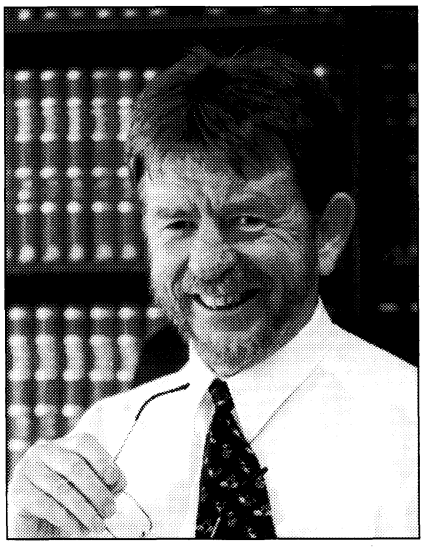
The urgent interlocutory injunction



Hon Justice Riley

"I will prepare and someday my chance will come"
Abraham Lincoln

Last month I discussed preparation for, and the presentation of, interlocutory applications. I now wish to refer to a specific class of such applications. If the application you are instructed to make is for an urgent interlocutory injunction there are special considerations to bear in mind.

The success or otherwise of such an application can, in many cases, mean success or failure in the whole action. As is noted in *Injunctions: A Practical Handbook*[1]:

> *In some cases, the result of a final hearing will be purely academic after the interlocutory result; in others, the passage of time will cause parties to lose interest; but most importantly the determination of an application for interlocutory injunction will often give the parties to a dispute an insight into the approach of the court in determining matters in dispute.*

The granting of an interlocutory injunction calls for the exercise of a discretion by the court. Where there is a serious issue to be tried the court will be called upon to consider where the balance of convenience lies. That will usually involve a delicate act of balancing the competing interests of the parties.

Often there will be no clearly correct, or even preferable, response to the problem that arises. In many cases one party or another will be substantially disadvantaged by whatever decision the court reaches. In those cases the slightest of matters may sway the court in one direction or another. In such circumstances the skill of the advocate in presenting a persuasive argument will be vital to the interests of the client.

Any failure to present the case for the client in a clear, compelling and forceful way may have consequences for the client of an ongoing and significant kind. Such consequences are likely to reach far beyond the outcome of the application immediately before the court.

Applications of this kind are often dealt with on short notice and in an emotionally charged atmosphere. There is little time for preparation of evidential materials to be placed before the court let alone for reviewing and refining issues of law.

Given the nature of such applications it is prudent for the advocate to be aware, in advance, of the relevant law in relation to applications for interlocutory injunctive relief.

In order to avoid delay and possible embarrassment when instructions are received preparation of a general kind for such applications should take place in anticipation that instructions may be received on some future occasion. In my view it is highly desirable for an advocate to have researched the topic so that he or she has a ready familiarity with the applicable law.

It is prudent for the advocate to have created and maintained a precedent file in which the leading general authorities relevant to such an application are stored. It should be possible to address any aspect of the law relating to the granting of an injunction by reference to the materials in the file.

Also included in that file should be any other information that experience suggests may be of use in presenting or opposing an urgent application. Resort to such a file can then be had on short notice saving precious preparation time and avoiding the possibility that some failure on the part of the advocate will cause embarrassment in the course of the proceedings.

When instructions to seek injunctive relief are received the advocate will be able to concentrate upon the issues raised by the factual circumstances of the matter without the need to research the law.

This is not an appropriate place to review the law relevant to such applications however, to demonstrate the desirability of anticipatory preparation, I refer to two matters vital to such applications.

Firstly, if the application is to be ex parte, in preparing the material for presentation to the court it must be remembered that there is an obligation on the applicant to bring to the attention of the court all facts material to the application.

As is pointed out by Mr Burns: "the entire facts of the case must be fairly and candidly stated. If this is not done, the injunction will be dissolved." The applicant must demonstrate the utmost good faith.

Secondly, the need for clear instructions to provide the "usual undertaking as to damages" should not be overlooked. The form of the usual undertaking in the Northern Territory is to be found in Practice Direction 3 of 1992.

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Your client must understand the nature of the undertaking and the possible consequences for him or her of providing it to the court.

In a matter that is factually or legally complex, and where time permits, you should consider the use of a chronology and an outline of submissions for presentation to the court prior to or at the commencement of the hearing.

The use of such aids has been discussed in earlier articles in this series.

In an application of this kind, where the outcome is most likely to be directly affected by the quality of the submissions made by the advocate, you will call upon your early anticipatory preparation and the advocacy skills you have developed elsewhere to present the application in the most persuasive manner possible.

1 NR Burns, Injunctions: A Practical Handbook (LBC 1988)

Robertson to speak at Law Conference

Renowned human rights lawyer (and sometime host of the popular *Hypotheticals*), Geoffrey Robertson, will be a keynote speaker for the Commonwealth Law Conference in April.

Mr Robertson was recently appointed President of the Special Court for Sierra Leone to prosecute war crimes and crimes against humanity in that country.

He will speak at a conference plenary session about his work in Sierra Leone and also take part in a number of buisness sessions.

He is the latest addition to the conference program, joining other luminaries including Cherie Blair QC, Dr Mary Robinson and Karpal Singh.

National report: NT superior courts "slow"

The Northern Territory has ranked last place for the percentage of non-appeal civil matters finalised within 12 months in the Supreme and Federal Courts.

The national *Report on Government Services 2003* is compiled for the Steering Committee for the Review of Commonwealth/State Service Provision by the Productivity Commission. It covers 2001-02.

The report shows the NT finalised 46.3 percent of its non-appeal civil matters before the Supreme Court and Federal Court (Territory cases) compared with 94.3 percent in WA, 74.9 percent in NSW, 73.3 percent in Victoria, 69.1 percent in Qld, 94.3 percent in WA, 86.9 percent in SA, 59 percent in Tasmania and 48 percent in the ACT.

The Territory fared better with it's percentage of civil appeals finalised by the superior courts within 12 months at 94.5 percent (second rank).

Also, the percentage of non-appeal criminal matters finalised within 12 months in the Supreme Court was 85.8 percent (fifth rank).

The report also used "expenditure less income (excluding fines) per finalisation" as an efficiency indicator.

Expenditure less income per criminal finalisation for magistrates' courts only (excluding electronic and children's courts) was $415 nationally. Across jurisdictions, it was highest in NSW ($647) and lowest in Tasmania ($128). The Territory's figure was around $570-$580.

complexity and distribution

The Productivity Commission says the complexity and distribution of cases can vary between jurisdictions and when comparing the performance of different jurisdictions, it is important to note that unlike other jurisdictions, Tasmania, the ACT and the NT do not have three tier court systems.

The report also features Northern Territory Government comments which say, in part:

> *During the 2001-02 reporting year, the former Office of Courts Administration merged with related government agencies in the Northern Territory to form the Department of Justice. At the same time, the Northern Territory Government commenced significant financial reforms designed to increase efficiency and effectiveness in the delivery of government services, as well as a system of improved accountability and openness. Systems to implement accrual accounting, underpinned by Working for Outcomes objectives, were prepared by all agencies.*

The government says significant initiatives and improvements included:

- A review of its existing information systems, with a particular focus on the data reporting facilities and communication systems. The review looks at the enhancements needed to meet the future needs of the judiciary (including the magistracy) in areas such as caseload, activity, progress through the system including delays and case specific data.
- Major enhancement of civil case-flow in the local court to result from the introduction of electronic document lodgements in 2003.
- The improvement of video conferencing facilities in the larger courthouses.
- A number of "Courts and the Public" initiatives implemented by the Office of Courts Administration to enhance public confidence, improve access to and increase knowledge of the courts system.
- The start of the Fines Recovery Unit operations on 1 January 2002.