PRACTICE AND PROCEDURE BEFORE THE DUTY JUDGE IN EQUITY

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This paper is concerned with practice and procedure before the Duty Judge in the Equity Division. There is also a Duty Judge in the Common Law Division, who deals amongst other things with applications for listening devices, stays of execution, writs of possession (although occasionally misconceived applications for injunctions to restrain the Sheriff from taking possession are incorrectly brought in Equity), and applications for injunctions to restrain publication of defamations. However, this paper is exclusively concerned with practice and procedure before the Duty Judge in the Equity Division. Although I will touch on some aspects of the law pertaining to applications that feature in the business of the Equity Duty Judge – such as Mareva injunctions, Anton Piller orders, and extensions of caveats – a detailed discussion of the law applicable to various types of interlocutory applications is beyond its scope.

Fundamentally, the role of the Equity Duty Judge is to deal with urgent applications in Equity proceedings, other than corporations list matters (which should be brought before the Corporations List Judge) and commercial list matters (which are allocated to the Commercial List Judge). Duty Judges are rostered on fortnightly from those who sit in the Equity General List. They are available 24 hours a day, seven days a week if really required – but approach us out of hours and on weekends at your peril unless it is a truly urgent matter that cannot wait until the next sitting day. The Duty Judge always robes when sitting in Court.

The Duty Judge List

The Duty Judge list is for matters requiring urgent or short judicial attention. Matters get into the Duty Judge list essentially in three ways. The *first* is by referral from the Registrar's list; the *second* is by adjournment from a previous Duty Judge list; and the *third* is as a fresh application.

Referrals are of matters that are returnable in the Registrar's list, or that have been adjourned to the Registrar's list, which now require urgent and/or short judicial attention. The Registrar calls for matters for referral to the Duty Judge at the beginning of the Registrar's 9.15

General Equity list. Counsel who intend to ask for a matter to be referred should attend before the Registrar at 9.15 am, so that it can be mentioned at the beginning of the Registrar's list and referred. The Registrar will have the Court file conveyed to the Duty Judge.

Other matters will already be in the Duty Judge's list for the day, having been adjourned from a previous occasion – for example, the first return date of a matter in which an abridgement of time for service, or an *ex parte* injunction, has been granted; or an adjourned date on which it is anticipated there might be an interlocutory hearing.

At the beginning of the Duty Judge's list each day he or she will want to organise the day's business as best as it can be, which will require that the list be called over. At this point, what is required is a short succinct statement of what is involved in the application that day. As I repeatedly try to remind those who appear before me, this requires three sentences: *Is it contested or unopposed? What is the nature of the application? How long will it take and what is the degree of urgency?* For example:

> Contested application for an injunction to restrain a mortgagee sale. Two hours, must be heard before midday because the sale is at 1.00 pm.

And that is all that is needed at the outset – not a five minute explanation of what the case is all about.

Armed with that information for each of the matters in the list, the judge will then arrange the day's business, having regard to the estimates of time and the degree of urgency. Most will take into account that you will have other things to do, and give markings for various times during the day once it is possible to assess how long matters are going to take. Often, the Duty Judge will receive an offer of assistance from another judge who has become available – although it seems never to happen on the busiest days – and when there is an offer of assistance, typically a longer matter that will require some hearing time will be referred.

Fresh applications that bring matters before the Duty Judge for the first time are made under *Uniform Civil Procedure Rules* ("*UCPR*") r 25.2, which provides for relief to be granted before the institution of proceedings. Proceedings are not commenced by the application before the Duty Judge; they are commenced when the initiating process is subsequently filed

in the Registry. This is relevant to the point I make below about the unnecessary multiplicity of documentation that is now commonly presented on such applications. On such an application for relief before institution of proceedings – which virtually every initial application to a Duty Judge is – the plaintiff gives an undertaking to the Court to file proceedings within the time directed by the Court, or within 48 hours if no direction is made.[1] Generally speaking, proceedings are instituted almost immediately after the matter is before the Duty Judge, when the file is conveyed to the registry and the initiating process – a draft of which will have been initialled by the Duty Judge – is filed.

The two most common types of application that come before the Duty Judge are applications for abridgements of time for service (sometimes called applications for leave to serve short notice) of initiating process, and applications for *ex parte* interim relief such as an injunction or appointment of a receiver (almost invariably coupled with an application for leave to serve short notice).

Applications for *ex parte* relief and/or abridgement of time for service

On an application for an abridgement of time for service, the Duty Judge will want to be satisfied that there is a legitimate claim for urgency, and that the time frame proposed for service and return of the summons is appropriate, having regard to the degree of urgency and the interests of the defendant – which usually involves allowing sufficient time for the defendant to obtain legal advice and representation. Generally speaking, the Court will usually act on the assurance of responsible counsel as to these matters.

An abridgement of time for service is required only if the summons must be returnable in less than five clear days from the date of filing (or, in the case of a notice of motion, less than three clear days). There is no formal requirement for an abridgement of time for service outside five days for a summons and three days for a motion. Sometimes, for listing reasons, the registry may not allocate an early return date outside those time frames, in which case the Duty Deputy Registrar should be approached with an insistence on an earlier date, coupled with an explanation as to why it is necessary. Only trouble the Duty Judge in those circumstances if that course fails.

[1] *UCPR*, r 25.2(3).

On an application for *ex parte* interim relief, the judge will want to be satisfied, in addition to what is required on an application for leave to serve short notice, that the urgency of the situation is such that it warrants the grant of relief without notice to the other party, and of the basic elements required for an interlocutory injunction – essentially, that there is a seriously arguable case for final relief, and that the balance of convenience favours the grant of interlocutory relief. Normally, there will need to be some evidence of what attempts have been made to communicate with the proposed defendant, and to notify it of the intention to make the application – except where such a course would defeat the purpose of the application, such as on an application for Mareva relief or an Anton Piller order.

On an application for *ex parte* relief, an applicant is obliged to make full disclosure to the Court of all relevant matters – including, in particular, all those matters within its knowledge that the respondent might have raised, if present, in opposition to the relief sought. A party applying *ex parte* to the Court bears a heavy onus of frankness and candour in placing material before the judge in connection with the application.[2] Failure to comply with this obligation will result in the *ex parte* injunction being dissolved, although such dissolution is without prejudice to a further application for a further interim injunction.[3] This said, judges nonetheless appreciate that *ex parte* applications often have to be made in circumstances in which the facts are cloudy and the applicant and its advisors have an imperfect knowledge of the relevant material and context, and that material may not available in a form that could properly be put before the Court, and those considerations are balanced with insistence upon the obligation of frank disclosure.[4]

Procedure on *ex parte* applications

The first step in making an application for an abridgement of time for service or *ex parte* relief is the preparation of the relevant documents. For this type of application, all the documentation required is:

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[2] *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 955, [38].
[3] *Frigo v Culhaci* (NSWCA, 17 July 1998, unreported, BC 9803225); *Harrem Pty Ltd v Tebb & Anor* [2006] NSWSC 1415; *Bennett v Excelsior Land Investment & Building Co Ltd* (1893) 14 LR(NSW) Eq 179, 182.
[4] See, for example, *Mutch v English & Anor* [2006] NSWSC 946.

- a summons,
- the affidavits relied upon, and
- preferably, short minutes of the orders sought.

No notice of motion is required: the interlocutory relief sought can be specified in the summons. A notice of motion for the interlocutory relief sought is necessary only if the initiating process is a statement of claim, which in the Duty Judge context is exceptionally rare, because the urgency of the proceedings usually does not permit the preparation of a statement of claim, although on occasion it may be seen in an intellectual property case in conjunction with which Mareva and Anton Piller relief is sought, and in such a case, the Duty Judge should be approached with a draft motion setting out the interlocutory relief sought, which may be filed once the Duty Judge has abridged time or made *ex parte* orders.

Even less so is there any need for a motion claiming an order abridging time for service, making the application returnable *instanter* before the Duty Judge, and so on. While the revenue of the Court benefits from multiple filing fees on a summons, a motion for interlocutory relief, and a motion for an abridgement of time for service and *ex parte* relief, the motions are an unnecessary expense for clients. Those who persist in this practice can anticipate that the Court will happily accept the superfluous process and extract the filing fees, but direct that no charge in respect of them be passed on to the client!

If the application is to be late in the day, or out-of-hours, warn the judge's associate that it is impending. If it is complex or in involves extensive documentary material, inquire whether the Duty Judge would like the material delivered to Chambers in advance.

Generally speaking, approach the Duty Judge in the Court in which he or she is sitting at the time. If the judge isn't in Court, contact the associate in chambers. No prior notice is required, although as already indicated, sometimes – particularly if the matter is a complex one – prior notice to the judge's associate, and delivery of documentation, is appreciated. Most judges take *ex parte* applications at 10.00 am, at 11.50 am (after the morning adjournment), at 2.00 pm and at 3.45 pm before the evening adjournment. But if the matter requires immediate attention, mention to the Court officer that it is particularly urgent and it will be drawn to the judge's attention and dealt with as soon as the Court can.

Sometimes, where notice has been given of an intended application, the proposed defendant will attend Court. There is said to be a view that the defendant is not entitled to be heard on an *ex parte* application. If there is such a view, I do not understand it. As far as I am concerned, if the opposing party attends it is entitled to be heard, and if they choose not to be heard but their presence is established, their silence may be taken into account.

In the case of an out-of-hours application between say 9.00 am and 6.00 pm, a telephone call to the judge's chambers should be the first attempt at contact. Outside those hours, a call to the security desk number – which is advertised daily in the law list – will result in the security officer telephoning the Duty Judge or Associate, who will return the call to ascertain the nature of the application and make arrangements for its disposition. Out-of-hours applications are sometimes dealt with over the telephone, or in electronic form. In years gone by, judges sometimes entertained such applications at their homes – but since one received a visit from counsel and solicitors accompanied by clients of very menacing appearance, that practice has been less favourably viewed. If a hearing is appropriate, the Court will sit out of hours, late at night or during the weekend. But if you do persuade a Duty Judge that you have a sufficiently urgent matter for the judge to sit in Court on the weekend, then it is not good form for counsel to appear in sporting attire when the judge has gone to the trouble of convening a Court and robing for the occasion. In the last three years, I have convened a Court on a weekend only once. But modern technology facilitates the prompt disposition of urgent business – such as by issuing orders to restrain a bank from dealing with a cheque, by mobile telephone while on the way into town in the morning so that the orders were in place before bank opening hours; or restraining late at night a cattle sale to take place the following morning by having the papers forwarded electronically, and then transmitting the order from the home computer.

Upon making the application, an undertaking will be required from the applicant's solicitor to pay the appropriate filing fees in connection with the summons or motion. If interim relief is granted, the usual undertaking as to damages will be required. Generally speaking, the form of orders will be along these lines:

1. Upon the undertaking of the plaintiff's solicitor to pay the appropriate filing fees, grant leave to the plaintiff to file a summons in the form initialled by me, dated this day and placed with the papers.

2. Direct that the summons be returnable on <date> before {the Registrar *or* the Duty Judge}.[5]

3. Abridge time for service of the summons to <date and time>.

4. Order that in the first instance, notice of the Summons may be served by transmission of a facsimile of a sealed copy thereof to the defendant at facsimile number <number> {*or*, delivery of a sealed copy to Messrs XYZ solicitors, *or* delivery of a sealed copy addressed to {the defendant's solicitors} at Document Exchange box <number>, *or* email transmission of a PDF copy to <email address>}.

If interim relief is granted then an order will be made in the form:

5. Upon the plaintiff by her counsel giving to the Court the usual undertaking as to damages, order that until <return date>, the defendant be restrained from by himself, his servants or agents …

Or, in the case of an extension of a caveat:

5. Upon the plaintiff by his counsel giving to the Court the usual undertaking as to damages, order that the operation of caveat 123456 be extended until <return date>.

The papers will be conveyed to the registry by the Court officer or tipstaff and filed, the order engrossed and entered, and the applicant's solicitor will take away the service copies and attend to service. The solicitor must wait at Court and accompany the papers and Court officer to the registry, to file the initiating process, pay the filing fee and to collect the service copies. It is bemusing to see the number of occasions on which the process of the Court is urgently invoked, and an injunction or abridgement of time obtained, yet no one to file the process or uplift the service copies can afterwards be found! When an injunction is granted, then the order must be taken out in the registry. Under the old rules, it was necessary to obtain a direction that an order be entered forthwith, because the rules provided that an order could not be entered for a number of days unless the Court otherwise ordered – to enable an order to be settled after notice to each party. There is no longer any such provision in the rules, and Rule 36.11(2) provides that a judgment or order is taken to be entered – in the case

[5] Some judges prefer to make proceedings returnable before the Registrar, on the basis that they might not require the attention of the Duty Judge on the return date. Others make them returnable before the Duty Judge, on the basis that they then know what is in the list the following day, rather than have surprises appear.

of a Court that uses a computerised Court record system, as the Supreme Court does – when it is recorded in that system. Rule 36.11(2A) provides that if a Court directs that a judgment or order be entered forthwith, it is taken to be entered when a document embodying the judgment or order is signed and sealed by a registrar. Strictly speaking, there is no longer any requirement for a direction that an order be entered forthwith, but strict speech and registry practice do not always coincide, and the registry will only engross and seal an order if there is the direction that it be entered forthwith. So, it is still necessary to obtain from the Duty Judge a direction that the order be entered forthwith – which will result in the registry engrossing, sealing and issuing the order. One hears occasionally of alleged delays in obtaining orders from the Registry. If the solicitor attends the Registry following the pronouncement of an injunction and a direction for "entry forthwith", this should not be a problem. Many judges' associates nowadays, once the associate's record of proceedings has been prepared and checked by the judge if necessary, will transmit it electronically to the registry, which can then be copied into the formal order to expedite the process. If the registry is closed, sometimes the judge's staff will engross the order and have it sealed by the judge, but ordinarily resort to this course is required only out of hours.

If only an abridgement of time for service is obtained, it is endorsed by the Registry on the initiating process; no formal minute of the order is required (although a formal minute is necessary if the abridgment is accompanied by a grant of substituted service).

Substituted service

It is commonplace for applicants for abridgments of time for service and *ex parte* relief to seek substituted service of the initiating process. Substituted service is authorised by *UCPR*, r 10.14, which provides that if a document is required or permitted to be served on a person in connection with any proceedings and it cannot practicably be served in person or cannot practicably be served in the manner provided by law, the Court may direct that instead of service such steps can be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned. The touchstone for the power to order substituted service is therefore the *impracticability* of ordinary service in accordance with the rules. Initiating process must be served personally and mere inconvenience in effecting personal service is not sufficient ground for substituted service: it must be shown that

personal service is impracticable. That said, in cases of urgency what is practicable will take into account the speed with which it must be effected.

Often, the Court may make a direction that *in the first instance* service may be effected by an alternative means without dispensing with the requirement for personal service. That is not a true order for substituted service, but has the result that the Court can be satisfied in respect of the urgent interlocutory application that appropriate steps are taken to give notice to the defendant. In such a case, the practical result is often that the defendant files an appearance, so that further (personal) service becomes superfluous; but if that does not happen, the originating process must still be personally served in due course. Another way of dealing with it is, when abridging time for service, to provide for some alternative form of service (for example electronically or by fax) within a short time frame, leaving a long time frame for personal service.

On any application for substituted service there must be some evidence that the proposed form of substituted service is likely to bring the document to the notice of the defendant. This means, for example, evidence (not assertion from the bar table) that a solicitor is acting for the defendant and some evidence of the address, facsimile number or other contact detail of that solicitor – for example, a letter emanating from that solicitor. As the precedent set out above indicates, orders for substituted service require precision in respect of the email address, telephone number or address at which substituted service is to be effected, and the evidence must establish those matters.

Personal service and substituted service must be strictly proved, in the absence of an appearance by the defendant. Often the evidence of service is quite unsatisfactory. With surprising frequency, one sees affidavits of solicitors deposing: "I caused this to be served on X by placing it in an envelope and putting it in the out tray of the office". That does not prove service by post: the proper means of proof of service by post is having the clerk who placed the letter into the post box depose to having done so. Service by post – or by facsimile – is not proved by a solicitor saying that his or her clerk did it. In the case of facsimile transmission, the person who operated the facsimile machine should swear the affidavit of service, although a machine generated report proving transmission is likely to be acceptable.

Applications for interlocutory injunctions

On an application for an interlocutory injunction, the test is whether the plaintiff has established a sufficiently seriously arguable case for a final injunction as to justify the grant of interlocutory relief, having regard to the balance of convenience. Putting the test that way emphasises:

- First, that the plaintiff always has the onus of establishing a case for an interlocutory injunction in particular, a seriously arguable one.

- Secondly, that the balance of convenience is not reached unless and until there is a seriously arguable case for final relief.

- Thirdly, however, the strength of the case for final relief may influence the balance of convenience and conversely the preponderance of the balance of convenience can effect how strong a case for final relief is required to justify the grant of a final injunction. Thus a strong case for final relief may warrant the grant of an interlocutory injunction even though the balance of convenience tilts barely if at all in favour of granting rather than withholding relief, whereas even a weak case for final relief – so long as it passes the threshold of being seriously arguable – can justify an interlocutory injunction if the balance of convenience weighs heavily in favour of granting injunctive relief.

It is sometimes said that in applications for interlocutory injunctions, a third consideration is whether damages are a sufficient remedy. But this is really an aspect of the first limb – whether there is a seriously arguable case for a final injunction. Properly understood, the real question is whether final injunctive relief would be declined on the basis that damages were a sufficient remedy. If it can be seen at an interlocutory stage that a final injunction would be declined for that reason, then no interlocutory injunction would be granted because there was no sufficiently seriously arguable case for a final injunction.

Where, on an interlocutory application, the major issue is a question of law, the Court will usually endeavour – at least if time permits – to determine the question of law if it can, rather

than merely considering whether the question is sufficiently arguable. So when, on an application for interlocutory injunction, there is a pure question of law, or a question of law based on facts which are not really in contest, the judge will endeavour to decide that question, as usually it is in the interests of the parties that the Court do so. As Young J (as his Honour the Chief Judge then was) said in *D'Arcy v Burelli Investments Pty Ltd* (1987) 8 NSWLR 317, 320:

> In an interlocutory application for injunction where a question of law arises, the prevailing view is that that question of law should be decided, unless the judge considers that there are good reasons for not doing so. Those good reasons will usually occur because there has been too little time to do research or the questions of law might be affected by the facts.

Sometimes, an application for an interlocutory injunction will have the effect of practically determining the final outcome of the case. Typically this may be so in cases of restraints of trade for relatively short periods, which will have expired before the case can have a final hearing – where there is a post-employment restraint of three months or even six months, it may be very difficult to get the case on for final hearing in that time, so that the interlocutory determination will practically determine the rights of the parties. Where the determination of the interlocutory application will substantially determine the action finally in favour of whichever party succeeds, then it is necessary to give closer and more careful consideration than otherwise to the relative strengths of the cases for final relief, which adopts in that context a much more significant role than otherwise in determining whether or not interlocutory relief should be granted.[6]

The circumstances in and the basis on which interlocutory relief is granted means that it is not to be regarded as immutable pending the final hearing – it can be reconsidered when the justice of the case so requires. But to warrant reconsidering interlocutory relief will usually require that there has been some relevant change of circumstance since it was last granted or considered, that bears on the criteria governing the grant of relief – typically whether it can still be said that there is a seriously arguable question to be tried, or whether in some way the balance of convenience has changed. There is a clear distinction to be drawn in this respect between the granting of interlocutory relief properly so called after an interim injunction, and the variation of interlocutory relief after it has first been granted. After an *ex parte* injunction

[6] *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533.

or an interim injunction has been granted, but before there has been an interlocutory hearing, the applicant continues to bear the onus of justifying the continuation of the injunction. But once there has been an interlocutory hearing and an interlocutory injunction has been granted until further order – as distinct from an interim injunction until the next return day – then the onus shifts to the party seeking to have the injunction varied to demonstrate some relevant change of circumstances. As Bryson J said in *Elders Rural Finance Ltd v Westpac Banking Corp* [NSWSC, 24 May 1989], the nature of claims for interim injunctions means that they are usually made on a basis which admits of some debate or reargument, but repeated returns to the Court for reconsideration of a claim for an interim injunction cannot be regarded with favour. Nonetheless, there are circumstances where reconsideration may be appropriate. Gibbs CJ, Murphy, Aickin, Wilson and Brennan JJ in *Adam P Brown Male Fashions Pty Limited v Phillip Morris Inc* (1981) 148 CLR 170, 178 mentioned circumstances where new facts had come into existence or were discovered which rendered the enforcement of an interlocutory order unjust. As Bryson J commented:

> Their Honours did not, of course, endeavour to give an exhaustive statement of which reconsideration would be appropriate and it would hardly be possible to do so. However, there ought in my view for this as for other discretionary applications to be some new matter to be raised which could represent a sound and positive ground or otherwise a good reason for embarking upon reconsideration.

My view, for what it is worth and acknowledging that it is impossible to state a principle with universal application in this field, is that as a general rule interlocutory relief is not to be reconsidered when all that is involved is a review on the same facts as prevailed when it was originally granted or declined, or on facts which ought then reasonably have been contemplated: in those circumstances, the remedy is an application for leave to appeal and, if granted, an interlocutory appeal. But if new facts have emerged that may affect the arguability of the case for final relief, or the balance of convenience, then the question of interlocutory relief can be reconsidered.[7]

Often, in connection with the grant of interlocutory relief, liberty to apply or liberty to restore is reserved. This does not mean that one can automatically apply for variation of the existing orders. Nor is it a means for enforcing compliance with directions. There is no point in having a matter restored to the list just because the opposing party is in default – there is only

[7] *Harrison Partners Construction Pty Ltd v Jevena Pty Ltd* [2005] NSWSC 1225, [17].

utility in the exercise if it is proposed to seek some further order or relief (and *not* one that the opposing party comply with an order that it is already bound to comply with) can we put it back in the list in two days or three days, or whatever liberty to apply was. Usually, it is the party in default that should have some incentive to put the matter back into the list to remedy the default, but there is simply no point in bringing the matter back before the Court for the purposes of berating or embarrassing a defaulting party with nothing more. To address this, liberty to apply will usually be granted in the following terms:

> Liberty to apply on X day's notice, any such notice to specify the directions or relief to be sought.

Requests to restore a matter to the list pursuant to liberty to apply which fail to specify sensible relief to be sought result in a judicial requisition for specification of that relief, which seems usually to provoke silence.

Particular interlocutory applications

That then brings me to particular types of interlocutory applications. Again, this is not the time to review in any exhaustive degree the law relating to Mareva injunctions, Anton Piller orders, rights of way, lockouts and so on, but only to touch on what is involved in some of these applications.

Practice Notes SCGen 14 and SCGen 13 provide extensive detail as to the practice and procedure on applications for freezing orders (which seems to the current fashionable name for asset preservation orders, Mareva orders or Mareva injunctions), and search orders (the currently fashionable name for Anton Piller orders). Anyone appearing on such an application should be familiar with them.

My personal view is that a defendant who receives a penal notice and attached order in the form of that recommended by SCGen 14 would require comprehensive legal advice to have much hope of understanding the extent of the obligations it imposes. It is a document of unnecessary complexity and I much prefer to make a simple order to the following effect:

> Order that the defendant be restrained from by himself, his servants and agents alienating encumbering or further encumbering any of its assets except insofar as it would not

> reduce his assets below X dollars in value, and provided that this does not prevent him drawing $500 per week for living expenses or paying up to $10,000 for reasonable legal expenses in connection with this application.

Such an order can be expressed in two or three paragraphs, on a single page document, with the standard Notice to Party Bound, and is much more readily capable of being understood by the average intending defaulting judgment debtor than the form of penal notice and order that the practice note suggests.

On an application for a Mareva injunction, there must be evidence showing:

- what is the cause of action for final relief and the circumstances showing that there is a good arguable case – or, if there is already a judgment, details of the judgment;

- the amount of the claim or at least an assessment of it if it is an unliquidated claim;

- the nature and value of the respondent's assets so far as they are known;

- the identity of any person other than the respondent who might be effected by the order and how that person might be effected by it;

- if, as is often the case on a Mareva application, the application is made without notice to the respondent, any possible defence that the respondent might have;

- above all, circumstances showing – rather than a mere expression of fear – that there is a risk of dissipation if an order is not granted. Sometimes, but very rarely, a letter requesting an undertaking coupled with a refusal to give an undertaking may clear that hurdle, but normally more is required. That something more may be found in the conduct of the litigation or the cause of action itself – if there is evidence of fraud or misbehaviour up to that point – but usually something more than a mere refusal to give an undertaking will be required.

So far as Anton Piller orders are concerned, there must be:

- a description of the things or category of things in relation to which the order is to be made;

- the address or location of any premises in relation to which the orders are sought and whether they are private or business premises, and if the premises include residential premises, whether or not there is a female occupant, a child under the age of 18, a vulnerable person or a combination of one or more of them;

- why the order is sought, including why there is a real possibility that the things to be searched for might be destroyed or lost if notice is given or unless the order is made;

- the prejudice that the loss of those items would occasion;

- importantly, the name, address, firm, and commercial litigation experience of an independent solicitor who consents to being appointed to supervise the execution of the order. Evidence of the independent solicitor's consent should include a form of consent signed by that solicitor, appropriately verified in accordance with the rules, and that the solicitor gives the undertakings referred to in the relevant schedule to the proposed order in the Practice Note under the heading "Undertakings by Independent Solicitor".

A common application is one for an interlocutory injunction enforcing a restraint of trade. An applicant must be able to demonstrate what is the legitimate protectable interest of the applicant that the restraint protects, and why the restraint is not unreasonable at least to the extent of the interlocutory relief sought. Normally, if those matters are sufficiently established, the balance of convenience will not pose a significant difficulty, because equity favours the enforcement of negative contractual stipulations.

Applications concerning caveats are also very common. Generally speaking, a caveat application comes before the Duty Judge in two ways. The first is an application by the caveator, having received a lapsing notice 20 days earlier, for an order extending the operation of the caveat; the second is an application by a caveatee for removal of the caveat. The test is the same on both, and it is the same test as applies for an interlocutory injunction:

even if the caveatee files a summons claiming an order removing a caveat and the caveator is the defendant, it is the defendant caveator who bears the onus of justifying the caveat. First, the caveator – whether applying for an extension of the caveat or resisting its removal – must demonstrate that the caveat has or may have substance.[8] The term "may have substance" encompasses the concept of a seriously arguable case. Secondly, the Court will have regard to the balance of convenience, although it is a rare case that a valid caveat will be allowed to lapse or be removed on balance of convenience grounds. But it can and does occur – for example, where there is a valid caveat in respect of a security interest, but a substantial equity remains in the property and the registered proprietor proposes to refinance and can do so without seriously prejudicing the position of the caveator, then the Court may permit or require that the caveat be removed, with leave to relodge it once the refinance has been completed, upon terms that protect the caveator's interest.[9]

Despite comments in judgments reported and unreported,[10] an enormous number of caveats still claim "an equitable interest" and no more. A caveat that claims merely "an equitable interest" is insufficient to specify an interest claimed by the caveator as required by the relevant provisions of the (NSW) *Real Property Act* 1900. The regulations provide that it is unnecessary to describe an interest as "equitable", thus "equitable" adds nothing and all such a caveat does is claim "an interest", which tells the Registrar of Titles, the caveatee and the Court absolutely nothing. If you encounter such a caveat, then the summons should include, as well as or better still in place of an application for extension of the defective caveat, an application for leave to lodge a fresh caveat claiming an interest claiming substantially the same interest as that claimed in the original caveat.[11]

Other common applications for interlocutory injunctions include injunctions to restrain obstruction of rights of way, and injunctions to restrain landlords from locking out tenants, particularly as often seems to happen in the context of disputed exercise of options. In this

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[8] (NSW) *Real Property Act* 1900, s74K.
[9] S Jackson, *Removal of a Valid Caveat - How Convenient* (1996) 4 APLJ 1; *Australian Property & Management Pty Ltd v Devefi Pty Ltd* (1997) 7 BPR 15,255; *Esther Investments Pty Ltd v Wilson International Pty Ltd* [1982] ANZ ConvR 647; *Buchanan v Crown & Gleeson Business Finance Pty Ltd* (2007) 13 BPR 24,513; (2007) NSW ConvR 56-173; [2006] NSWSC 1465.
[10] Including Hanson *Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd* (2005) 12 BPR 23,355; (2006) NSW ConvR 56-137; [2005] NSWSC 880; *Circuit Finance Pty Ltd v Crown & Gleeson Securities Pty Ltd* (2005) 12 BPR 23,403; (2006) NSW ConvR 56-143; [2005] NSWSC 997; *Sutherland v Vale* [2008] NSWSC 759.
[11] (NSW) *Real Property Act 1900*, s74O.

context, be aware of the sometimes overlooked (NSW) *Conveyancing Act* 1919, ss133E, 133F and 133G, which have the effect that despite any provision in a lease which makes an option subject to performance by the lessee of any specified obligation, no breach by the lessee of such an obligation precludes the lessee's entitlement to the option unless (1) the lessor has given a prescribed notice within 14 days after the lessee purports to exercise the option stating that subject to any order of the Court the lessor proposes to treat the lessee as disentitled to the option, and (2) the Court has dismissed any application brought by the lessee for such relief; and that the lease continues in force until the issue is determined.

The undertaking as to damages

As a condition of *ex parte* relief or interlocutory relief, an applicant is required to give the usual undertaking as to damages. Rule 25.8 describes the usual undertaking as to damages as an undertaking given to the Court to submit to such order if any as the Court may consider just for the payment of compensation to any person whether or not a party affected by the operation of the interlocutory order or undertaking *or of any interlocutory continuation with or without variation of the interlocutory order* … . Thus the undertaking as to damages only needs to be given once, and enures automatically in respect of every interlocutory extension or variation; there is no need to repeat it each time.

Whether an undertaking as to damages is valuable may be material, and even decisive, on the balance of convenience. Generally speaking, when an undertaking as to damages is proffered the Court will assume that the undertaker is representing that he or she or it has the ability to make that undertaking good. In circumstances where there is doubt as to its worth, the Court may require that it be secured – that is, that the applicant give some sort of security for its undertaking as to damages. If there is reason to doubt the worth of an undertaking as to damages, then evidence will be required to show that it is valuable. A defendant who wants to put in issue the value of the undertaking, should notify the plaintiff that it is in issue, because otherwise the Court will proceed on the basis that the value of the undertaking is not in issue. Once it is put in issue, the applicant bears the onus of showing that it is valuable.

Alternative outcomes

In the interests of the just, quick and cheap resolution of litigation, other options need to be explored in each case. Courses of action that a Duty Judge might adopt include:

- adjourning a matter to an Expedition Judge's list – either with or without the grant of interlocutory relief in the meantime;

- fixing an early final hearing before the Duty Judge or some other judge if time can be found for it;

- even hearing the matter on a final basis, if that can be done without injustice.

Conclusion

Finally, can I urge these things?

Remember that when you approach the Duty Judge you are normally approaching a busy Court in which there will be a number of matters with competing claims for urgency. Take a pragmatic approach to what is really urgent and what is not. There are not many applications that really cannot wait until the next morning as opposed to 6.00 pm the night before, and there are few that will be prejudiced in being heard on Monday rather than the preceding Saturday.

In terms of presentation of Duty Judge applications before the Court, if there were two points to stress they would be conciseness, and proportionality to the real issues in dispute on an interlocutory application. The Court will not be interested in extensive submissions as to why the plaintiff should not be believed, because credit normally does not count for much on an interlocutory application. Concise written outlines – even dot point outlines – are normally more helpful than extensive and detailed submissions, although in a contested interlocutory hearing, longer submissions may be appropriate.

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