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# *EX PARTE* APPLICATIONS FOR INJUNCTIONS: THEN AND NOW*

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Two centuries ago, the *usual* practice in chancery was for *ex parte* injunctive relief to issue upon the filing of proceedings, and without any undertaking as to damages, in many common cases, including "plain nuisance, infringement of a clear copyright, forcible entry, wasteful trespass": see Chitty, *The Practice of the Law in All its Principal Departments* (3rd ed 1837), vol 1 p700. The injunction was dissolved in the ordinary course when and if the defendant "made a full and perfect answer" (in effect, filed a verified defence).

Undertakings only began to be required in the 1840s. They are said to have been invented by Sir James Knight-Bruce shortly after his appointment as one of the additional Vice-Chancellors in 1841, and their history was summarised by Aickin J in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1979) 146 CLR 249 at 260, including his Lordship's statement in 1856, now sitting in the Court of Appeal in Chancery, in *Chappell v Davidson* (1856) 8 De M & G 1 at 2, "Has it not been for the last twelve or thirteen years an almost universal practice to require, on granting an injunction, an undertaking on the part of the Plaintiff to be answerable in damages?"

In the twenty first century, quite different considerations apply. The usual undertaking is the "normal concomitant of obtaining injunctive relief from the Court", and where it is worthless, and no other form of security is proffered, that has been said to be a compelling reason for not granting injunctive relief: see *Australian Spirit Management Pty Ltd v Commissioner of Taxation* [2011] NSWSC 1626 at [45] (Rein J). To that there is a qualification that arises where interlocutory relief is necessary in order to avoid the destruction of the subject matter of the proceeding: see the decisions collected in *Cooper v Moloney (No 6)* [2012] SASC 212 at [75] (Blue J). The need for and content of the "usual undertaking as to damages" is set out in black and white in many courts' rules (eg UCPR r 25.8), and it is well understood that a plaintiff who proffers it may be incurring a

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very substantial liability.

Once instructions have been obtained to provide the usual undertaking, a recurring question is whether a client should seek ex parte injunctive relief, or merely to apply for short service so that there can be an early, contested hearing. The key difference is the heightened obligation of candour on an *ex parte* application, and the very real risk that there are apt to be two hearings – one *ex parte*, and one where there is opposition, including opposition based on the failure to make proper disclosure. It may be helpful to summarise four of the considerations bearing upon those matters.

***Disclosure of all the material which might cause the injunction to be refused***

What is the content of the obligation of disclosure on an *ex parte* application? Traditionally, it was said to be to "fully and fairly disclose the entire facts of the case": *Dease v Plunkett* (1843) 1 Drury 255 at 261 (Sugden LC) or to "state their case fully and fairly": *Holden v Waterlow* (1866) 15 WR 139 (Turner LJ). A standard formulation of "full and frank disclosure of all material facts" now appears in the harmonized practice notes of superior courts; it has also been described as one of "utmost good faith" and of "utmost candour"; there is a useful appellate discussion by Gillard AJA in *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 at [24]-[36]. But there can be difficulty in translating those descriptions into what is actually required in practice in order to demonstrate adherence to them, especially in the usual case where the application is being prepared urgently.

[304] Perhaps the most useful description, focussing the attention of lawyer and client on what is required in practice, is that long ago stated by Isaacs J in *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 682 of "bringing forward all the material facts which [the absent] party would presumably have brought forward in his defence to that application". The modern formulation which is regularly repeated, is an obligation to disclose "all material including that which might lead the court to refuse the application": *Re Southern Equities Corporation Ltd* (1997) 25 ACSR 394 at 423, *In the matter of Idoport Pty Ltd* (2011) 83 ACSR 164 at [147] (Ward J); *In the matter of Kala Capital Pty Ltd* [2012] NSWSC 1073 at [31] (Black J).

A different approach is followed in the United Kingdom, where the obligation is diluted depending upon the seriousness of the application and the risk of prejudice; see *The Jay Bola* [1992] QB 907 at [67]: "the extent of the duty and the gravity of any lack of frankness will depend in any given case on the character of the application. At one end of the scale there are *Anton Piller* orders and *Mareva*

injunctions where the consequences of the order may be unpredictable and irremediable and very possibly most serious for the proposed defendant: there the very fullest disclosure must be made so as to ensure as far as possible that no injustice is done to the defendant. At the other end of the scale are minor procedural applications where there may be no risk at all of prejudice, or at least none that cannot be fully made good on an order in costs." See also *Dar Al Arkan Real Estate Development Company v Al Refai* [2012] EWHC 3539 (Comm) at [149] and *Cecil v Bayat* [2010] EWHC 641 (Comm) at [172]-[176]. But *any* order affecting a defendant who has not been heard ought to be regarded as exceptional, and it seems, with respect, inappropriate to place an evaluative burden on the moving party to make an assessment of the extent to which the defendant is thereby prejudiced.

It may seem counterintuitive to make specific inquiry, for the purpose of highlighting for the court, of the considerations which will tend to discourage the granting of the injunction sought. But that is the best way of ensuring that the duty is complied with, and of avoiding the consequences of its breach, not to mention of explaining to the client (who is paying for his or her lawyers to determine and demonstrate factors tending towards against making the orders sought) why the inquiry is being undertaken.

***Not burying key facts in exhibits***

How is disclosure effected? Allsop J, as his Honour then was, said in *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 955 at [38] that the obligation was *not* discharged by:

> "stating matters obliquely, including documents in voluminous exhibits, and merely not mis-stating the position. It means squarely putting the other side's case, if there is one, by coherently expressing the known facts in a way such that the Court can understand, in the urgent context in which the application is brought forward, what might be said against the making of the orders. It is not for the Court to search out, organise and bring together what can be said on the respondents' behalf. That is the responsibility of the applicant, through its representatives."

That said, what is required depends upon the circumstances. As a Full Court put it in *Sutherland v Pascoe* [2013] FCAFC 15 at [53], where the question was whether there was a departure from the duty by reason of an incomplete summary of a pleading in an affidavit, notwithstanding that the

whole pleading was exhibited:

> unlike *Walter Rau* (where Allsop J was involved in an urgent ex parte hearing and was heavily reliant on what was put to him by senior counsel), the Registrar dealt with the liquidator's application on the papers. There was no oral hearing before the Registrar. Instead, the Registrar had an opportunity over a two week period to review the application and the Pascoe Affidavit. It can reasonably be presumed that that is what occurred. Each case must necessarily turn on its own facts.

***What facts are material?***

The better approach is to err on the side of disclosure. One common occasion arises where an *Anton Piller* order is made, whose premise necessarily is a proven risk that the defendant will destroy documents or [305] other evidence. It is essential to disclose the fact if it be a fact that the defendant had previously cooperated. Two cases illustrate the importance of this point. First, it does not matter even if the deponent is personally unaware of the cooperation, if the client is aware: see *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2004) 205 ALR 319 at [67]. And even if cooperation was reflected in without prejudice correspondence, it is important for the fact to be disclosed. As Bergin CJ in Eq put it in *Singtel Optus Pty Ltd v Almad Pty Ltd* [2011] NSWSC 492 at [59]:

> "It is not appropriate in an ex parte application for orders of this kind or for injunctive relief to merely refer to without prejudice correspondence and claim that further information cannot be provided by reason of that restriction and leave the evidence in a state that portrays an inaccurate or incomplete position."

***Breach of the obligation***

In the usual course, breach of the obligation will lead to the orders being discharged. One line of cases focusses on the nature of the breach, contrasting deliberate or intentional nondisclosure with cases of non-culpable breach: *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 at [31]. A firmer approach may be seen in the reasons of *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 543: "The failure of the applicants to make full disclosure of all facts relevant to the application for an interim injunction in itself *necessitated* the discharge of the ordered granted" (emphasis added), but that is inconsistent with what Isaacs J said in *Thomas A Edison Ltd v Bullock* and was not followed by the Full Court of

the Supreme Court of South Australia in *Re Southern Equities Corporation Ltd* (1997) 25 ACSR 394 at 423-424. Perhaps that is a distinction with little practical consequence, because it is quite clear that a discharge of interim relief for failure to make proper disclosure does not prevent a fresh application being made and determined in the light of all relevant facts. For example, in *Australian Football League v Hard On Sports* [2012] VSC 475 Vickery J amended *Anton Piller* orders obtained ex parte, based on several causes of action, so as to reduce their scope where there had been material non disclosure in relation to one cause of action.

***Form of order***

The price of *ex parte* injunctive relief is that it is *interim*, namely, only for a limited period of time, after which the onus remains with the plaintiff to persuade the Court (this time in the presence of the defendant) that it should be renewed. "It is generally undesirable that ex parte relief be granted until further order … The party subject to ex parte relief should not have to apply to discharge it": *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436 at [109]. Even if an order does issue "until further order", the solution was stated by McLelland J in *Resort Hotels Management Pty Ltd v Resort Hotels of Australia Pty Ltd* (1991) 22 NSWLR 730 at 731:

> when that occurs the practice of the court is ordinarily that on the return of the summons or on the notice of motion the injunction should be discharged unless the plaintiff shows sufficient reason for its continuation. In other words, the mode in which the duration of the ex parte injunction is expressed should not be allowed to affect the substance of the matter, or the onus, on the first occasion on which the defendant has any opportunity at all to put its case to the court.

That has regularly been applied: see for example *Apotex Pty Ltd v AstraZeneca AB* [2011] FCA 1520 at [62] (Rares J).