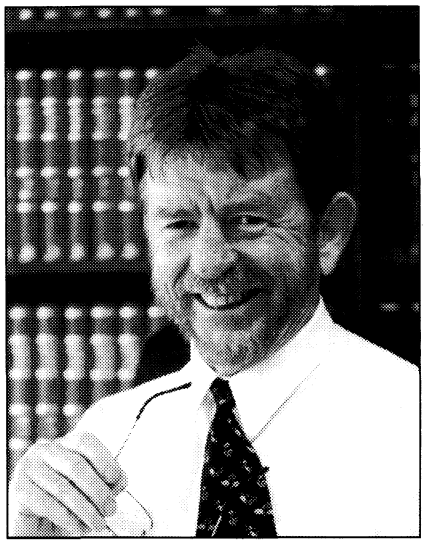
Interlocutory applications

"Never mistake motion for action"
Ernest Hemmingway



Hon Justice Riley

The Supreme Court Rules are designed to limit the need for interlocutory applications to the court. The Rules now permit matters that once called for, or allowed for, the intervention of the court to proceed without reference to the court. The Rules positively discourage the making of unnecessary applications by providing that each party shall bear its own costs of an interlocutory application "unless the court otherwise orders" (r63.18). The application of this rule is considered in *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143 and *Yow v NT Gymnastic Association Inc* (1991) 1 NTLR 180.

Before launching an interlocutory application you should consider all available alternative approaches. Bear in mind that, once commenced, such proceedings have the potential to become significant legal battles in their own right. They have the potential to divert resources from, and to distract you from, the preparation of the substantive proceedings.

Notwithstanding the effect of r63.18 there is also the prospect that debilitating costs orders may follow an unsuccessful or unnecessary application. In the event that you have concluded that such an application is necessary you will then turn to a consideration of how to proceed.

The approach of the advocate to a defended interlocutory application will reflect the approach adopted for a substantive hearing. Preparation will be the key. It will be necessary to formulate a case strategy relevant to the interlocutory application and to be guided by that strategy throughout the presentation of the application.

At an early time in the course of preparation you will clearly identify the source of the power that the court is being asked to exercise. This will usually be by reference to an identified rule within the relevant Rules of Court or by reference to the inherent power of the court.

If you are to rely upon the inherent power of the court, the basis of that submission should be determined in advance.

It is unlikely to be enough to merely assert that the court has inherent power. In many cases reference to authority will also be necessary and you should have the relevant authorities to hand.

If evidence is to be produced in support of the application you will ensure that the appropriate affidavit material is available in admissible form.

You should not permit yourself to be placed in a position where you have to seek to give evidence from the bar table to cover a deficiency in the material you present.

The need for such an application reflects inadequate preparation on your part. If your opponent is not cooperative you may need an adjournment to enable the appropriate information to be provided to the court in admissible form.

An adjournment is likely to have unnecessary and adverse cost consequences for your client.

When evidence is to be produced on affidavit in relation to an interlocutory matter, careful consideration should be given to the identity of the deponent.

This consideration will necessarily be in light of the proceedings as a whole and not just by reference to the application immediately to hand.

It needs to be borne in mind that the deponent may be required to attend to be examined before the court on the interlocutory application (r40.04).

You will need to ensure that the chosen deponent is both willing and available to be cross-examined should it become necessary.

Whether you want a particular witness exposed to cross-examination at an early stage in the proceedings may also be a matter for careful thought. If a witness is vague or is likely to present poorly for some reason you will not want to make that fact known to your opponent by presenting him or her for cross-examination on a preliminary matter.

It may be preferable to avoid exposing that potential witness to attack so early in the proceedings. You may prefer to have someone else who is familiar with the relevant material swear the affidavit.

In choosing your deponent you should consider the use of r43.03 which provides that, on an interlocutory application, an affidavit may contain a statement of fact based on information and belief if the grounds of that information or belief are set out.

One option commonly adopted, often without apparent thought for the consequences, is for the legal adviser to become the deponent.

Before you rush into making the affidavit yourself you should remember that you may thereby become the person who is required to attend for examination before the court.

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It is obviously inappropriate for you to be both counsel and a witness in relation to the matter and you will need to fully consider the implications of becoming the source of evidence in relation to a particular part of the proceedings, even at an early stage.

When you appear before the court to argue an interlocutory application you should present your argument in an ordered fashion. You will need to identify the evidence upon which you rely and be in a position to meet any objections to that evidence that may be made by your opponent.

You should have available to you all of the materials upon which you rely in a readily accessible form so that you can deal with any questions that may arise in discussion with the court. If you have prepared a chronology it is often convenient to identify the source of the information contained in the chronology by reference to the affidavit material or to the pleadings.

This will enable the court to quickly comprehend the factual basis upon which the argument is presented and will assist in the formulation of reasons for decision.

As with all appearances before a court or tribunal you should endeavour to present the application in a persuasive, interesting and ordered manner ensuring that you deal with all necessary matters in an effective yet concise way. Your case strategy will at all times guide the presentation of the argument.

Shoyer new Info officer

A former top Queensland bureaucrat has become the Territory's first Information Commissioner.

Peter Shoyer will take up his role in March. He was the Assistant Information Commissioner in Queensland and has a background in law.

Attorney-General Dr Peter Toyne says Mr Shoyer also played a key role in the development of informal resolution strategies for FOI disputes.

The Information Act was introduced last year and commences in July.

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I even heard that when the issue of the defendant's trial venue was debated, some Balinese people organised to pay the Indonesian Government trillions of rupiah in order to "buy" the defendants back into the custody of the Balinese Police.

There will be no few interested observers at the forthcoming trial.

Presumably the governments of those nationals who were slain, including our government, as well as independent jurist associations, will keep an eye on the proceedings.

Our association has a special interest in the proceedings: professionally and personally.

In that regard, we shall endeavor to follow and report back as comprehensively as possible the trial proceedings and their outcomes. The maximum penalty for acts of terrorism is the death penalty.

From what I saw and was told, anything less will be inadequate for the Balinese people. The penalty may well create a major issue.

Much of Indonesia's relatively fragile economic and political situation could well be affected by the outcome of these trials. The "democratic" President Megawati is under enormous domestic pressure.

The economic situation and the ubiquitous military hang over her like a cloud.

As it happens, her grandmother is Balinese and she is very popular on the island of Bali.

One can predict, even at this early stage, dissatisfaction and, perhaps, demonstrations by the Balinese if the offenders do not receive the maximum sentence available.①

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