# EVIDENCE, PRACTICE & PROCEDURE:

# INTERLOCUTORY INJUNCTIONS

(CPD 2 – 17 February 2005)

## General Principles and Practice

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## Introduction

1. An injunction may generally be described as an order of a court, made in personam, which protects rights against invasion or threatened invasion by prohibiting the doing of a wrongful act, or by requiring the undoing of a wrongful act. (Various "definitions" of injunctions are given in the authorities and in leading texts.)[1]

2. The description I have given is a generally accurate definition of final injunctions, but "(l)egal usage alone and not logic, decides which court orders can, and which cannot, accurately be described as injunctions".[2] The invention – or, perhaps, the re-invention – of "Mareva" orders, and the invention of "Anton Piller" orders, in 1975, emphasise the fact that conventional "definitions" of injunctions may mislead. Mareva orders forbid acts which are not in themselves necessarily wrongful. Interlocutory injunctions, and injunctions pending appeal, which are usually granted to preserve the "status quo", are also in a different category: they are granted before a final decision is made upon the question whether there is any relevant wrongful act.

3. Injunctions are, of course, directed against a person. In a sense, most orders, even the common order for the recovery of money, are "against" a person. But injunctions are different from such orders. An element of the description I have

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1 See, e.g., *Cardile v LEO Builders Pty Ltd* (1997) 198 CLR 380, 394; Sir Frederick Jordan, Select Legal Papers, 6th ed, p142; Spry, *Equitable Remedies* (5th ed, 1997), p322; Kerr on Injunctions, 6th ed, pl; Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 4th ed, p703; Tilbury, *Civil Remedies*, Volume 1, p272.

2 Meagher et al, p703

given is that injunctions – like other equitable remedies – are orders "in personam". That reflects the equitable origin of injunctions. Orders by the chancery courts, where injunctions originated, were made with reference to the moral duty of the respondent, the enforcement of which was then thought to justify measures against the person. (The early chancellors were usually ecclesiastics, and it has been said that the nature of the remedies was influenced by that fact.)[3]

4. Contravention of an injunction is a contempt of court. Under UCPR, the remedies for contravention of injunctions are (rr 898, 899) punishment for contempt (rr 904, 925-932), seizure of property under an enforcement warrant (rr 904, 906-912, 917-920) and substituted performance (r 899). It is the inherent jurisdiction of the court which is exercised: the principal purpose of these remedies is "to protect the effective administration of justice by demonstrating that the court's orders will be enforced".[4] (Of course, the circumstances of the contravention – e.g., whether it was casual, accidental, unintentional or wilful, etc – govern the question of which remedy may or should be ordered.)[5]

5. It is partly the drastic nature of the remedies for contravention of inunctions that renders them such effective weapons "in the armoury of litigation tacticians", particularly in commercial disputes at the interlocutory stage.[6] Indeed, Mareva and Anton Piller orders have been called the law's "nuclear weapons".[7] Some people may ignore orders for the recovery of money with impunity because their assets, if they have any, are beyond the reach of creditors, but the threat of jail for non-compliance puts injunctions in a different category.

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3 See per Kirby P in *Silktone Pty Ltd v Devreal Capital Pty Ltd* (1990) 21 NSWLR 317, 322 referring to H Potter, An Historical Introduction to English Law, 3rd ed (1948), London, 154.

4 *Harris v Muirhead* [1993] 2 Qd R 527.

5 See *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 109-115, in which the use of conditional and continuing, daily fines, and "suspended sentences" were approved for use in appropriate cases. A suspended sentence was imposed in *Harris v Muirhead*.

6 The quote is from Sofronoff, *Interlocutory Injunctions Having Final Effect*, 61 ALJ 341.

7 *Bank Mellat v Nikpour* [1985] FSR 87, 92.

6. The injunction enjoys a particular advantage over other orders against "$2 companies", because directors, managers, and others who knowingly permit or cause the company to contravene the injunction subject themselves to the risk of personal liability for fines, seizure of property, and imprisonment.[8]

**Terminology**

7. An interlocutory injunction is granted only until trial or further order. An interim injunction is in force only until some specified date or until further (earlier) order. It is usually granted on an ex parte application, or where the respondent only has short notice. The object is to regulate the position for a short time, only until both sides have the opportunity to be heard on whether or not an injunction should be granted until trial. A final injunction is granted after a full investigation of the merits of the case at trial.

8. A prohibitory injunction directs a person to refrain from embarking on or continuing with a course of conduct e.g., conduct in breach of contract. A mandatory injunction directs the performance of a positive act, as by directing a building to be demolished. A quia timet ("because he fears") injunction is granted to avoid a threatened (not existing) injury to the applicant's rights or to require the respondent to rectify the effect of a wrongful act which, if not rectified, will cause further damage.

9. The Mareva order[9] is one form of quia timet injunction. It restrains the defendant from removing assets from the jurisdiction or disposing or dealing with assets within the jurisdiction so as to defeat an applicant's claim for a certain or approximate sum. The Anton Piller Order[10] is a mandatory injunction, by which the Court compels a form of discovery, which authorises the applicant to search for articles and evidence relevant to an action or a

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8 The liability of directors is discussed in *Madeira v Roggette Pty Ltd* [1990] 2 Qd R 357 at 364-5, in which the Court committed a company's director who had arranged for the destruction of a shop in contravention of an injunction against the company, of which injunction the director was aware. An appeal was dismissed: *Madeira v Roggette Pty Ltd (No 2)* [1992] 1 Qd R 394, 403. See also, e.g., *Re Intex Consultants Pty Ltd* [1986] 2 Qd R 99.

9 *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509.

10 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

proposed action, to inspect the evidence, and to remove it to prevent its removal, destruction or concealment by the defendants.

## Interlocutory injunctions

10. This paper concerns interlocutory injunctions. Issues specifically related to Mareva orders and Anton Piller orders are not discussed.

11. Generally, interlocutory injunctions are necessary only because of the inevitable delay between commencement of an action and a hearing on the merits. Interlocutory injunctions pending appeal are in a similar category.[11] Furthermore, (unlike Mareva orders and Anton Piller orders) they must be granted as ancillary to and in aid of a claim for final "in personam" relief, such as a final injunction, specific performance etc.[12]

## Jurisdiction and Power

12. Jurisdiction is conferred upon the Supreme Court to grant injunctions by ss 180-185, 199-201, 244[13] and (specifically as to interlocutory injunctions) 246 of the *Supreme Court Act* 1995,[14] and the inherent jurisdiction.[15]

13. Federal jurisdiction is conferred on the Supreme Court by the cross-vesting legislation.[16] In addition, various other Queensland and Commonwealth Acts

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11 *Jesasu Pty Ltd v Minister For Mineral Resources* (1987) 11 NSWLR 110, 123.

12 *Siskina v Distos Compania Naviera SA* [1979] AC 210, 256; *Jackson v Sterling Industries*, 61.

13 See *Bank of New Zealand v Jones* [1982] QdR 466.

14 Early sources of jurisdiction were ss 20-22 of the *Supreme Court Act* 1867 and ss 4(1)-(4), (7), (8) and s 5(8) of the *Judicature Act* 1876; see also McPherson, Supreme Court of Queensland, pp95-98, 126-127, 154-166; *Injunctions*, D Mullins (rev'd Bates, Lynch) in Moynihan, *Court Forms, Precedents & Pleadings, Queensland* (Butterworths) at p. 35,041

15 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 (CA); Mason K, *The Inherent Jurisdiction of the Court*, (1983) 57 ALJ 449.

16 *Jurisdiction of Courts (Miscellaneous Amendments) Act* 1987 (Cth); *Jurisdiction of Courts (Cross-Vesting) Act* 1987 *(Cth); Jurisdiction of Courts (Cross-Vesting) Act* 1987 *(Qld).*

vest jurisdiction and confer power on the Supreme Court to grant injunctions in particular cases.[17]

14. The District Court is not a court possessing general jurisdiction, but it has had quite a broad power to grant injunctions since the 1989 amendments to the *District Courts Act* 1967. It may do so in two classes of cases prescribed by that Act.

15. The first is where there is an actual, threatened or apprehended trespass or nuisance to land, the value of which does not exceed $250,000.00 (s 68(1)(b)(xii)), which reflects the second part of s 5(8) of the *Judicature Act 1876*. In such a case, the claim may seek an injunction either alone or with a claim for damages.

16. In the second class of cases, there must be an action otherwise within the District Court's jurisdiction (e.g. a personal action claiming recovery of no more than $250,000.00, under s 68(1)(a), or an action of the kind described in s 68(1)(b)). In such a case – and only where such a claim is actually made in a proceeding that has commenced, or undertaken to be commenced – the District Court may give ancillary injunctive relief (s 69(1), (2)(b)).[18]

17. The Federal Court possesses the jurisdiction vested in it by laws made by the Parliament (s 19(1) of *Federal Court of Australia Act* 1976), and may grant all appropriate remedies and make appropriate orders in respect of all legal and equitable claims made in matters within that jurisdiction (see ss 22, 23). Thus, these provisions – and the implied power of the Federal Court – empower that Court to grant injunctions in matters otherwise within its jurisdiction.[19] The *Trade Practices Act 1974* is, perhaps, the most well known statute which confers a jurisdiction on the Federal Court in which injunctions

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17 As to particular statutes vesting jurisdiction and power: see *Injunctions*, D Mullins (rev'd Bates, Lynch) in Moynihan, *Court Forms, Precedents & Pleadings, Queensland* (Butterworths) at p. 35,041 [34,050], [34,100].

18 *Startune Pty Ltd v Ultra-Tune Systems (Aust) Pty Ltd* [1991] 1 Qd R 192; *Matelot Holdings Pty Ltd v Gold Coast City Council* [1993] 2 Qd R 168; see *Pelechowski v Registrar, Court of Appeal* (1999) 73 ALJR 687.

19 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 616, 618, 621, 622-3, 628-30.

are commonly granted. (It also confers further, express powers to grant injunctions – see e.g., s 80.)

18. There are, of course, other statutes conferring jurisdiction in the Federal Court. In some cases the terms of those statutes implicitly restrict the Federal Court's wide power under the *Federal Court of Australia Act* to grant injunctions.[20]

## General Principles

19. The broad enquiries in an application for an interlocutory injunction are:[21]
    (a) Is there a triable issue?
    (b) If so, does the balance of convenience favour the grant of an injunction?

### *Triable Issue*

20. In Queensland, it has been authoritatively held that this first inquiry is whether the applicant has established that there is a serious question to be tried (that the applicant is entitled to final relief of a kind that justifies an interlocutory injunction).[22]

21. Although it is necessary to be aware of the (formerly) competing "prima facie case" test[23], that debate is no longer of any moment here. (It may never have been of any practical significance).[24]

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20 See e.g., *Lawrence v Australian Workers' Union* (1983) 46 ALR 389, 396-7.

21 *Murphy v Lush* (1986) 60 ALJR 523, 524; *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd* [1991] 1 Qd R 301, 303 (Full Court), following *Castlemaine Tooheys Limited v South Australia* (1986) 161 CLR 148, 153; *Shiel v Transmedia Productions Pty Ltd* [1987] 1 Qd R 199, 203.2 (Full Court).

22 *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd* [1991] 1 Qd R 301, 303 (Full Court); *Queensland Industrial Steel Pty Ltd v Jensen* [1987] 2 Qd R 572; *Sheil v Transmedia Productions Pty Ltd* [1987] 1 Qd R 199. This test derived from *American Cyanimid Co v Ethicon Ltd* [1975] AC 396; *Murphy v Lush* (1986) 55 ALR 651; *Australian Course Grains Pool Pty Ltd v Barley Marketing Board of Queensland* (1983) 46 ALR 398; *Tableland Peanuts Pty Ltd v Peanut Marketing Board* (1984) 52 ALR 651; *A v Hayden (No 1)* (1984) 56 ALR 73; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; *Cohen v Peko Wallsend Ltd* (1986) 68 ALR 394.

23 Deriving from *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 622; see e.g., *Elliot v Seymour* (1993) 22 Leg Rep 1 at 2 (note 5).

24 *Shercliff v Engadine Acceptance Corp Pty Ltd* [1979] 1 NSWLR 729; *Declarations, Injunctions, and Constructive Trusts*, (1980) 11 UQLJ 121, at 128 (per Sir Anthony Mason).

***Balance of Convenience***

22. The second inquiry is whether the balance of convenience lies in favour of granting the injunction[25], i.e., whether the injury to the applicant occasioned by refusal of the injunction outweighs the injury to the respondent if the injunction is granted.[26]

23. It was put in this way by Hoffman J, in *Films Rover International Ltd v Canon Film Sales Ltd* [1987] 1 WLR 670 at 680:[27]

> "The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that 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 I have described."

24. The balance of convenience issue comprehends questions as to the adequacy of an award of damages, the availability and sufficiency of the usual undertakings as to damages, and the risk of irreparable injury to a party if the injunction is granted or refused.[28]

***Undertaking as to Damages***

25. UCPR incorporates the longstanding practice[29] that (except very rarely[30]) the Court will not grant an interim or interlocutory injunction (or Mareva or Anton Piller order) without the usual undertaking as to damages: r 264(1).

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25 *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd* at 303-4, 311.

26 *Chappell v TCN Channel 9 Pty Ltd* (1988) 14 NSWLR 153, 158.

27 Cited will approval by Gummow J in *Businessworld Computers Pty Ltd v Telecom* (1998) 82 ALR 499, 502, 35 and by Jerrard J in *Bingham v 7-Eleven Stores Pty Ltd* [2003] QCA 402 at [41].

28 *Active Leisure (Sports) Pty Ltd* (supra).

29 *Queensland Lithographic Process Co. v McKellar* (1890) 4 QLJ 21.

30 For example, an undertaking is not usually required from the Crown, unless it has involved itself in a commercial transaction: *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39.

26. The usual undertaking "means an undertaking to pay a person (whether or not a party to the proceeding) who is affected by the order, an amount the court decides should be paid for damages the person may sustain because of the order.": r 264(5)[31].

***Relationship between Triable Issue, Balance of Convenience, and Undertaking***

27. The usual undertaking is of particular relevance in the balance of convenience inquiry. In effect, that inquiry may be restated as being whether the potential injury to the applicant outweighs such injury to the respondent as will not be avoided by the respondent resorting to its rights under the undertaking.

28. The "triable issue" inquiry is also related to the balance of convenience, in the sense that a more convincing case is required to justify the order in some cases than in others.[32]

29. In applications for interlocutory injunctions which will finally resolve the litigation, the strength of the applicant's case often assumes great significance.[33]

30. The strength of the applicant's case is also often important when an interlocutory mandatory injunction is sought,[34] but whether a "high degree of assurance" must be shown to justify an interlocutory mandatory injunction is controversial.[35]

31. Although the strength of the case can be material, it is ordinarily impracticable for the court to resolve factual disputes on an application for an interlocutory injunction; this is not a preliminary trial.[36]

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31 The predecessor to this rule (Practice Direction No. 5 of 1982) confined the undertaking to any "party" restrained or affected by the injunction.

32 *Bingham v 7-Eleven Stores Pty Ltd* [2003] QCA 402 at [41], [108]; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 155 (Mason ACJ); *Slater Walker Superannuation Pty Ltd v Great Boulder Gold Mines Ltd* [1979] VR 107, 110.

33 Sofronoff, *Interlocutory Injunctions Having Final Effect*, (1987) 61 ALJ 341.

34 *Active Leisure (Sports) Pty Ltd; HB Homes Pty Ltd v Bee* [1986] Qd R 379, 381 (McPherson J); *Intasys Billing Technologies (Asia Pacific) Pty Ltd v Sokolov* [2002] QSC 338 (White J); *Gillespie v Whiteoak* [1989] 1 Qd R 284; c.f. *Businessworld Computers Pty Ltd v Australia Telecommunications Commission* (1988) 82 ALR 499.

35 *Bingham v 7-Eleven Stores* [2003] QCA 402, [106]-[107].

36 *Beecham Group Ltd* (supra) at 622.

## Principles In Some Particular Categories

### *Restraining the Enforcement of Mortgages*

32. A particular approach is adopted by the Court when a mortgagor seeks to restrain a mortgagee from exercising a power of sale. The Court of Appeal has affirmed the general rule[37] that a mortgagee will not be restrained from exercising its power of sale unless the amount of the debt is paid, or paid into Court, except where the validity of the mortgage or the present availability of the power of sale is in issue[38] or where the amount claimed by the mortgagee is clearly wrong.[39]

33. In one case it was said that a failure to tender payment or to offer to submit to a condition of payment does not constitute a bar to the grant of a stay or a judgment for possession or to the grant of other interlocutory relief to a mortgagor to stay or prevent the exercise by a mortgagee of disputed powers of sale or entry into possession, although in that case it was held to be "a very weighty consideration militating against the grant of such relief in all the circumstances".[40]

34. Extensive reviews of the cases, and of the various justifications advanced for this general rule, may be found in various articles.[41]

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37 *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161; *Commonwealth Bank of Australia v J E Frost and Associates Pty Ltd* (9/6/93, unrep. At 11-12) *Burman v AGC (Advances) Ltd* (1993) Q ConvR 54-449, 59,429. More recent decisions are collected in *Eastgate Properties Pty Ltd v J Hutchinson Pty Ltd* [2003] QSC 360 (Mullins J) and *Andrew Garrett Wine Resorts Pty Ltd v National Australia Bank Ltd* [2004] SASC 60. There are apparent exceptions for claims under the *Trade Practices Act* 1974, see, e.g. *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540, 545, referred to in many decisions.

38 *Harvey v McWalters* (1948) 49 SR (NSW) 173, 178..

39 *Clarke v Japan Machines (Australia) Pty Ltd (No. 2)* [1984] 1 Qd R 421 at 422-3. This case also has been referred to in numerous decisions.

40 *Rahme v Commonwealth Bank of Australia* (1993) 68 ALJ 53, 54, per Deane J.

41 See, e.g., Bryson J, *Restraining Sales by Mortgagees and a Curial Myth*, ABR Vol 11 No 1, p. 1; 66 ALJ 863; Aitken, *Injunctive Relief to Prevent Enforcement of a Mortgage*, (1992) 300(10) LSJ 58.

***Restraining the Publication of Defamations***

35. Another case in which special rules have been developed is the claim for an injunction to restrain publication of defamatory matter. The courts have possessed power to restrain the publication of defamations which are merely injurious to reputation at least since the *Common Law Procedure Act* 1854 *(Imp)*, and such injunctions may be granted even though they are purely quia timet. But the law's preoccupation with the freedom of speech has had the consequence that interlocutory injunctions will only sparingly be granted to restrain defamatory publications.[42]

***Injunctions Facilitating Exposure of the Respondent to a Penalty***

36. Statutory warrant apart, such injunctions will not be granted.[43]

***Other Categories***

37. Reference should be made to the standard texts for other categories of injunctions affected by particular considerations, including injunctions that require the Court to supervise the performance of a contract (such as building contracts), to enforce contracts of personal service, or to enforce contracts dealing with chattels.

**Formal Requirements[44] under The Uniform Civil Procedure Rules[45]**

***Applications***

38. An application for an interlocutory injunction (r 259(2)(b)), Mareva Order (r 260(1)), Anton Piller Order (r 261(2)), or interim injunction (r 259(2)(a))

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42 See *Shiel v Transmedia Productions Pty Ltd* [1987] 1 Qd R 199; *Clarke v Queensland Newspapers Pty Ltd* [2000] 1 Qd R 233 (Atkinson J) at [24-[25]; c.f. *Rimsale Pty Ltd v Australian Broadcasting Corporation* [1993] Aust Torts Rep 62,377.

43 *Exagym Pty Ltd v Professional Gymnasium Equipment Company Pty Ltd (No. 2)* [1994] 2 Qd R 129 (Byrne J); see also *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436, 451-2 (Giles JA, Spigelman CJ and McColl JA concurring) (abrogation of privilege against self-incrimination not justified).

44 The UCPR itself indicates that those rules do not impede the development of the substantive law; r257.

45 For a discussion of these rules, see Hinson SC, *Injunctions, Mareva Orders and Anton Piller Orders*, 20 Queensland Lawyer, 147 (December 1999).

should comply with Ch 2 Pt 4 (rr 25-31): r 258. (That is so even though the rules about interlocutory proceedings generally are found in ch 2 Pt 5.)[46]

39. It follows that the appropriate form of application for an interlocutory injunction is Form 5 (not Form 9) and it should comply with r 26.[47]

40. Urgent applications may be made orally by counsel or a solicitor, upon such person undertaking to file an application within the time directed, if the Court considers that to be appropriate and upon any conditions imposed by the Court: rr 12, 31, 259(2), 367(1), 658; see also the Court's general power to impose conditions in s 80, *Supreme Court Act* 1991.

***Summary Application for Final Relief***

41. A summary application for a final injunction (with or without a declaration or other relief) under r 262 may result instead in an interlocutory injunction being granted: r 262 (3)(b). It should be borne in mind, though, that such an application instead might lead to the result, unfortunate for the applicant, of final judgment summarily dismissing the applicant's claim: r 262 (2)(a).[48]

***Other Orders***

42. A common result of an application for an interlocutory injunction, whether granted or refused, is an order for an expedited trial under r 468, specifically contemplated in r 263.

***Affidavits***

43. The application should list the affidavits upon which the applicant relies: r 26(4).

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46 This may have occurred because Pt 5 was added after the UCPR Consultation Draft.

47 A formal defect would not, however, invalidate the whole proceeding; rr 13, 14, 16, 371-373, 975; *Acts Interpretation Act* 1954, s 49(1).

48 See *Australasian Performing Right Association v Ceridale* (1990) 96 ALR 432; (1990) 97 ALR 497

44. The contents of the affidavits are (in part) prescribed for applications for Mareva and Anton Piller orders, but not for applications for an interlocutory injunction. (This topic is discussed below.)

***Service of Application***

45. Applications for interlocutory injunctions are required to be served, unless the Court is satisfied that there is adequate reason for dispensing with notice to the party(s) affected: r 259. (By way of contrast, applications for Anton Piller orders are ordinarily made ex parte (r 261(1)), upon the applicant establishing by affidavit adequate grounds for the applicant's belief that the respondent may remove, destroy or alter the documents or items in question.)

46. Third parties affected by an injunction may in some cases be entitled to be heard on the application, or it may be prudent to offer that opportunity.[49]

47. The prescribed minimum notice period is 3 business days[50], but this may be shortened (or dispensed with altogether) in an appropriate case: rr 27, 7.

48. The commonest example of a case in which the Court might hear an application which has not been served 3 business days before the hearing date is one of the examples given in r 27(3), namely where irreparable or serious mischief to the applicant would be caused by delay[51] and there is no significant prejudice to the respondent.

***Ex Parte Applications***

49. The provisions of UCPR discussed above contemplate variations to the usual requirements for the application, affidavits and service where that is justified by circumstances.

50. The ex parte application, however, clearly must be reserved for very special circumstances. In *Re Griffiths* [1991] 2 Qd R 29 at 34, Byrne J said:

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49 Cf. *Silktone Pty Ltd v Devreal Capital Pty Ltd* (1990) 21 NSWLR 317 at 325F.

50 Defined by *Acts Interpretation Act* 1954, s 36.

51 E.g., where giving notice would put at risk the utility of the interlocutory injunction: *Ex parte Island Records Ltd* (1978) 3 WLR 23.

> "The practice of the Court when invited to grant an injunction ex parte illustrates the flexibility of established procedures. Sometimes the circumstances are so special as to justify an applicant for interim relief proceeding without giving notice of any kind: Spry, *Equitable Remedies* (4th Ed.), 1990 p.501. On other occasions service of the application and the supporting affidavits may prove impracticable, but some notice of the hearing and generally of the orders sought may be able to be communicated. In *Bond Brewing Holdings Ltd. v. National Australia Bank* (1990) 1 ACSR 445 the Appeal Division of the Victorian Supreme Court said (at 459):-
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> > 'Megarry J has gone so far as to say this: 'Ex parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion': *Bates v. Lord Hailsham* (1972) 1 WLR 1373 at 1380. This statement was probably not intended to be absolute, as His Lordship's later words ('unless perhaps the plaintiff had had an overwhelming case on the merits') seemed to accept. While the applicant will find it very difficult to persuade the Court, in a strong enough case an ex parte injunction can properly be granted although the applicant could have given notice of the application but has failed to do so. But the useful modern practice, well known in this State, of hearing in opposition to an application the party sought to be enjoined, who has been given informal notice (*Pickwick International Inc. (G.B.) Ltd v. Multiple Sound Distributors Ltd.* (1972) 1 WLR 1213) makes it more difficult for an applicant to show that he has not had time to give the opposite parties such notice of the application, formal or informal, as would enable him to be heard.'"

51. As is there recognised, there are occasions (very rarely) when departure from the usual requirement for service, and indeed virtually all formal requirements, are justified: see, e.g., *Madeira v Roggette Pty Ltd* [1990] 2 Qd R 357, 361, in which junior counsel woke up a chamber judge with a phone call at 1.50am to apply for an interlocutory injunction to restrain the immediately threatened demolition of the applicant's shop.

52. The necessary modification to the usual procedures may be much less extreme in a different case in which, although there is no time for formal notice, some notice can be given, or in which, though there is no time to have affidavits sworn, a draft affidavit or statement can be prepared. The appropriate approach is to depart from the formal requirements only when, and only to the extent that, the departure is plainly demanded by the exigencies of the application.

***Duty of Candour***

*Applicant's Duty*

53. In *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, 681-682, Isaacs J said:

> "...it is the duty of a party asking for an injunction ex parte to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say that he was not aware of their importance. Uberrima fides is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fall."

54. This duty imposes a very high standard of candour and responsibility upon the applicant applying ex parte.[52] It extends beyond ensuring appropriate disclosure of facts favouring refusal of the injunction to all other relevant matters[53], including material legal issues, defects in the evidentiary basis of the applicant's case, and the applicant's omission to proffer a worthwhile undertaking as to damages.[54]

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52 *Gerrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662, per Mahoney AP at 676-7 (Clarke J concurring); *South Down Packers Pty Ltd* [1984] 2 Qd R 559; *Re Griffiths* [1991] 2 Qd R 29 at 35-6; *Gold Ribbon Accountants Pty Ltd (in liq) v Sheers* [2002] QSC 400 at [51]-[54].

53 See the discussion in *Commercial Injunctions*, Steven Gee QC, 5th Ed, (Sweet & Maxwell) Chapter 9; Spry, *Equitable Remedies*, 4th Ed, Law Book Co, (1990), p.485.

54 *Frigo v Culhaci*, unrep. 17/7/98, NSWCA (Mason P, Sheller JA, Sheppard AJA), BC9803225.

55. Failure to comply with the duty of candour in an ex parte application may lead to the discharge of the interim injunction, perhaps automatically or nearly so; but that does not prevent a fresh application being made instanter.[55]

56. Furthermore, such a failure has been said to be a factor militating against an application on notice for a fresh injunction.[56]

57. A particular trap for counsel to be aware of in this respect is the selective use of correspondence. Occasionally, the brief does not include the respondent's communications mentioned in the applicant's correspondence. Any written or oral denial or explanation by the respondent should be produced to the Court or fairly quoted. Counsel can then explain why the respondent's defence or explanation is not a good one.

*Barrister's Ethical Obligations*

58. Counsel should be familiar with the relevant ethical rules concerning frankness in Court in the *Barristers Rule 2004*, rr 23 et seq. So far as ex parte applications are concerned, rr 25 – 27 are particularly significant.

59. Rule 25 reflects one aspect of the applicant's general obligations of disclosure, but it is not expressed as widely as perhaps it ought to be: the general obligation requires active efforts to ascertain whether there is anything requiring disclosure, whereas this rule is literally limited to matters within the barrister's knowledge.

60. Rules 26 and 27 may be less well known: the barrister must seek instructions for any necessary waiver of legal professional privilege so as to permit the disclosure required by rule 25 (c); if the client does not waive the privilege, the barrister must inform the client of the client's responsibility to authorise the disclosure, and the possible consequences of not doing so, and must inform the

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55 *Thomas A Edison Ltd v Bullock* at 683; *Town & Country v Partnership Pacific* (1990) 97 ALR 315, 318 (Davies, Gummow and Lee JJ); c.f. *South Down Packers* at [1984] 2 Qd R 559; *Gold Ribbon Accountants Pty Ltd (in liq) v Sheers* [2002] QSC 400 at [51]-[54]; *Hayden v Teplitztis*(1997) 74 FCR 7 (Lindgren J).

56 *Ali and Fahd Shobask Group Ltd v Moneim* [1989] 1 WLR 710; *Behbchan v Salent* [1989] 1 WLR 723(n); *Frigo v Culhaci* (supra); *Bentley v Nelson* [1963] WAR 89 (FC).

Court that the barrister cannot assure the Court that all matters which should be disclosed have been disclosed to the Court.

**Precedents**

61. Useful precedents may be found in *Injunctions*, D Mullins (rev'd Bates, Lynch) in Moynihan, *Court Forms, Precedents & Pleadings, Queensland* (Butterworths) at p. 35,167 et seq, Nevill and Ashe, *Equity Proceedings with Precedents (NSW)*, Butterworths, 1981 and (bearing in mind its focus on practice in New South Wales) Burns NR, *Injunctions: A Practical Handbook*, Law Book Company, 1988.

**Correspondence before Application**

62. In most cases, it is necessary or at least desirable, for the applicant's solicitors to write to the respondent (or respondent's solicitors) demanding that the respondent cease the wrong, seeking undertakings, threatening an application in default, and reserving the applicant's right to rely upon the letter on the question of costs.

63. Often it will be appropriate for the applicant to offer the usual undertaking as to damages in that or a subsequent letter. (Of course, its terms and effect should be explained to the client before it is offered).

64. The undertakings sought should be carefully formulated, reflecting the form of order to be sought.

65. The respondent's letter in reply (if it does not agree to the demands) might attack the worth of the applicant's undertaking, identify important facts opposed to the threatened application, offer (without prejudice, except as to costs) more limited undertakings (such as to keep proper accounts of profits made from an alleged wrong and to support an application for an early trial), make such an offer on the basis of cross-undertakings (including the usual undertaking as to

damages) from the applicant or others, and require security to support such undertakings.[57]

66. The respondent may need to seek an adjournment to enable it to prepare its material before the hearing. Short adjournments are commonly granted by consent on terms that an interim undertaking is offered to protect the applicant's position. Sufficient time should be allowed for the applicant to consider the respondent's material and to serve any reply affidavits a reasonable time before the hearing.

67. If deponents of affidavits are required for cross-examination, the appropriate notice should be given: r 439.

## Settlement

68. Many applications are settled, usually at or shortly before the hearing, by agreement upon (without prejudice) undertakings and directions for an early trial. This possibility should always be borne in mind.

## The Evidence

### *Form*

69. Save in very urgent cases, the whole of the evidence of both parties should be contained in affidavits.

### *Admissibility*

70. Hearsay in the prescribed form (i.e., statements of information and belief, stating the source of the information and the grounds for the belief) is admissible (r 430(2)), but the use of hearsay on significant issues may well attract adverse inferences.

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[57] In addition to the usual undertaking as to damages from the applicant, the Court may require another person to give that undertaking; and it may require a person who gives such an undertaking to secure it, e.g., by way of payment into Court, a bank guarantee or otherwise: rr 265 (1), (2). In deciding whether or not to impose such requirement, the court may consider the matters relevant to security for costs applications and also may (rather than must, if a literal construction of the rule is adopted) consider whether it is otherwise reasonable to impose the requirement: r 265 (3).

71. For conversations, the words used – or at last their substance – should be quoted.

72. Opinion evidence should be proved in the usual way (with the expert's qualifications, unless not in issue, set out in an exhibit to the affidavit).

***Stamp Duty***

73. A question has arisen whether s 487 of the *Duties Act 2001* renders dutiable instruments inadmissible to establish a cause of action despite approval by the Court of a written undertaking to produce the document to the Commissioner for stamping and to pay any duty assessed, as contemplated by s 487 (2).[58]

***General Matters***

74. The quality of the advocacy in applications for interlocutory injunctions is especially important. The affidavits themselves should be persuasive – not by being argumentative, but by concisely narrating the critical facts directly relevant to the critical issues (usually, triable issue and balance of convenience), not delving into tendentious explanations or marginally relevant details, exhibiting important documents, and not exhibiting masses of peripheral correspondence, invoices and the like.

75. In particular, the duplication by the respondent of bulky exhibits in the applicant's affidavits is a bad practice.

76. There should usually be one affidavit that tells the story in a coherent fashion. Affidavits (and exhibits) that are supplementary to the main affidavit should be limited to what is really necessary. Headings in the affidavits are often useful. If the exhibits are bulky, pagination will be helpful.

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58 See per MacKenzie J in *Mission Development v Rhett* [2004] QSC 359 and *Franks v Norfolk Estates Pty Ltd* [2004] QSC 301 (Moynihan J), referring to *Hoggett v O'Rourke* [2000] QSC 387 and *Caxton St Agencies Pty Ltd v Korkidas* [2002] QSC 210 (Holmes J).

77. That the (typical) application is concerned with triable issue and balance of convenience, rather than being a preliminary trial, should be borne steadily in mind in preparing the material. This is particularly important for the respondent, who often can demonstrate only a dispute, rather than absence of a triable issue.

78. Counsel should also bear in mind that in most cases the application will not resolve the case. Mistakes in affidavits might have dire consequences at trial for the witnesses' credibility.

79. Faced with the application and the applicant's affidavits, the respondent should consider whether to offer undertakings and to seek a quick trial, rather than contesting the application. The expense of a contest, the relative consequences of victory and defeat, and any delay in getting to trial will be important factors in that decision.

80. If the application is to be opposed, the respondent should consider whether any evidence is required. It is, however, a very rare case in which the applicant's claim to a triable issue can be defeated only on its own material.

81. If the respondent has an arguable defence, ordinarily that defence should be sworn to on affidavit. If it is not, the Court might take into account the apparent strength of the applicant's claim in the balancing exercise and more readily grant an interlocutory injunction, despite significant potential injury to the respondent.

***Issues for Affidavits***

82. The particular case determines the nature and extent of the evidence. It is not practicable in a theoretical way to identify the necessary contents of the affidavits.

83. The following is intended to offer some guidance, as an aide memoire of matters to take into account when settling the applicant's affidavits:

*(Triable Issue)*

(a) Prove each element of the applicant's cause of action, to the point of establishing an issue to be tried and (preferably) a strong case.

(b) In particular, prove the right claimed by the applicant and the respondent's threat to that right (e.g., the likelihood of repetition of a past breach of contract or a past tort).

(c) Exhibit the correspondence demanding cessation of the wrong and seeking undertakings.

(d) Exhibit the respondent's responses to that correspondence.

(e) Establish that the interlocutory injunction goes in aid of a claim to a final injunction or other in personam relief that probably will be granted if the applicant succeeds at trial.[59]

*(Balance of Convenience)*

(f) Give the usual undertaking as to damages and any cross-undertakings.

(g) Establish the worth and value of the undertakings (including by offering security, if necessary) if that issue has been raised; even if the issue has not been raised, establish worth and value if they can be demonstrated convincingly.

(h) Impugn the worth and value of any undertaking offered by the respondent.

(i) Establish that the potential injury to the applicant upon refusal of the interlocutory relief exceeds the potential harm to the respondent, taking into account the value and worth of the usual undertaking in the latter's favour and the value and worth of other undertakings offered by the parties.

(j) In that respect, refer to the practical consequences for the applicant of the refusal of an interlocutory injunction, such as the destruction of its business or diversion of income, the impracticality of the applicant pursuing an award of damages in such circumstances, difficulties in assessment of damages that might later be awarded, potential inability of the defendant to pay damages, and potential difficulties of execution upon any award.

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[59] Consider the substantive law on this topic: for example, an injunction will readily issue to restrain a breach of a negative covenant (*Bingham v 7-Eleven Stores Pty Ltd* [2003] QCA 402 at [6]-[9]), or in aid of specific performance of a contract concerning land *(Pianta v National Finance & Trustees* (1964) 180 CLR 146, 151 (Barwick CJ)).

(k) Demonstrate that granting the interlocutory injunction will preserve the status quo.

(l) Explain any delay by the applicant.[60]

(m) Demonstrate the absence or relative insignificance of adverse consequences for the respondent as a result of any delay by the applicant.

(n) Demonstrate that the respondent can practically comply with the injunction, so that it is not futile to grant it. [61]

(o) Prove adverse effect on third parties (such as the applicant's employees, contractors, the public) if the interlocutory injunction is refused. [62]

*(Ex Parte Applications)*

(p) In addition, in ex parte applications make the necessary disclosures of matters favouring the respondent.

84. The obverse of those points should be considered when settling the respondent's affidavits.

85. As to affidavits in reply, there is no point in responding to evidence that merely puts the applicant's original claims in issue, at least if the response is merely to repeat or embellish the applicant's original affidavits. And if the applicant does put on a reply affidavit, and fails to respond to all of the respondent's significant material, it might be suggested that the applicant has no answer to that material.[63] But occasionally a telling blow can be made by reference to a document or incontrovertible fact.

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60 See the useful discussion about the significance of delay in *Imac Security Services Pty Ltd v Tyco Australia Pty Ltd* [2002] VSC 592 at [41]-[49].

61 See, e.g., *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd* [1991] 1 Qd R 301 at 308

62 Adverse effect on third parties is relevant to the discretion: *Clarke v Japan Machines (Austraia) Pty Ltd* [1984] 1 Qd R 404, 419 (Thomas J); *Gedbury v Michael David Kennedy Autos* [1986] 1 Qd R 103, 105 (Thomas J); *M.A.T.F.A. v A.M.I.E.U* [1990] 1 Qd R 441 at 448 (Byrne J).

63 See *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 97-8 (a summary judgment case).

## The Hearing

### *Cross-Examination*

86. The Court has a discretion whether to permit cross-examination: r.439(5) In the typical application for an interlocutory injunction, the Court will ordinarily not make findings of credit or resolve disputed factual issues. Thus there should be persuasive reasons for embarking upon cross-examination (especially where the application will not effectively resolve the dispute).

87. The judge will not welcome cross-examination merely for the sake of a purely speculative investigation. If asked, the cross-examiner should be able to identify the point of the cross-examination in a sentence or two.

### *Submissions*

88. Outlines of submissions (with chronology) should be prepared, in compliance with the Practice Direction,[64] except in the very rare case where the application is so urgent that there is not time to do so.

89. The outlines should at least:

    (a) Applicant: Specify the threat to the applicant's rights. Respondent: acknowledge (and justify) or deny the threat.

    (b) Applicant: Summarise the basis of the claim to those rights and demonstrate a persuasive claim or at least a triable issue. Respondent: Deny the existence of a triable issue or point to any serious weaknesses in the claim, but acknowledge a triable issue where there is one.

    (c) Applicant: Explain why the balance of convenience favours the grant of an injunction, including reference to the usual undertaking. Respondent: Explain the contrary, including reference to any deficiency in the worth or value of the usual undertaking.

    (d) Applicant only in an ex parte case: refer to the matters required to be disclosed (including identifying parts of the affidavits and exhibits) in such manner as fulfils the applicant's and counsel's duties of candour.

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64 Practice Direction No 6 of 2004

90. The real issues in an interlocutory injunction case tend to be quite confined, despite often bulky material, with issue joined and no marked advantage to either party in the apparent prospects of success. Clear thinking about the often quite complicated balance of convenience issues is then crucial. As it was put by Justice Bergin: [65]

> "The persuasive argument is quite often that which addresses the facts in a clear manner, demonstrating with common sense arguments why it is that an injunction should or should not go."

91. A draft order should be prepared in advance.

92. Counsel briefed in such applications should ascertain the availability of early trial dates. In some cases, that can significantly bear upon the discretion to grant interlocutory injunctions and the form of any injunction granted.

93. Counsel should not offer the usual undertaking unless express instructions to do so (preferably in writing) have been obtained after the terms and effect of the undertaking have been explained to the person offering it.[66] (This is one reason why it is preferable to have the undertaking offered in an affidavit.)

94. As to the oral argument, Justice Bergin said:[67]

> "A good question for the interlocutory litigator to ask is "what will the Court expect of me during this application"? I understand that in some jurisdictions in the USA there is a prominently placed check list for practitioners on the Bar Table. One Judge's explanation of what the court was looking for is, I suggest, a good check list for the interlocutory (or any) litigator:
>
> - A factual summary distilled into a few sentences;
> - A "dialogue with the court, not a monologue to the court';

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65 *Interlocutory Procedures*, Supreme Court of New South Wales College of Law, CLE 28/11/00, www.lawlink.nsw.gov.au/sc\sc.nsp/pages/Bergin.

66 See Burns, *Injunctions A Practical Handbook*, Law Book Co., 1988, at p17.

67 *Interlocutory Procedures*(supra).

- No jury speeches, lectures, personal attacks on opposing counsel, or overstatements;
- A logical analysis;
- Eye contact;
- Courtesy and honesty; and
- A complete understanding of the law pertinent to all the issues."

**The Order**

95. The form of the order is important. It must not be ambiguous, uncertain or indefinite.[68] In *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Limited* [1991] 1 Qd R 301 Cooper J (with whom Kneipp and Shepherdson JJ agreed) observed (at 308) that:-

> "Injunctions must be framed in precise language so that the person enjoined knows exactly what is prohibited by the injunction and what conduct is permissible (see Morris v. Redland Bricks Ltd. [1970] A.C. 652 H.L. at 666-667)."

96. On the other hand, broad expressions with some degree of imprecision may be well justified by the nature of the conduct sought to be restrained.[69]

97. Ambiguity in the form of order (or undertaking) may defeat attempts at enforcement.[70]

98. The order should not be directed against non-parties: "the respondent, its servants and agents". It should be made against parties. If any reference of that kind is thought necessary, it should be to "the respondent, by itself, its servants and agents".

99. In the case of an ex parte injunction, it is desirable that it be granted until a fixed date or earlier order. It should not be granted simply "until further order". A party subject to ex parte relief should not have to apply to discharge it.[71]

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68 *Abella v Anderson* [1987] 2 Qd R 1, 4 (McPherson J).
69 *M.A.T.F.A.v A.M.I.E.U* [1990] 1 Qd R 441 t 449.
70 *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483, 516.

100. A mandatory injunction must specify the time by which the act is to be done: r 665.

101. If the order is obtained out of Court hours, the question whether the Registry can be kept open, or re-opened, the cost of doing so, and other practical issues, such as a direction permitting initial service by telephone or by notification in some other way should be considered.

**Costs**

102. The costs of a successful application for an interlocutory injunction are usually reserved, but of course there is no fetter on the discretion. Unjustifiable resistance, failure to give adequate notice, delay in providing material, and the like might justify a different order.

103. The costs of an unsuccessful application are often given to the respondent, but again there is no hard and fast rule.

**Setting Aside Orders For Interlocutory Injunctions**

104. The Court is expressly empowered to set aside or vary Mareva and Anton Piller Orders (rr 260(5), 261(c)) and injunctions (r 667(2)(c)) at any time. The circumstances in which the Court may make such an order include that the order was made in the absence of a party, or by fraud, or that facts have arisen or been discovered since the order which entitles the respondent to relief: rr 667, 668.

105. A relatively common variation is one which extends time for compliance where the respondent has been unable to comply but demonstrates a willingness and ability to do so, albeit late.

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[71] *Ross v Internet Wines Pty Ltd* [2004] 60 NSWLR 436, 453.

**Appeals**

106. An unsuccessful applicant for an ex parte order may renew the application by appeal to the Court of Appeal: r 763. Otherwise, the usual provisions concerning appeals are applicable.[72]

107. The Court of Appeal may grant an injunction pending appeal (r 767), or stay the first instance interlocutory injunction pending appeal (r 761).

**Claim Upon the Usual Undertaking as to Damages**

108. A person claiming pursuant to the undertaking must prove that damages were caused by the grant of the injunction (that, in hindsight, should not have been granted), rather than by the fact of the litigation generally.[73]

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72 *Supreme Court Act* 1995, s 254; UCPR rr 745(2), 765; *District Court Act* 1967, s 118(3) (by leave only, for an interlocutory order).

73 *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1991) 146 CLR 249. See also *Re Cannon* [1999] 1 Qd R 247, per Williams J at 254-257, where the discretion was discussed; and see rr.264 and 507-512.