, etc, in the course of bringing the application, or alternatively, has the

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[52] [1992] 2 VR 715 at 722-723. (See also: *American Cyanamid Co v Ethicon Limited* [1975] AC 396).
[53] Sien Sen Choy v St Kilda Baths Pty Ltd [1999] VSCA 212.
[54] Falcke v Gray (1859) 4 Drew 651. See also: Aitken, L., "When are damages an adequate remedy?" (2004) 78 *Australian Law Journal* 544.
[55] See: *Carlton and United Breweries (NSW) Pty Limited v Bond Brewing New South Wales Limited* (1987) 76 ALR 633.

applicant engaged in conduct which is unconscionable or improper, arising from the facts of the application itself).[56]

- Whether the grant of the interlocutory injunction will operate oppressively in the interest of the respondent, so as to cause it unfair or unnecessary hardship.[57]

- Is the grant of an interlocutory injunction doing the minimum equity between the parties in the circumstances – in other words would the grant of an injunction create an unfair advantage over the respondent in favour of the applicant, which the applicant is not otherwise (but for the grounds on the grant of the injunction), otherwise entitled to enjoy).[58]

2.6 Procedural Considerations

Upon fully ascertaining the applicant's case and also considering other available remedies (ie. appointment of a receiver or removal/replacement of a trustee/director), the means of bringing the application should be considered.

Once again and as stated above, clients (as with all litigation) should be reminded that once the litigation roller-coaster has started, it may be difficult to get off, without there being adverse consequences as to both outcome and costs. Accordingly, the applicant's resolve to see the substantive proceedings through to trial should first be confirmed before the interlocutory orders are sought.

Having said that though, it is not uncommon for a well-prepared interlocutory application which succeeds to bring about a rapid resolution of the dispute overall by way of settlement between the parties, especially if the respondent has been "caught napping" when the orders were obtained. The principal reason for this is that in the course of bringing an interlocutory injunction, there is in effect a de-facto adjudication of the applicant's case on

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[56] See: *Redwin Industries Pty Ltd v Feetsafe Pty Ltd and Another* [2002] VSC 427 and *Westpac Banking Corporation v Hilliard and Another* [2001] VSC 198 (In *Westpac v Hilliard*, solicitor/client costs were awarded against an applicant who obtained a Mareva style order ex parte who was determined by McDonald J not to have made full and proper disclosure of all material facts when the order was initially obtained). See also: *Lloyds Bowmaker v Britannia Arrow Holdings PLC* [1988] 3 All ER 178; *Bank Mellat v Nikpour* (1985) Com LR 158; *Henry Roach (Petroleum) Pty Limited v Credit House (Vic) Pty Limited* [1976] VR 309 at 318 to 320 and *Hubbard v Vosper* [1972] 2 QB 84.

[57] See: *Beese v Woodhouse* [1970] 1 All ER 769.

it's merits by the court, in the process of it determining whether or not to grant interlocutory relief (ie. serious question to be tried/prima facie case – "sufficient likelihood of success")[59]. However, while settlement of the substantive proceedings is a common outcome of interlocutory injunction applications, applicants should never bank on the fact that their application will bring about an early resolution of the overall dispute.

Another matter requiring careful consideration is whether the application should be brought ex-parte or on notice.

Ex-parte applications are made where the circumstances are "ultra-urgent" or in cases where stealth at first instance in dealing with the respondent is legitimately required, usually where there is clear evidence that the respondent is acting dishonestly and ruthlessly so far as the applicant's interests are concerned and where the anticipated outcome of the applicant's application would be rendered futile if the application was brought on notice (ie. Anton Pillar orders and some Mareva orders). Of course, it should always be remembered that the court will place a far greater reliance upon the applicant so far as candour and disclosure is required when considering orders ex-parte. This means disclosing all details relevant to the application, including those facts and propositions, which operate against the applicant's interests. Failure to adhere to this duty will almost certainly ensure that the urgent injunction obtained ex-parte will be dissolved on its return and upon the respondent being represented.[60]

Accordingly, where possible, the injunction sought on an interlocutory basis should be made on notice, even if the notice is short.

2.7 Ancillary Orders

In the course of seeking interlocutory injunction relief, there is in theory, as a consequence of the court operating in its inherent jurisdiction, no limit to other orders, which an applicant may seek in order to aid the operation of the interlocutory injunction.

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[58] See: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at par 70 and *Glenwood Management Group Pty Ltd v Mayo* [1990] VR 49 at 55.
[59] Footnote 28.
[60] See: *Redwin Industries Pty Ltd v Feetsafe Pty Ltd and Another* [2002] VSC 427 and *Westpac Banking Corporation v Hilliard and Another* [2001] VSC 198. See also: *Bank Mellat v Nikpour* (1985) Com LR 158 and *T A Edison Limited v Bullock* (1912) 15 CLR 679.

Such ancillary orders might include the respondent to immediately declare on oath by way of affidavit the whereabouts of specific property in cases where the applicant has a right to "trace" the property in question, or provide preliminary discovery by promptly filing with the court and serving on the applicant a preliminary affidavit of documents.[61]

Ancillary orders are commonly sought in interlocutory injunction applications in cases of equitable fraud, or where Anton Pillar or Mareva orders are sought.

2.8 Undertaking

For any form of interlocutory injunction application, under no circumstances should an applicant go before the court without being prepared to extend to the court (for the benefit of the respondent or any other party adversely effected by the interlocutory orders), an undertaking as to damages.

Accordingly, before charging off to court, not only clear should instructions of the applicant's preparedness to offer the undertaking be sought, but also it's capacity to honour such undertaking if it were ever called upon.

The grant of an undertaking, in practical terms operates as "insurance" for the grant of the interlocutory injunction.[62]

Without the support of a sufficient undertaking as to damages in support of an interlocutory injunction, the injunctive orders are likely to be set aside.[63]

The undertaking should not be given lightly and practitioners should ensure that the applicant fully understands and appreciates the nature and consequences of the undertaking provided, before the application is made.

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[61] See: *Ballabil Holdings Pty Limited v Hospital Products Limited* (1985) 1 NSWLR 155; *A.J. Bekhor & Co Ltd v Bilton* [1981] 2 WLR 601 and *Bankers Trust Co. v Shapira* [1980] 1 WLR 1274.

[62] See: *Southern Tableland Insurance Brokers Pty Limited (In Liquidation) & Another v Schomberg* (1986) 11 ACLR 337 at 340.

3. Defending the Application

3.1 Instructions/Evidence

As with bringing an application for an interlocutory injunction, the starting point for defending one is receive precise instructions from the respondent.

Irrespective of how it is the application is to be responded to, full and clear instructions are required as to all matters relevant to the dispute, regardless of whether all such issues are included in the applicant's material so that a proper and informed decision can be made as to how the application is to be dealt with.

Likewise, the respondent's expectation as to the outcome of the proceedings overall should be ascertained at this early stage, so that the response to the interlocutory application/orders can be directed towards achieving these objectives.

3.2 Defending the Application

Once clear instructions are obtained, a tactical decision needs to be made by the respondent as to how it intends to respond to the either the application (or the ex-parte order) for interlocutory relief.

The following considerations are relevant:

- Does the injunction need to be resisted? In other words, can the respondent "live with" the injunction/orders sought by the applicant;
- Is it tactically wise to resist the application?;
- If opposing the application, is there a need (and a corresponding disadvantage) to file affidavit evidence in opposition at such an early stage of the proceedings overall, (bearing in mind the inherent risks of interlocutory affidavits coming back to haunt the deponent at trial)?;
- Can consensus be reached with partial consent to the orders sought?;
- Should the duration of the interlocutory orders effecting the respondent be truncated by seeking to have the substantive proceedings expedited?; and

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[63] See: *National Australia Bank Limited v Bond Brewing Holdings Limited* (1990) 169 CLR 271.

- If the application/orders are to be resisted, then what is the best method to proceed?.

3.3 Opposing the Application

3.3.1 Attack on the Applicant's Case at Law

Given the threshold legal requirement on the applicant to show a "serious issue to be tried" or in the case of a Mareva order, a "good arguable case", an attack on the legal merit of the application where this option presents itself, can for obvious reasons, be of devastating effect where successfully pursued, in not only having the application refused, but ultimately undermining (and resolving) the substantive action in favour of the respondent.

An attack at law can range from the substantive issue of the proceedings itself and/or the point of jurisdiction, to the appropriateness of the grant of interlocutory relief itself, appropo the principal action.

3.3.2 Attack on the Applicant's Evidence

Assuming the applicant has satisfied the legal threshold, then the next point of vulnerability in any application is whether or not the evidence is of sufficient weight to support the legal grievance complained of.

The following questions should be asked:

- Is there sufficient evidence on the applicant's own material to support the grant of an injunction?;
- Is the case one of sufficient seriousness that "better" evidence (ie. non-hearsay) should be before the court?;
- Again, although an irregular practice, is the case and the circumstances of sufficient seriousness to warrant the limited cross-examination on selected issues material in the consideration in the grant of relief?; and
- Should evidence be lead from the respondent in opposition.

3.3.3 Attack on the Applicant's Conduct by Reference to Equity's Maxims Relevant to any Discretionary Grant of Relief

When disputing the exercise of the balance of convenience, the following factors should be considered and where appropriate, agitated:

- Has there been a lack of candour/clean hands on the part of the applicant;
- Has there been unreasonable delay on the part of the applicant (and has this delay caused the respondent any calculable prejudice);
- Would the orders sought, if made, cause unreasonable hardship to the respondent;
- Would the making of the orders confer upon the applicant a collateral unfair advantage which it might not otherwise but for the application, be entitled to enjoy;
- In comparison of the competing merits of each parties claim, is the respondents case stronger than the applicants and is the status quo also capable of being preserved by not making the orders;
- Has the applicant over-reacted in seeking the orders and is the "risk" over-stated.

3.3.4 Availability of an Award of Damages as an Alternative Remedy to the Applicant

Where a later award of damages at the hearing can adequately compensate the plaintiff's "interim prejudice", then interlocutory injunctive relief may be refused on this ground.[64]

3.3.5 Leading Evidence in Opposition

The decision to lead evidence at the interlocutory phase of the proceedings is always one, which should be carefully considered. The same considerations, which apply to bringing an application for and interlocutory injunction also, apply to defending one.

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[64] See Discussion under Part 2.5.3 above.

Accordingly, clear and precise instructions and the best available deponent are necessary to ensure a carefully drafted affidavit in reply can be not only safely relied upon at the interlocutory hearing, but so that the respondent can continue the proceedings in the comfort of knowing that its earlier affidavit evidence cannot be used to undermine or contradict its evidence at the hearing.

3.4 Cross Application

Where a dispute involves an apportionment of blame between both applicant and respondent, consideration should always be had to the tactical decision of not simply just defending the application of the applicant, but to also go on the attack and bring a cross-application against your opponent's client.

Accordingly, the following options (which are by no means exhaustive), are worthy of consideration and if any (or all) of them are of merit, may be pursued to great advantage by the respondent.

- Do grounds exist to bring an interlocutory injunction against the applicant restraining its conduct?;
- If there is a risk to property in which the respondent has an interest, is the risk sufficient to warrant the appointment of a Receiver?;
- Are the circumstances, in the case of a corporation, such to justify the appointment of a Provisional Liquidator?; and
- Is the applicant vulnerable to an application for security for costs (and in such circumstances also vulnerable to a challenge as to the substance of it's undertaking as to damages).

The conduct of such cross applications, (where properly brought), not only serve to enhance the position of the respondent in the event of their success, but in the course of their prosecution, can also serve to undermine the merits and dilute the force of the applicant's application for interlocutory relief.

3.5 Sufficiency of Undertaking Proffered by the Applicant

It is one thing for an applicant to give to the court and to the respondent an undertaking as to damages, but it is another thing to be capable of honouring it.

As every good practitioner knows, an undertaking is only as good as the person giving it.

Accordingly, the undertaking should be of substance and where a respondent is able to cast doubt upon the bona-fides or substance of the undertaking proffered by the applicant, then this will weigh heavily in favour of the respondent in being able to successfully resist the application, or to have the interlocutory injunction discharged.[65]

In the event of an injunction being dissolved and a respondent (or indeed a third party) sustaining loss as a consequence of the interlocutory injunction, damages are at large and are determined in the course of a separate hearing by way of Inquiry.[66]

4. Orders and Execution of Orders

4.1 Form of Orders

Upon appearing in court to seek an interlocutory injunction, a draft order should be ready to be handed up to the court, so that the precise terms of the injunction can be ascertained. If the terms of the injunction are too wide, ambiguous or uncertain, it is almost certain that even the most meritorious application will be refused.[67]

Ideally, the Summons or application for interlocutory relief should state with reasonable precision the terms of the orders, which will be sought by the applicant at the interlocutory hearing, and accordingly, this should be reflected in the draft orders handed up to the court.

In the case of a restraining injunction, the operative terms of the order restraining the respondent from doing or refraining form doing any particular act is preceded by the words "*Until further order"*, thereby reflecting the interlocutory nature of the injunction. Of course, where circumstances between the parties change, between the initial grant of an interlocutory injunction and the hearing, where a respondent has just cause, the

[65] See: *Yellowrock Pty Ltd v Liberty Services Pty Ltd* [2003] VSC 123.
[66] See: *Air Express Limited v Ansett Transport Industries (Operations) Pty Limited* (1981) 146 CLR 249 at 259-268.
[67] See: *Optus Networks Pty Limited v City of Boroondara* [1997] 2 VR 318.

interlocutory proceedings can always be re-agitated at the instigation of the respondent and the injunction dissolved.

When acting for the applicant, the draft order should note in "Other Matters" in Supreme Court actions and where appropriate in the preamble to the order in other jurisdictions, the applicant's undertaking as to damages.

The undertaking is frequently phrased, *"Upon the Applicant, by its Counsel, extending to the Court, the usual undertaking as to damages"*.

However, the more fuller and correct undertaking is still favoured by many Judges and should be expressed, *"The Applicant by its Counsel, undertakes to abide by any order the Court may make as to damages in case the Court should hereinafter be of the opinion that the Respondent or other party shall have sustained any loss by reason of the above undertaking and the Court's order of [date of order] which the Applicant ought to pay"*.

4.2 Service of Orders

The order will usually contain provisions for service on the respondent (and where appropriate, other parties effected by the order), of the order and the material relied upon by the applicant in obtaining the order, in cases where applications have been granted ex-parte.

Caution should be exercised as always when service is being effected and on the return of the application, post-service, the applicant should be armed with an affidavit of service, in case the respondent declines to appear and so that the applicant can seek orders that the injunction continue.

In the case of Anton Pillar orders, the service of such orders is critical in ensuring compliance with the order. Special provisions apply to the service of Anton Pillar orders and these can be found in a variety of specific publications on the topic.[68]

[68] See: Supreme Court of Victoria *Practice Note No. 2 of 2006* (Anton Pillar Orders) and *Practice Note No. 3 of 2006* (Mareva and Freezing Orders), which directs how parties should approach the Court with Mareva and Anton Pillar applications. See also: *Long v Specifer Publications Pty Ltd* (1998) 33 NSWLR 545 and in particular,

4.3 Compliance

Where there has unfortunately been difficulty in obtaining compliance with the order, an applicant is always entitled to re-list the application on the filing of a Motion or Summons, together with supporting affidavit material, seeking declarations that the respondent has acted in contempt of court and should be punished accordingly.[69]

5. Conclusion

When used properly, an interlocutory injunction will not only protect your client's position, but will also enhance its position so far as the overall outcome of the dispute or proceedings is concerned. However, where the application is made in undue haste and without earnest and full consideration as to not only the outcome of the immediate problem requiring redress, but the overall dispute, not only will the application be likely to fail, but so to, the final determination of the dispute will also be likely to be determined on terms which are not ultimately to favourable to your client. A careful consideration of not only the immediate concern with which your client presents, but also the "big picture" so far as the outcome of the overall/substantive dispute is concerned, will ensure satisfaction for both the client and counsel.

5 April 2011

Paul J. Hayes
Barrister-at-Law

C/- Clerk Dever (List D)
Owen Dixon Chambers West
525 Lonsdale Street
MELBOURNE. VIC. 3000.

Tel: (03) 9225 7159
Fax: (03) 9225 7728
DX 96 MELBOURNE
Email: pjhayes@vicbar.com.au
Website: http://www.vicbar.com.au/c.1.3.aspx?RollNumber=3153

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see: McMillan SC and Forbes, "Update on Mareva Injunctions and Anton Pillar Orders" – *Law Institute of Victoria CLE Paper* - 17 June 2002.

[69] See: *Optus Networks Pty Limited v City of Boroondara* [1997] 2 VR 318.