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Interlocutory Procedures

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Justice P.A. Bergin

Introduction
I understand from the brochure describing this evening's proceedings that you have an expectation of learning about "those fiddly little matters of practice vital to the successful conduct of court proceedings, but almost impossible to learn from a book".

There may be some matters that will fall into this latter category, however so many matters of Practice are able to be gleaned from a particular "book" which I suggest is an essential accoutrement for the successful practitioner. It is of course **Ritchie's Supreme Court Procedure NSW**.

"Interlocutory"
Almost 100 years ago Buckley LJ expressed the view that it was essential that there should be plain rules as to what are interlocutory orders. He said it was "impossible for the suitor in many cases to know whether an order is interlocutory or final[1]". The problem for the suitor continues today with Appellate Courts having to rule upon whether an order is interlocutory or final.

It has been said that an application will be interlocutory or not depending upon its relationship to the determination of the issues raised in the principal proceeding[2] and that interlocutory proceedings are those that do not affect the "ultimate rights[3]" of the parties.

A practical basis upon which I intend to proceed for our purposes this evening is to assume that interlocutory applications or proceedings are those that are "not final, usually dealing with procedural problems that arise in preparing a case for trial, including proceedings for injunctions pending the trial of the action[4]".

Equity Division
I intend to focus upon the Equity Division although my general comments will also apply to the Common Law Division. In the Equity Division of the Supreme Court interlocutory hearings include applications for urgent remedies before the Duty Judge, the Expedition Judge and the Masters[5]. Hearings before the Duty Judge will include applications for injunctions[6] and appointment of Receivers[7]. Applications before the Expedition Judge will include applications for expedition[8] and may also involve injunctive relief with directions for urgent preparation for the trial. Applications before the Master include applications in relation to discovery[9], interrogatories[10], security for costs[11], striking out pleadings[12] or summary judgment[13].

Over the last decade The College of Law, with the assistance of the profession, has provided a veritable feast of papers on interlocutory applications and procedures[14]. I do not intend to repeat the wisdom of the authors of each of those papers but I commend a careful reading of them as a guide to practitioners in interlocutory applications.

The Lists[15]
It is important that the practitioner knows the way around the court structure. By that I mean a good working knowledge of the various Lists within each Division is required. Since the changes in the Divisions and the creation of various Lists in 1998 a number of Practice Notes have issued to assist the practitioner and I suggest that it is essential to be aware of their detail[16]. You must also be familiar with other earlier Practice Notes dealing with interlocutory procedures[17].

Most cases in the Equity Division are first listed in the Registrar's List on the return of a Summons or a Notice of Motion. The Registrar may give Directions for the preparation of the matter or hear a particular application. If necessary the matter may be referred to a Master or a Judge depending upon the nature of the application. Check carefully to see whether the Registrar or Master has the power to hear your application or whether it must be heard by a Judge[18].

Cases which are not entered into particular Lists are case managed by the Registrar and when ready for hearing are placed in the General List then listed in a call over and fixed for hearing. The matter is then listed before the trial Judge at a pre trial directions hearing at which time you must be ready to apply for any particular directions such as a further timetable for any outstanding affidavits and return of subpoenae. At this hearing you should be able to inform the trial judge what the particular issues for trial are and the number of witnesses you anticipate you will need to cross examine.

This will enable a reasonable assessment of the length of the trial.

There is a Duty Judge available in the Equity Division 24 hours per day every day of the year. Applications for urgent injunctions or the abridgement of time for service are heard by the Duty Judge.

Other Lists in the Equity Division are the Expedition List, the Commercial and Construction List, the Corporations List, the Probate List, the Protective List, the Admiralty List, the Adoptions List, the Short Notice List and the General List.

Expedition

An expedited matter is one that effectively jumps the queue of cases already filed because of particular features of urgency that are not present in those other cases, or if they are present the parties are willing to tolerate the usual time to trial. It is a fast track List in which the aim is to have the matter heard before it would be heard without a grant of expedition.

The Practice Note in relation to the operation of the List[19] gives the following guidance to practitioners:

· application should be made as soon as urgency arises as delay may prejudice a grant of expedition;
· application is by Notice of Motion with supporting affidavit which sets out the basis of the claim for expedition and the issues which it is anticipated will arise;
· directions will be given for the purpose of confining the issues to those really in dispute, discovery of documents and facts appropriate to the circumstances, simplifying proof of facts, and preventing surprise by giving adequate notice of documentary and oral evidence to be relied upon;
· there must be strict compliance with directions; and
· parties must be prepared to accept whatever hearing date is allotted.

The Practice Note announced that this was a change of procedure to provide consistency in making orders for expedition, to attempt to shorten trials, provide reliable estimates of time required for trial and promote settlements.

What are matters of urgency that may qualify for a grant of expedition? They may include matters in which:

· a party or essential witness is of advanced years;
· a party or essential witness is frail or in declining health;
· an interlocutory injunction has been granted;
· an application is made for the removal of a trustee;
· a business is being crippled by the dispute; and
· there is a 'stand off' in relation to a contract for sale of property.

Each case will depend upon its facts and it may be that a feature of urgency emerges before all the issues in dispute are crystallised. Take for example the case in which the feature of urgency is the frailty or declining health of an essential witness. If a grant of expedition is made and subsequently the issue upon which this witness' evidence was necessary is no longer in issue, the feature of urgency has disappeared. However without being in the List and subject to directions on a tight timetable such issue may not have disappeared so quickly.

In any event, with this and similar types of circumstances in mind I have allowed some matters to remain in the List without a formal grant of expedition and given directions for the preparation of the matter for trial so that better assessment could be made when evidence was filed and issues were clear. There were other cases in which a grant of expedition was made immediately.

A good working knowledge of the Practice Notes and of the Supreme Court Rules generally, will arm the practitioner with the capacity to navigate the system in an effective manner ensuring the most appropriate forum is chosen for the client's case. A virtue for which one might do well to aim is that extolled by Bryson J last year[20]:

Find a middle way between loftily ignoring the Rules of Court and the form and appearance of things, and appearing to be obsessed with them. The flow of events should be that everything is in good order so good order does not have to be mentioned. Perhaps I am telling you to be obsessed with the Rules of Court but not to let it show.

Just, Quick and Cheap

An overriding concern of all Judges of the Court is the just, quick and cheap resolution of the real issues in proceedings [21]. Case management requires a hands on approach to any litigation and interlocutory procedures are not immune to this process. Today the profession must appreciate that judges are called upon to be "pro-active"[22] and that such a role requires the judge to retain control of the progress of proceedings to final resolution. In this process the aim is to ensure that the proceedings do not become "bogged down" by inefficient practices and that the case is litigated on the basis of the matters truly in issue between the parties[23].

Remember that when an urgent hearing date is available, the fact that a witness or party is not within the jurisdiction at that time may not be an impediment to the hearing taking place on that date. The Court has the capacity to and does take evidence from remote locations by audio and audio visual link[24]. It will be unusual to require such evidence in an interlocutory hearing, however the application to call evidence in this form at the final hearing is itself an interlocutory procedure and the practitioner must be aware of the matters to be proved to obtain such an order.

An application is made in which the supporting affidavit sets out the relevant evidence including the reasons why such a procedure is desirable, the nature of the evidence to be taken, the expected duration of the evidence, and whether

issues of character are likely to be raised. The directions the Court may give if an order is made for the taking of evidence from a remote location include a direction in relation to who should be present at that location during the hearing[25].

Practitioners should consider these matters and be ready to request particular directions that will facilitate an efficient hearing. For instance if there are a number of documents to be utilised in the examination of the witness, arrangements need to be made for the witness to have access to them at the remote location with an identical bundle of documents made available in court.

When making arrangements for the taking of evidence from witnesses in locations overseas make sure you have regard to the possible difficulties that may be encountered with the taking of an oath in some jurisdictions. International protocols and international respect for the rights of citizens in other countries must be observed[26].

Practice Note 108 requires close scrutiny. It is aimed at ensuring compliance with the Court's directions and the Rules of Court by the use of costs sanctions including costs against practitioners personally. It requires the practitioner to:
· facilitate the just, quick and cheap resolution of proceedings;
· identify the issues genuinely in dispute;
· be satisfied there is a reasonable basis for alleging, denying or not admitting facts in pleadings;
· observe directions and Rules of Court;
· ensure readiness for trial;
· provide reasonable estimates of the length of applications and trials;
· present written outlines and submissions on time; and
· give the earliest practicable notice of applications for adjournments.

The Practice Note warns of the possible referral of practitioners to the Legal Services Commission, the Law Society or the Bar Association in circumstances of repeated defaults. I suggest a high priority on the interlocutory litigator's list should be to ensure that Practice Note 108 is never applied to the practitioner or the practitioner's client.

Interlocutory Injunctions
Equity provides remedies other than money. It is therefore crucial to your case to understand what it is that you wish to achieve in an interlocutory application. Consider what evidence is needed. How is the requested order to be enforced? Is it practical? Legal practitioners must have a clear understanding of the issues and what matters have to be established. For example, in an application for an interlocutory injunction you must be in a position to satisfy the Court that there is a serious question to be tried, that damages are not an adequate remedy and the balance of convenience favours the grant of an injunction.[27]

The evidence rules are effectively loosened in interlocutory applications as hearsay evidence is admissible[28]. It is sensible to keep in mind that the Duty Judge will usually have a number of urgent matters with which to deal on any day. You should try to avoid taking objections to evidence on the grounds of relevance and applications to cross examine parties or witnesses should only be made if it is essential to your client's case on the interlocutory issues.

There are many cases before the Duty Judge in which there is little or no argument that there is a serious issue to be tried. In those circumstances focus will be upon whether damages are an adequate remedy and which party the balance of convenience favours.

The nature of the factors to be taken into account and the significance accorded to them will vary depending upon the circumstances of each case. Such factors will include the nature of the property rights in dispute, the nature of the allegations, whether the interlocutory relief sought will overturn or merely maintain the status quo and the hardship or injury arising from the grant or refusal of the injunction[29].

It is in this area that the practitioners' powers of persuasion are paramount. 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.

It is very important to remember that when an application is made ex parte the Judge will always be concerned that the other party or parties have had adequate notification or opportunity to give undertakings. In cases in which notification may defeat the purpose of the application ex parte injunctions may be warranted. These include cases in which money may be spirited away unless an appropriate restraint is in place[30].

Of course ex parte applications have the highest standard of candour and responsibility for the practitioner to bring to the notice of the Court all facts material to the determination of the application, including facts which would favour the absent party[31]. An injunction may be dissolved immediately if it is proved that it was obtained in circumstances of a material non-disclosure.

Although in the ex parte circumstance pressure will be intense and time will be of the essence, you must review the material upon which you are making your application to ensure proper disclosure. A trap is the selective use of correspondence. If you have been provided with a series of letters which refer to letters from the opposing party which have not been provided to you, you should require their production.

Take the following example; your client instructs you to try to prevent a party from leaving the jurisdiction with what your client alleges is its intellectual property; the departure is to occur within twelve hours and it is during the weekend that you receive instructions; you are provided with a series of letters which evidence claims by your client that the property belongs to it; and there is reference in the correspondence to some letters from the opposing party which have not been produced to you.

If the letters are simply not available by the time you have to approach the Duty Judge for an injunction you should obtain instructions as to their content and disclose that information to the court if it is relevant. It may be that the opposing party has asserted a particular basis upon which it claims to be entitled to depart the jurisdiction with the property. If that letter only emerges after the injunction is granted the restraint may be dissolved.

The perception that is created, without that letter or the detail of it, may be quite misleading. For instance it may create the impression, quite wrongly, that the opposing party is leaving the jurisdiction in a furtive manner which should give rise to a fear that assets are at risk. There are any number of different impressions that may be gleaned from the opposing party's letter. You must do your best to ensure that such matters are brought to the court's attention.

An innocent oversight may put your client at risk of losing the injunction and you at risk of a serious allegation that you have misled the court. You will then have to marshal your resources to fend off such allegations and to show that the oversight was innocent and ultimately that it was not material.

When you are ready to put the application before a Judge out of court hours, you should make contact with the Supreme Court number provided in the Court Lists and arrangements will be made to make contact with the Duty Judge. In extremely urgent circumstances which occur out of court hours you may have to make an oral application with an undertaking to file the documents within 24 hours. Sometimes orders may be granted over the telephone but usually an application is made in person to the Duty Judge.

In these days of mobility of employment and intense commercial competitiveness quite a number of cases involve allegations of ex-employees misusing and/or misappropriating confidential information. You may receive instructions to try to obtain an Anton Pillar order to authorise entry and search of the ex-employee's office or even the ex-employee's home for the allegedly "stolen" information. I suggest acute caution in these circumstances.

You may think it wise to keep in mind this caution when you find yourself so instructed:
Anton Pillar orders are frequently sought in actions against former employees who have joined competitors or started competing businesses of their own. I have learned to approach such applications with a certain initial scepticism. There is a strong incentive for employers to launch a pre-emptive strike to crush the unhatched competition in the egg by causing severe strains on the financial and management resources of the defendants or even a withdrawal of their financial support.[32]

Remember that the essential pre-requisites to the granting of such an order are an extremely strong prima facie case, very serious potential or actual damage, clear evidence that the documents are in the defendant's possession, and evidence that there is a real possibility of the defendant destroying the documents or removing them from the jurisdiction before an inter partes application can be made[33].

It is imperative to keep in mind that the Court depends upon your candour in these matters and because the orders are so powerful and intrusive you must not seek more than you need. Think about alternatives to intrusive interlocutory orders[34]. Ask yourself if there is a less onerous or intrusive approach available by which your client's position will be protected, for instance the administration of interrogatories[35].

If you are successful in persuading the Court to make Mareva orders which include the filing of affidavits disclosing the whereabouts of certain assets and money, the party, the subject of the orders, may be entitled to object on the ground of self incrimination[36]. So that the order is effective you should ask the court to make the order subject to any claim for privilege.

It is also important to remember that if an application for an ex parte injunction is refused it is not open to apply to another Judge for the same relief. However if the evidence or circumstances have changed since the application was refused then an application to a single Judge for the same relief may be made.[37]

The exercise of the discretion in favour of granting an injunction is almost always conditional upon the party who seeks it being willing to proffer an undertaking as to damages to the Court. Remember also that the Court has the capacity to stipulate further conditions in connection with undertakings[38].

The Court relies upon practitioners to explain to the party proffering the undertaking that such party is vulnerable to payment of damages if, at the final hearing, it is determined that the injuncted party is successful and the interlocutory injunction ought not to have been granted[39].

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[40] 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";
- 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.

Interlocutory referral to Mediation

Mediation. Verisimilitude was given to this bare concept in NSW when a former Chief Justice of the Supreme Court, Sir Laurence Street, AC, KCMG, retired in 1988 and commenced mediation 'practice'. By 1991 Sir Laurence had discovered that within what was referred to as the Alternative Dispute Resolution (ADR) environment a "fog" had "been generated by well-intentioned, but misguided, attempts to introduce precision of terminology into a field that, by its very nature does not lend itself to precision"[41].

Sir Laurence expressed a very firm view about litigation. He said:
It cannot be doubted that litigation - the process of formal determination of a dispute by a court - stands clear and positive amongst dispute resolution procedures. It is indeed well that this process, the sovereign remedy of litigation leading to judicial determination, is clearly recognisable and understood.
And:
Litigation, the ultimate, sovereign dispute resolution process, stands above and apart from all other processes.[42]

Sir Laurence also expressed his "deep commitment" to regarding ADR as standing for Additional (rather than Alternative) Dispute Resolution. The commencement of the **Supreme Court Amendment (Referral of Proceedings) Act 2000 on 1 August 2000** introduced ss 110K-M[43] into the **Supreme Court Act 1970** which give the Court power to refer proceedings, or parts of proceedings, to mediation, irrespective of the consent of the parties.

The stated reason for the amendment is to improve the operation of the Supreme Court in the pursuit of the just, quick and cheap resolution of disputes[44]. The amendment has not been received well by some at the Bar and has been described as radical and most undesirable as a matter of principle.[45]

It has also been suggested that the power will be exercised frequently in times of "pressure on Courts institutionally to 'up their productivity', whatever this is meant to mean, and on judges individually to deliver judgments expeditiously"[46]. For my part, any suggestion that discretions may be corrupted by pressures of workload is a surprising and wholly unwarranted prediction.

Non-consensual referral to this imprecise additional dispute resolution process in the course of preparation of the clear and positive sovereign litigation process may presently be controversial. However it seems to me that the concurrence of these processes will become less controversial as the legal community appreciates that the sovereignty of litigation is not under threat by this co-existence. This will take time and experience with the system.

Rolfe J recently had this to say of mediation:
My experience in large cases,..is that a judicial decision inevitably leads to an appeal and the unfortunate diversion of the commercial talents of the parties to the appeal from pursuing gainful commercial activities and opportunities, by having to concentrate on litigation. If some independent evaluation by an experienced commercial mediator was to lead the parties to recognise potential weaknesses in their respective cases, as well as strengths, a commercial resolution could bring an end to the whole proceedings once and for all.[47]

The reality is that there are important differences between mediation and litigation. Mediation provides the parties with the opportunity to fashion their own solution. This may promote the continuation of the commercial relationship whereas litigation can destroy commercial relationships. By focusing on interests rather than rights the dispute is something the parties recognise as their own problem which needs resolving. In a rights based litigious environment the parties may feel they have lost control of the dispute, in particular, when new and possibly unforeseen problems emerge during the trial. The confidentiality of the mediation may be very attractive compared to the public exposure of the dispute in the court room.

Mediation may occasionally be difficult due to the unpredictability of the legal rights. Either side may think they have a strong case because no clear precedent exists. In certain situations an imbalance of power between the parties may be exacerbated in mediation. Your client may have very strong feelings against "dealing" with the opposing party because of an irrevocable breakdown in the commercial or other relationship.

As the power of referral is irrespective of consent, it is incumbent upon all practitioners to explain the process of mediation to all clients who are parties to litigation in the Supreme Court. It is imperative that before you are in a position to provide advice to a client as to the advantages and disadvantages of mediation you have instruction in mediation.[48] Such instruction is necessary so that the practitioner will be better able to assess when the dispute is "ripe" or appropriate for mediation.

Prior to the consideration of mediation it is important that the practitioner has an understanding of the merits of the

client's case and the capacity to prove the client's case. It seems to me that a client could only be in a position to give informed consent to or informed instructions about mediation after an explanation of the process and the possible outcomes are given to the client.

The Equity Division has for some time had in place a consensual mediation process which includes an awareness session for practitioners and clients. Matters which have been successfully mediated have included Family Provision Act matters, partnership disputes, applications under the Conveyancing Act 1919 and assessments of damages.

It will be your responsibility to advise on the advantages and disadvantages of mediation in each particular case. It will be your responsibility to persuade the court for or against a referral in non-consensual cases. It seems to me that in those circumstances instruction and/or experience in mediation is an essential pre-requisite to fulfilling your obligations.

Many of the things about which I have been speaking are of course available to you from books. However having regard to the promotion given to this evening's proceedings that you would be informed of matters almost impossible to learn from a book, I feel it incumbent upon me to give certain information to those of you who have been so interested to attend this evening.

I do not believe that you will find it in the particular form in which I intend to provide it to you in any book and to avoid that happening I shall now deal with it separately. (Information provided).

Ladies and gentlemen, the nature of legal practice is in a state of exciting and, in some respects, complex development. From the interest I infer from your attendance this evening, I trust you will enjoy participating in this development.

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1 Re Page [1910] Ch 489 at 494.
2 FAI Homes Security Pty Ltd v Price & Ors trading as Maurice Blackburn & CO [1999] VSC 274.
3 Gilbert v Endean (1878) 9 ChD 259 per Jessell MR at 267.
4 ALRC Report 38.
5 Part 60 Supreme Court Rules
6 Part 28 rule 1 Supreme Court Rules.
7 Section 67 Supreme Court Act and Part 29 Supreme Court Rules.
8 Practice Note 43
9 Part 23 rule 3 Supreme Court Rules.
10 Part 24 rule 1 Supreme Court Rules.
11 Part 53 rule 2 Supreme Court Rules.
12 Part 15 rule 26 Supreme Court Rules and Part 13 rule 5 Supreme Court Rules.
13 Part 13 rule 2 Supreme Court Rules
14 1986/32: Interlocutory Procedures - A Civil Litigation Workshop; Introduction and Overview including Notices of Motion, R Druitt; Common Errors in this Field - A Master's Perspective, Master T Greenwood; Summary Judgment, A Frank; Interlocutory Procedures: A Civil Litigation Workshop, P O'Donnell; Discovery and Interrogatories, P Schell; Particulars, H Conway; Subpoenas, P Stone.
1988/33: Interlocutory Procedures; Introduction and Overview Including Notices of Motion R Druitt; Interlocutory Procedures A Civil Litigation Workshop, P O'Donnell; Summary Judgment, Alistair Little; Expedition, RJH Darke; Subpoenas, P Stone; Particulars, H Conway; Discovery and Interrogatories, JE Thomson.
1996/83: Interlocutory Procedures: Preliminary Discovery, D Epstein; Notices of Motion, D Epstein; Subpoenas and Notices to Produce, J Hatzistergos; Particulars, S Walmsley.
1997/46: Interlocutory Procedures: The Exercise of Discretion in Making Costs Orders, J Hatzistergos; Running Ex Parte or Other Urgent Applications before the Equity Duty Judge - A Short Practical Guide, R Brender; The When, What and How of Injunctions, M Anastasi.
2000/73: Commercial Litigation: Discovery and Inspection of Documents, R Weber; Lay Statements and Expert Evidence Reports, A Abadee; "Direction to Mediation" Recent Changes to the Supreme Court Act, S Lancken
15 I have drawn very largely upon a paper delivered by Hodgson CJ in Eq in the NSW Bar Association 2000 Readers Lectures on "The Operation of the Equity Division and the expectations of Judges".
16 Practice Note (PN) 99 Registrar's Call-Over; PN 100 Commercial List and Construction List; PN 104 Professional Negligence List; PN 106 Possession List; PN 114 Defamation List.
17 See for instance PN 43 Expedition List; PN 46 Short Notice List and Pre Trial Directions Hearing.
18 See Schedule D & E to the Supreme Court Rules.
19 PN 43 issued 2 October 1987.
20 The Hon. Justice J.Bryson, Affidavits. (1999) 18 Australian Bar Review 166.
21 Part 1 rule 3 Supreme Court Rules.
22 Sir Anthony Mason, "The Appointment and Removal of Judges: Fragile Bastion - Judicial Independence in the Nineties and Beyond", Helen Cunningham (ed)., Judicial Commission of NSW, (1997) at p.3.
23 The Hon. Mr Justice Rolfe, "Commentary on the Future of the Court", Annual Conference of Supreme Court Judges, 13-14 June 1997 at p.3.
24 Evidence (Audio and Audio Visual Links) Act 1998 (NSW); Part 77 Rule 133 Supreme Court Rules. Idoport P/L & Anor v National Australia Bank & Ors (2000) 49 NSWLR 51.
25 Part 77 Rule 133(4) Supreme Court Rules.
26 Cigna Insurance Australia Limited & Ors v CSR Limited & Ors (unreported, Rolfe J NSWSC, 29 November 1995); see also the commentary in J.Leslie's Equity and Commercial Practice E 130 - 20/1-20/3.

27 Carriage v Duke Australia Operations Pty Ltd [2000] NSWSC 239 per Young J.
28 Section 75 of the Evidence Act 1995 (NSW).
29 Ritchie's Supreme Court Procedure at 1128.
30 Patterson v BTR Engineering (Aust) Ltd (1989) 18 NSWLR 319.
31 Garrard v Email Furniture Pty Ltd (1993) 32 NSWLR 662 per Mahoney AP at 676-7, with whom Clarke JA agreed.
32 Lock International plc v Beswick & Ors [1989] 1 WLR 1268 at 1280
33 Anton Pillar KG v Manufacturing Processes Ltd [1976] Ch 55 per Ormrod LJ at 62
34 The Mareva injunction and the Anton Pillar order are two of the most powerful and intrusive interlocutory orders the court makes.
35 See generally the discussion in Bax Global (Australia) Pty Ltd v Evans (1999) 47 NSWLR 538.
36 Vasil v National Australia Bank (1999) 46 NSWLR 207. For procedure see also Bax Global v Evans
37 Collier v Howard (unreported, McLelland CJ in Eq., NSWSC, 23 April 1996).
38 Select Personnel Pty Ltd v Morgan & Banks Pty Ltd (1988) 12 IPR 167.
39 NR Burns, Injunctions: A Practical Handbook, Law Book Co., 1988 at p. 17.
40 Justice Gormon Houston of the Alabama Supreme Court as reported in "Making your Appeals more Appealing", Susan S. Wagner, 59 Ala. Law. 321
41 Street, Sir Laurence, "The Language of Alternative Dispute Resloution" (1992) 66 ALJ 194.
42 66 ALJ at 194 & 197.
43 If a Judge considers "the circumstances appropriate" proceedings or any part of proceedings may be referred for mediation and may be referred without the consent of the parties. If the parties cannot agree upon who the mediator will be then the Court may appoint the mediator whether or not the mediator is on a list of mediators compiled under the Act (s.110K). If the proceedings or any part of them are referred for mediation each party is required to participate in good faith in the mediation (s. 110L). The parties may agree upon the proportions of costs to be paid before the mediation or the Court may make an order as to the payment of the costs of the mediation (s. 110M).
44 Supreme Court Amendment (Referral of Proceedings) Bill Second Reading Speech, Legislative Council, June 8, 2000 at p 6845.
45 B Walker SC and Andrew S Bell "Justice According to Compulsory Mediation" Bar News Spring 2000 at p. 8.
46 B Walker SC and Andrew S Bell "Justice According to Compulsory Mediation" Bar News Spring 2000 p. 8.
47 McLernon Group (Insurances) Pty Ltd & Anor v Bernard John Kelly & Ors (unreported, Rolfe J, NSWSC, 24 October 2000).
48 SB Goldberg, FEA Sander, Nancy H Rogers "Dispute Resolution- Negotiation, Mediation and Other Processors" 2nd Edition; Mediation "A Practical Outline by Sir Lawrence Street" 3rd Edition.