

2001 LEGAL SYMPOSIUM

**Practical session on appearing in the Applications jurisdiction
with role play by experienced barristers and solicitors of
common errors and infelicities**

2 March 2001

Introductory remarks by Justice Atkinson

THE CALLOVER

Judge: Are there any consents or adjournments?

First Matter

Michael Liddy: Would Your Honour take the matter of *Immovable Object Pty Ltd v. Unstoppable Force Limited*? It is number 6 on the list.

Judge: Yes I have that.

M.L.: Your Honour, this matter is to be adjourned by consent to tomorrow.

Judge: Are any of the other parties here Mr?

M.L.: Mr Everkeen, Your Honour.

Judge: Is there an appearance slip Mr Everkeen?

Bailiff: I told Mr Everkeen to do an appearance slip.

M.L.: The matter is a consent order, Your Honour.

Judge: Mr Everkeen I asked you was there an appearance slip, is there an appearance slip?

M.L.: No, Your Honour.

Judge: Would you announce your appearance then?

M.L.: My name is Everkeen, from Almost Ready, The Litigation Lawyers, I appear on behalf of the applicant plaintiff, Immovable Force Pty Ltd, there will be no appearance on behalf of any other party, but, the matter is to proceed by consent.

Judge: Mr Everkeen are you an articulated clerk? Are you sufficiently informed of this matter to appear in this application?

M.L.: Yes, Your Worship. The parties have known for a week that the matter wasn't going to proceed today.

Judge: I beg your pardon.

M.L.: Sorry your Lordship I didn't mean to say 'Your Worship', I mean Your Honour.

Judge: Thank you Mr Everkeen. You may appear on the adjournment application. Mr Everkeen as I understand it this matter is set down on today's list for 2 hours. The list today was full. Presumably a number of litigants who perhaps would have desired their matter to be heard today have been put off to other days because of the presence on the list of this 2 hour matter in which you are involved. Why was it not adjourned on the papers? Was the Registry notified of this in advance?

M.L.: I don't know Your Honour.

Judge: Now you want the hearing to take place tomorrow. Unfortunately the list for tomorrow is unable to accommodate a 2 hour matter. The next day in which there are 2 hours available is Thursday of next week. I am concerned that the matter may take more than 2 hours. Is it appropriate that this matter be referred to the civil list?

M.L.: I'm not familiar with the issues, Your Honour.

Judge: Well, I am not going to adjourn the application to a specific date to the detriment of all other matters that might want to be set down on that date without knowing more about it. I take it you do not know whether or not the solicitors and barristers involved in the case are available next Thursday?

M.L.: No, Your Majesty, I apologise for that Your Eminence, I mean Your Grace, I mean Your Honour.

Judge: Mr Everkeen it seems appropriate to me that I adjourn this matter to the Registry. The parties can apply to set it down on a date when it is ready.

M.L.: Costs Your Honour?

Judge: I do not intend to make any order as to costs in respect of today. Next time you appear in Court, Mr Everkeen you should inform yourself as to the issues relevant to the matter generally and particularly those relevant to the application before the Court. You cannot assume that the Court will be able to accommodate every wish of the parties without the consideration of the

convenience of the Court and the other litigants.

Second Matter

Judge: Are there any other consents or adjournments?

Dalton: Would Your Honour take the matter of *Eidsvold v Geranium*. I have a draft order.

Judge: Ms Dalton this is an order for injunctive relief.

Dalton: Yes, Your Honour, exactly, an interim injunction.

Judge: I can't make this kind of order by consent - I need to read the material and exercise my discretion.

Dalton: There is no material Your Honour it is an interim injunction.

Judge: What do you mean there is no material? What has been served on the other side? What exactly are the other side consenting to? Has this draft order been served upon them?

Dalton: No Your Honour. This is an interim injunction. It's ex parte. The circumstances surrounding this matter are urgent. Nothing has been served on the other side - there is no opposition, that is why I am mentioning it now Your Honour so Your Honour can deal with it quickly.

Judge: Ms Dalton, I will set it further down the list. I expect you to inform the other side and endeavour to prepare some material.

No other consents or adjournments? I'll call the list.

Third Matter

Judge calls the matter of *Patience Virtue v The Sisters of Perpetual Suffering*

- PKF:** Your Honour, I have briefed Mr O Booker of Counsel to appear for the applicant defendant. Mr Booker is not able to attend this morning as he is in a trial in the District Court.
- Sue Brown:** I appear as Town Agent for the solicitors for the plaintiff.
- Judge:** When did the District Court trial start?
- PKF:** Yesterday Your Honour.
- Judge:** And how long was it set down for?
- PKF:** I'm not sure but two days I think.
- Judge:** Two days?
- PKF:** Well he told me that it would probably settle Your Honour and it hasn't yet so he just asked me to tell you to give the matter a "not before 4.30" time. He thinks he might be finished by then.
- Judge:** Ms Feeney, the Court is not subject to the convenience of counsel. The matter will be heard when it is called on the list whether Mr O Booker is available or not. What is the matter about?

- PKF:** It's an application to stay the plaintiff's claim until she is examined by doctor.
- Judge:** How long will it take. Will it exceed the estimate of 15 minutes?
- PKF:** I don't really know probably not.
- Judge:** Ms Brown what do you say about that?
- Sue Brown:** About what?
- Judge:** The time estimate.
- Sue Brown:** That sounds good to me.

Fourth Matter

- Judge:** The next matter on the list is *Mr and Mrs Homeowner v Builder Pty Ltd*
- Michael Liddy:** Your Honour, this is an unopposed application for summary judgment. The material is in order 10 minutes.
- Judge:** Thank you
- Judge:** I'll hear them in this Order, *Mr & Mrs Homeowner v Builder Pty Ltd*, *Patience Virtue v The Sisters of Perpetual Suffering* and *Eidsvold v Geranium*.

Summary Judgment Chamber Application
The Matter of *Mr & Mrs Homeowner v Builder Pty Ltd*

Judge: Yes, Mr Liddy

Michael Liddy Your Honour, this is an application for summary judgment. My client's a home owner. The Defendants are builders. The Defendants have done an atrocious job in building my client's house. The application's for a summary judgment.

Judge: Now, the matter is unopposed is that correct?

Mr Other: No, Your Honour, we oppose the application.

Judge: Your name is?

Mr Other: Mr Other

Judge: Mr Liddy I understood you to say in the Callover that the matter was unopposed. That's not the case?

Michael Liddy: There are no lawyers on the other side, Your Honour.

Judge: Mr Liddy is it your understanding that the Defendants do not oppose the application before the Court for summary judgment?

Michael Liddy: Well, Your Honour, they haven't got lawyers and haven't filed any material.

Judge: Mr Liddy, do the Defendants oppose your application? Perhaps I should ask Mr Other.

Mr Other, do you oppose the Plaintiff having summary judgment against you in the amount of \$350,216.45 as sought in the application?

Mr Other: Yes, Your Honour. In fact they owe us money they haven't paid for the work we done at their house. They've just got advice that the best way not to pay us is to sue us and then because we have been up in Darwin doing a job we have found it difficult to get lawyers to act for us. They're just trying to screw us.

Judge: Mr Other do you seek an adjournment of the hearing today so as to obtain legal representation?

Mr Other: Your Honour, I reckon if I can build a house I can build a case.

Judge: Mr Liddy would you please read your material?

Michael Liddy: Oh, Your Honour, I've read it.

Judge: Would you please read your material for the application. Do you have anything to hand up to me, Mr Liddy?

Michael Liddy: I read the application filed and serviced on 16 February 2001 and I read the affidavit of Harry Homeowner, sworn on 16 February 2001. I also read the Claim and Statement of Claim filed on 5 January 2001.

Judge: Mr Other, do you have any material?

Mr Other: There's heaps of materials we used in their house, Your Honour, bricks, tiles, carpeting..

Judge: No Mr Other, do you have documents that you wish me to consider in the application here before the Court.

Mr Other: I have 3 affidavits, Your Honour, one by myself, one by my foreman and one by my wife. They contain various annexures. They have been properly sworn to. Unfortunately because we only arrived back from Darwin yesterday we have not had the opportunity to file those, however, facsimile copies of unsworn affidavits were sent to the solicitors acting on behalf of the Plaintiff/Applicant more than a week ago. Sworn copies were seen by them with the annexures 4 days ago.

Judge: Mr Liddy is that correct?

Michael Liddy: Yes, Your Honour.

Judge: Do you oppose the Defendant/Respondent being given leave to read and file, the 3 affidavits he has, Mr Liddy?

Mr Liddy: Yes, Your Honour, that's totally unfair. The rules clearly say that the Plaintiff should have filed this material earlier. You can't just spring a surprise on us at the last minute when we are all ready to go and expect us just to be able to deal with it.

Judge: But I understand that you had the unsworn material more than a week ago and the sworn material for 4 days or so. Do you dispute that?

Michael Liddy: Oh no, Your Honour, but the rules say they've got to file it beforehand.

Judge: I grant the Defendant leave to read and file the affidavits that have been indicated.

Now, Mr Liddy, may I please see your outline of submissions.

Michael Liddy: Your Honour, I thought the matter really simple so I didn't need an outline.

Judge: Mr Liddy Practice Direction No 14 of 1999 provides that the court hearing applications will expect practitioners to provide written outlines of argument in all contested and ex parte applications. A separate copy of the material to be read should also be provided to my Associate. Now, Mr Liddy, as you do not have an outline could you provide a concise summary of your argument?

Michael Liddy: Your Honour, the Defendants built my client's house. They were 5 weeks late in finishing it, there is a clause in the contract which says that they have to pay \$2,000.00 a day liquidated damages for each day late.

Judge: Now what do the Defendants say about that? Do they accept that they are liable for that amount?

Michael Liddy: Your Honour, they say that is because of rain and a strike at their suppliers, delays were caused to the project but, like, it doesn't help my people now, does it?

Judge: Is the contract in the material before me?

Michael Liddy: The terms of the contract are not in dispute.

Judge: Mr Liddy, is the contract in the material before me?

Mr Other: Your Honour, I think you'll find a full copy of the contract with the relevant schedules appears as exhibit "ANO34" to the affidavit of my wife's Ann Other. The relevant extracts relating to delays caused by matters beyond the control of the parties appear at paragraphs 15 to 19 of the Affidavit of Ms Other. Exhibits 19 through 34 of Ms Other's affidavit are computer printouts from the Bureau of Meteorology (certified under the *Evidence Act*) showing the rainfall figures for the Brisbane region in the period with which we are concerned. The effect of the rain on the contract prior to the lockup stage is dealt with in my affidavit in paragraphs 74 to 107. The delays caused by the strike at the steel works is also dealt with in my affidavit.

Judge: Mr Liddy, what does your client say to that?

Michael Liddy: We don't believe them, Your Honour, we don't think it rained that much and they could have done other stuff. Stuff that didn't require them to be in the rain. I think that Mr Other and his wife must be cross-examined in respect of their evidence because my instructions are that it is just not true. I require the deponents of the affidavits for which Your Honour has given leave for the Respondent Defendant to file today, to be cross-examined.

Judge: Mr Liddy, leave to cross-examine in chambers is not given as of right. This matter has been estimated for 10 minutes on the basis that it was unopposed. It now seems to be your position in respect of the first part of the claim, which you told me was uncontentious, now will require disputes of fact to be resolved after hearing oral evidence. Is that right?

Michael Liddy: Well yes, Your Honour.

Judge: It seems to me that there is a triable issue in respect of that first part of the claim. I would not be minded to grant summary judgement at least in that respect. Are there other aspects of your claim?

Michael Liddy: Yes, Your Honour. The house isn't what my clients asked the Defendants to build. Aesthetically it is appalling. People keep driving past the house slowing down and they're obviously laughing. My clients wanted basically a Swiss chalet style house although with some pretty major Tuscan influences. However, an agreed variation was made to the contract to put a minaret towards the back more to the left hand side. The thing is the house looks atrocious. People are laughing at my clients. Their kids are being bullied and stuff at school. One of the kids now has to go to a private school rather than the state school because people at private schools all have weird looking houses. So my clients seek judgment for \$250,000.00 damages for the humiliation and heartache and disappointment they have suffered directly as a consequence of the defendant's inability to construct an aesthetically pleasing house.

Judge: Mr Liddy, your claim, therefore, is not in debt or for a liquidated demand. You seek judgment and then an assessment of damages, is that correct?

Michael Liddy: Your Honour, what my clients have had to go through would be worth at least \$250,000.00 and my client abandons any claim in excess of that. We just want to get this thing over with. That's why we bought the application for summary judgment. The rules are meant to encourage the quick and cost effective resolution of matters. My clients don't want a full trial. They just want their money so they can get on with their life.

Judge: I take it that the Defendant intends to dispute the claim which Mr Liddy calls injurious aesthetics?

Mr Other: In paragraphs 250 to 297 of my affidavit I refer to the directions we were given by the Plaintiffs in respect of aesthetics. The relevant correspondence is attached and Your Honour will see that each of the variations to the contract are supported by written variations which have been certified by the Building Services Authority. If it is any consolation I do agree with the submission that the house looks atrocious. That matter is not in dispute. That the Plaintiffs and the Plaintiffs' family are being ridiculed is not a matter upon which we can comment at this stage, our investigations in this regard remaining incomplete, however, we would be extremely surprised if the family are not subject odium and contempt as a result of the monstrosity they required us, pursuant to contract, to complete.

Judge: Mr Liddy, it seems that both elements of your clients' claim are disputed by the Defendants. It seems that there is no simple way for the Court to resolve this matter ahead of a trial. The issues that are raised are disputes of substance and it does not seem that this is an appropriate matter where the Court would attempt to deal with the Plaintiffs' claim summarily.

Michael Liddy: Your Honour, if you think about it, it is all pretty simple.

Judge: Mr Liddy, I have "thought about it" before I started speaking. There are disputes of fact and . . .

Michael Liddy: But Your Honour, what I'm trying to say is.

Judge: Mr Liddy, please do not interrupt me when I am speaking. As I was saying, there are difficult issues of fact and . . .

Michael Liddy: With respect, Your Honour, and not wanting to cut across you but anticipating that this matter will be at an end very soon, and knowing that my duty to my clients dictates that I must put my point across, let me say that there is a High Court case that says just because there is a hard matter at a summary judgment level doesn't mean that you shouldn't make a decision. In fact, the decision goes on to say that you should make a decision if the matter is hard because that will save the Court having to deal with that hard matter at another time, which is good because it allows other people to have their matters heard, you know what I mean?

Judge: Mr Liddy, do I understand you to be referring me to an authority?

Michael Liddy: Yes, Your Honour, it's a High Court one.

Judge: And what is its name?

Michael Liddy: I'm not sure Your Honour, but, the bit I'm talking about has that McTiernan Judge and I think it's ages ago, like people have been citing it for years, it might even be from, like, the 50's or maybe the 60's.

Judge: That's not very helpful, Mr Liddy.

Michael Liddy: And Your Honour, there's another judgment from the High Court, of Gaudron where His Honour makes it extremely clear.

Judge: Did you refer to His Honour Justice Gaudron?

Michael Liddy: Yes, Your Honour, in Gaudron's judgment he says..

Judge: If you were to look in the front of the law reports, Mr Liddy, you might notice that Justice Gaudron is female.

Michael Liddy: Oh, sorry Your Honour, it's hard to know, I just assumed ... anyway.

Judge: In any event, am I correct in assuming that you don't know the name of the judgment of Her Honour Justice Gaudron **either**?

Michael Liddy: Yes, Your Honour.

Judge: I'm also right in assuming that you accept that there is a dispute in respect of the facts in this matter but that you client says there should not be a dispute because the case is unanswerable?

Michael Liddy: Exactly, Your Honour.

Judge: Mr Liddy, I am not prepared to grant the application for summary judgment. In any event I have looked at the pleading on your clients' behalf in this matter and it does not comply with the Rules in many respects. It contains large tracts of evidence but does not give proper particulars of the contract; it does not specify the damages that are sought in the body of the pleading and it seems to seek relief on behalf of the children of your clients pursuant to a contract to which the rest of the pleading seems to suggest they were not a party. Further, the relief claimed pursuant to the *Trade Practices Act* is not supported by any facts that have been pleaded.

Michael Liddy: Your Honour, the precedent we used has been used in our office for ages. There has never been any criticism of it before. I think that if you look at it carefully you will see that, even if there is some stuff that might be added, there is enough there to get us off the ground, you know what I mean?

Judge: There is no application before this Court to strike out your pleading as disclosing no cause of action. I have had a look at the pleading, it seems to me that if such an application were made, as an absolute minimum, significant amendment would be required to the existing pleading to ensure it was not struck out. In any event today I am only dealing with the application before me which is for summary judgment. That application is refused. Were it not for the fact that the Defendant has not considered it necessary at this stage to engage lawyers, I

would have ordered costs on an indemnity basis against the applicant.

The Matter of *Patience Virtue v The Sisters of Perpetual Suffering*

PKF: Your Honour, my name is Patricia Feeney I'm a solicitor employed by City and Fitful lawyers. I appear for the applicant defendant.

SB: Your Honour, my name is Brown I appear as Town agents for Rural and Graceful the solicitors for the plaintiff respondent.

JUDGE: Yes Ms Feeney.

PKF: Your Honour this is an application to have the plaintiff's action stayed until she is examined by Dr Metropolis. We have asked the plaintiff to attend and she won't.

JUDGE: Do you have any material?

PKF: Sorry?

JUDGE: Do you wish to read any material? The documents upon which you intend to rely. The application? Do you have affidavits?

PKF: OK. Take notice that the defendant in this matter applies....

JUDGE: You don't have to read them out just tell me the documents you intend to rely on.

PKF: Oh good. Well there's the application Your Honour.

JUDGE: Filed?

PKF: [Blank look]

JUDGE: Do you have any affidavit material?

PKF: Yes Your Honour there is an affidavit by me I'll give it to you now.

JUDGE: Has it been filed?

PKF: Not yet.

JUDGE: Ms Feeney this affidavit is not sworn!!!

PKF: Isn't it? I must have forgotten to do that. I can do it now if you like.

JUDGE: Do you undertake to file a sworn affidavit? In that case I shall mark this draft affidavit "Exhibit 1"

JUDGE: Ms Brown do you have any objection to this draft affidavit being made an exhibit?

SB: No Your Honour. I also have an affidavit to be filed by leave. The affidavit of Octavius Graceful sworn 2 March 2000.

JUDGE: Yes. Any objection to that Ms Feeney?

PKF: No Your Honour.

JUDGE: Yes Ms Feeney

PKF: Your Honour the plaintiff is suing my client's hospital regarding an operation she had in 1998. She says that ...

JUDGE: Do you have an outline of submission?

PKF: No Your Honour. Mr Booker said he might do one if he got time but he hasn't given me one at this stage.

JUDGE: Well Ms Feeney the practice directions of this court apply to solicitors who appear as well as to barristers

PKF: Well I'm sorry Your Honour but I really didn't think I was going to have to do this today Mr Booker said that he was 80% certain his trial would settle and...

mobile phone rings.

Hang on a minute Your Honour that might be important.

Answers phone.

No No She's hearing it now. Yes now and I've got no idea what I'm doing when are you going to get here? No we didn't manage to get the other judge. What? What do you mean- hold on

Your Honour its Mr Booker. He said he can't come down do you want to talk to him?

JUDGE: No Ms Feeney. Firstly you should have briefed a barrister who was not double-booked; secondly if you did you should have known enough about the case and the procedure of the court to argue it yourself; thirdly it is utterly unacceptable to have a mobile phone on in court, let alone to have it ring and to answer it and then to expect me to engage in conversation on it. Turn off your mobile phone and go on with your application before I call for the senior partner of City and Fitful.

PKF: Well as I said, the plaintiff is suing the hospital because she had an operation and had a pair of surgical forceps left inside her and she says she has psychiatric damage which is complete rubbish if you ask me so we asked her to come to Brisbane to be examined by Dr Metropolis and she refused. And that's about it Your Honour.

JUDGE: Alright, Ms Brown

SB: Your Honour I hand up my written submissions.

JUDGE: Thank you. Do you have any thing else you want to say.

SB: No Your Honour.

JUDGE: Ms Feeney this material says that Mrs Virtue is a paraplegic and finds travel difficult. She lives in Charters Towers and has been asked to travel to Brisbane. What arrangements have been made in regard to her travel?

PKF: Well Your Honour the fact that she's a paraplegic is not my client's fault – I mean it's got nothing to do with the claim against my client. I said we'd pay for a bus ticket.

JUDGE: But Ms Feeney there is a report here from Dr Caring who says that the plaintiff cannot travel by bus and she needs assistance to travel by train or aeroplane.

PKF: Yes but our doctors say that's not necessary. Anyway my client can't afford to bring two people to Brisbane by plane.

JUDGE: Well could Dr Metropolis go to Charters Towers to see the plaintiff?

PKF: Of course not he's way too important and busy for that and besides that would be even more expensive.

JUDGE: Do you have any evidence of any of that?

PKF: Not with me Your Honour I didn't bring the whole file it was too heavy.

JUDGE: Ms Feeney isn't it usual to submit a panel of doctors to the plaintiff?

PKF: I asked my barrister about that and he said no. He said there were some cases about it.

JUDGE: What are those cases? – Do you have copies?

PKF: No Your Honour Mr Booker has. He said you only need a panel if it's a car accident or workers comp claim and there are cases about it. He did say the name of one of the cases but I wasn't really listening so I can't remember.

JUDGE: You are wasting the Court's time Ms Feeney. The application is dismissed.

PKF: Wait a minute Your Honour, you haven't dealt with the other part of the application about delivery of a further list of documents.

JUDGE: Have you anything to say about that Ms Brown.

SB: I don't have instructions about that Your Honour.

JUDGE: Very well Ms Feeney where is your material showing you have complied with Rule 444.

PKF: What's that Your Honour?

JUDGE: Your application is dismissed Ms Feeney. I suggest you consult Rule 444 and the rules in general in some detail before you next appear in court.

Application For an Interim Injunction in the Matter of *Eidsvold v Geranium*

Judge: Next matter.

Dalton: Would Your Honour take the matter of *Eidsvold v Geranium*.

Judge: Oh yes. Ms Dalton. I remember this matter from the Callover. Have you had time to prepare material?

Dalton: No Your Honour.

Judge: Well, you have telephoned the other side and alerted them to the fact that you are making this application?

Dalton: No Your Honour - I don't think Your Honour appreciates the urgency of this application. I have come here to make an application on an urgent interim ex parte basis.

Judge: If you have had time to prepare a draft order then you have had time to prepare at least an originating application, if not affidavit material.

Dalton: Your Honour, there is plenty of authority to the effect that in circumstances of urgency the court has jurisdiction to hear applications without the necessity of formal material. May I hand Your Honour some authorities. [PRODUCES VERY LARGE BUNDLE OF AUTHORITIES] and if I could take Your Honour to the first of those. *Begins long factual recitation from rather old case.*

Judge: Isn't this case rather dated. Hasn't the law regarding the grant of ex parte injunctions been set out by Justice Byrne in *Re Griffiths* reported at [1991] 2 QD R 29.

Dalton: Yes Your Honour. I thought I would start by tracing the origins of the principles which are applicable to this case and following the history through, bring Your Honour up to date and Your Honour will see that I have arranged the cases in Your Honour's bundle in chronological order so that Your Honour may better see the development of the historical principles which relate to the granting of interim injunctions.

Judge: Ms Dalton, you may take it that I am aware of those principles and you may also take it that I am aware of the principles which allow me to act without formal process when there are circumstances of urgency. Tell me why the matter is urgent.

Dalton: My client, Eidsvold, owns a property on the Gold Coast on which there is situated a large warehouse. Geranium took a lease of this warehouse four years ago. That lease contained a term that they would not use the warehouse for any purpose contrary to the Gold Coast City Town Plan. In fact, and it has now come to my client's attention, that

this was quite without any planning permission, Geranium used the warehouse for spiritual meetings and seances and in fact Geranium Pty Ltd is actually a company which holds all its assets on trust for something which is registered in America as a religious organisation called The One True Way. It came to my client's attention that Geranium has made large structural changes to the interior of the warehouse and in fact created a mezzanine floor and a sound recording studio and constructed three sets of bathrooms and toilets. All of this was done without planning permission.

Judge: Yes, but why do you need urgent injunctive relief.

Dalton: Because Geranium is now threatening to vacate the premises, in breach of its lease and it is planning to remove all the structural improvements it has put in the warehouse. My client is outraged because under the terms of the lease all the structural improvements belong to the landlord and furthermore my client fears that in removing the structural improvements Geranium will damage the fabric of the building. The reason the matter is so urgent is that it has become apparent to my client that Geranium plans to begin this construction work, or should I say de-construction work, on Monday at 9.00am.

Judge: You say this became apparent to your client, who on behalf of your client.

Dalton: It became apparent to Mr Eric Eidsvold in discussions with a Ms Acacia of Geranium Pty Ltd.

- Judge:** When did these discussions take place?
- Dalton:** Oh, I am not sure Your Honour, quite recently.
- Judge:** When did these discussions take place?
- Dalton:** I'll just check with my instructing solicitor ... a week ago Your Honour. Last Friday afternoon.
- Judge:** So you have delayed for a week, not prepared any material and not even informed the other side that the injunction was being sought
- Dalton:** Well Your Honour, at the time, there was no necessity to invoke the court process because it was thought that the parties could come to some arrangement between themselves. Indeed Your Honour, there were discussions going on between Mr Eidsvold and Ms Acacia at the time to the effect well, Your Honour, it was hoped Your Honour that the disputes between them could be resolved amicably.
- Judge:** What disputes between them?
- Dalton:** The disputes as to whether or not Geranium ought to have made structural changes to the building.
- Judge:** Ms Dalton, when did these discussions take place?
- Dalton:** Well, Your Honour they have been ongoing - ongoing until very recently.
- Judge:** No, Ms Dalton answer me precisely, when did these discussions take place?

Dalton: Well Your Honour, they began last Friday when Mr Eidsvold discovered that - completely in breach of all town planning regulations and Your Honour, I stress this, completely in breach of the lease - there were structural alterations made to the warehouse.

Judge: So the discussions between the parties began last Friday.

Dalton: Yes, Your Honour.

Judge: When did they conclude?

Dalton: Well, Your Honour they, in a sense Your Honour, they perhaps haven't finally concluded. However, Your Honour my client has become somewhat disenchanted with the process of negotiation between the parties and is therefore moved to approach the court before his rights are infringed.

Judge: Do you mean there are still negotiations ongoing between the parties?

Dalton: Well Your Honour, as at last night the parties were still discussing, but had been unable to reach an agreement and further discussions are planned to take place, there is a meeting which is planned to take place this afternoon beginning at 5.00pm. However, Your Honour, my client's fear is that if agreement is not reached at that meeting it will be far too late to stop the demolition works which are proposed to begin at 9.00am on Monday.

Judge: Ms Dalton, is your client offering an undertaking as to damages?

Dalton: No Your Honour, we might lose in the end.

Judge: Would there have been any difficulty in informing the respondents of your application?

Dalton: No Your Honour, but we didn't want them to know about it.

Judge: There are instances where it is necessary to act immediately and the Court will make an order ex parte. But in this instance, the applicant could have prepared written material and served the respondent or, if not, at least informed the respondent of the application and that it would be heard today. An applicant for an ex parte injunction bears a substantial burden to inform to the Court of all of the material facts. I am not satisfied that has been done in this instance. Further no undertaking as to damages has been offered. The application is dismissed.

Any other matters? There being no other matters, the Court will be adjourned.

Concluding remarks by Justice Atkinson, Michael Liddy, Patricia Feeney and Jean Dalton.