Interlocutory Injunctions – A guide

a paper presented by

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About the Author

Nicholas Smith graduated from ANU in 2002, with an honours degree in law, and began his legal career with a two-year stint at the World Intellectual Property Organization.

He subsequently spent five years as a solicitor with King & Wood Mallesons, working in their Banking and Finance, Intellectual Property, and Dispute Resolution groups.

Since 2011 he has practised at the Bar in Blackstone Chambers, principally in the areas of Commercial Law, Intellectual Property, Contracts, Equity, Trade Practices and Competition Law, Corporations Law and Insolvency.

Nicholas has co-authored papers on Design Elements of an Effective ADR Mechanism (in 2004) and on the Anti-Money Laundering and Counter-Terrorism Financing Act (in 2006) and was recently published in the Law Society Journal on the subject of resolving domain name disputes.

He is a member of the Copyright Society of Australia (of which he is also a Committee Member) and the Intellectual Property Society of Australia and New Zealand.
Interlocutory Injunctions – A guide
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You are sitting in your office one day and suddenly get an urgent call from a good client of yours. “So and So’s just started advertising their product using my name. I asked them to stop and they refused. Can you stop them quickly?” It’s now time to prepare an interlocutory injunction.

In the alternative, you are sitting in your office one day and you suddenly get an urgent call from a good client of yours. “So and So’s getting an injunction against me, he’s going to stop me from advertising my product using my slogan”. Your client has been having a “civilised” dispute with the other side and suddenly, instead of resolving itself, turns into a nasty case involving interlocutory injunctions.

An interlocutory injunction is an injunction obtained before the final determination of the rights of the parties and framed so as to endure until the hearing and determination of the proceeding concerned. The usual purpose of such an injunction is to maintain the status quo between the parties pending the trial. This may mean the state of affairs in existence immediately prior to the issue of the relevant originating process or, in certain circumstances it may be that some earlier position should be restored.

This paper is primarily focused about how to defend the defendant’s interests when the other side has indicated that they will seek an interlocutory injunction or has just applied for and successfully received an ex parte interim injunction against the defendant’s. The reason for this is that practitioners for the defendant, especially defendants who have not perceived the legal difficulties they are in until the last minute, are often placed in positions where they have to act very quickly to save their client’s business. However, in discussing how to defend a client’s interests, this paper will also operate as a guide to practitioners preparing to obtain an injunction as to what missteps to avoid that the defendant may be able to take advantage of. In general this paper will assume that the party seeking the application (the applicant) has
or will be able to show that a serious question to be tried exists, as that question will always be dependent on the specific facts of the claim. In addition, while this paper will focus on more general interlocutory injunctions, much of the substance of the paper will also be applicable when dealing with Search Orders (also known as Anton Pillar orders) and Freezing Orders (also known as Mareva Orders).

**Offensive Strategy**

The strategy in obtaining an interlocutory injunction is pretty simple: Get the evidence in order to satisfy the court of the requirements for an interlocutory injunction be issued. The key questions of strategy usually involve the crafting of the appropriate orders, which must be sufficient but not overly broad, and the question of whether such orders should be obtained ex parte or whether leave for short service be obtained, thus giving the defendant an opportunity to make their case at the hearing of the application.

**Defensive Strategy**

Like most legal circumstances, when opposing an application for an interlocutory injunction, there is no one obvious defensive strategy, rather the best strategy will depend on the strength of the applicant’s case, the circumstances of your client’s position, the impact of the proposed injunction and the financial resources of the client. In particular, you will need to consider whether your client is prepared to fight the injunction in its entirety, consent to (or negotiate) an injunction or undertakings that are narrower than the form proposed by the applicant, or in some cases, acquiesce to the injunction in its entirety.

**Elements required to obtain an interlocutory injunction**

In order to obtain an injunction, generally an applicant will need to establish the following to the court’s satisfaction:

a) That there is a serious question to be tried;

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1 *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148
b) That attempts to rectify the situation other than by order have failed;

c) That there is a reason for urgency (and that the applicant has acted promptly);

d) That damages are not enough to cure wrong; and

e) That the balance of convenience favours making the order.

It is also strongly advisable (though not strictly necessary) that:

f) The applicant be prepared to give the usual undertaking to damages (as defined in s25.8 of the UCPR to submit to any order for the payment of compensation to any person affected by the operation of the interlocutory proceeding); and

g) That the applicant can establish means to make good on that undertaking.

When an injunction is ex parte (granted without all parties present) the urgency element of the application is particularly important: Courts are wary of granting ex parte applications for injunctions, unless the application is particularly urgent. If the situation is one that can be resolved in 3-5 days’ time, a court will often prefer to grant an order for short service and then list the matter for hearing before the particular duty judge, in order to ensure that it gets “both sides of the story” when making its decision. If this cannot occur then the applicant has full duty of candour to court and must state all relevant matters within their knowledge include all those matters that weigh against the making of the order. As a practitioner, you must consider, at the time of making the application, whether your client would be better served by obtaining an ex parte application immediately with the risk that the ex parte application will be dissolved by the return date, or obtain an order for short service and hope to catch the defendant unprepared.

It is important, when acting for a defendant in these circumstances, to bear in mind the applicant’s requirements. The applicant bears the burden of proof in relation to each of the elements and if they fail to put on evidence or make submissions sufficient to discharge the burden this should be pointed out to the Court.

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2 Kerridge v. Foley (1968) 70 SR (NSW) 251

3 Thomas A Edison v Bullock (1912) 15 CLR 679
Questions to Ask – Defendant

Aside from the basic questions to ask a client (what is this all about? How will the injunction affect your business? Have you tried to settle?) there are three major questions/areas of discussion that you need to broach with a client.

1) Has the injunction already been obtained? Was it obtained on an ex parte basis?

The first question to ask your client is whether the injunction has already been obtained, and if so, was it obtained ex parte? It is vitally important to know whether the injunction has already been obtained or not, as it guides your strategy for the rest of the proceeding. The contrary question that a practitioner acting for an applicant must consider is whether it is possible and advisable to obtain the injunction on an urgent ex parte basis or should an application be made for short service and then the application for the injunction be made on the first return date.

If an injunction is made ex parte and on an interim basis (and it isn’t an order (such as a search order or an order to cease trading on a particular date) that would no longer be in effect on the return date) then in order for the injunction to continue, a formal application must be made at the return date, so the applicant must have evidence, in at least a reasonably admissible form, by that date in order for the injunction to continue. One option, when acting for the defendant, is to prepare vigorously for a contested application on that date, in the hope of catching the applicant off guard and getting the injunction removed. In the alternative, if the defendant is in a situation where they has insufficient time to prepare for an application, they could seek a later date for the hearing of the formal application and consent for the injunction to remain in place or provide undertakings in lieu of an injunction until that application is heard. An applicant’s representative should be wary of this tactic being used against them and ensure that they have adequate and admissible evidence prepared for the return date.

If the injunction has already been obtained but it was not an interim ex parte application (i.e. the defendant was properly notified of the application but either did not appear at the application or appeared in in the absence of, or with different representation) then the
Injunction will usually be expressed to apply indefinitely or until the final hearing of the proceedings. In such circumstances it will be necessary for the defendant to file a formal motion seeking the removal of or variation of the injunction. It will normally be necessary for the defendant to put on evidence in support of that motion, including an explanation of why such evidence was not before the court at the time the initial order was made.

2) Can the defendant live with the injunction, or is there a possibility of negotiating an acceptable order?

Once it is clear whether an injunction has been ordered the next question is whether the defendant should oppose the injunction at all. If the defendant does not wish to oppose the injunction in its entirety, it may be possible to:

a) consent to the form of orders sought without admission;

b) agree to certain undertakings to the other side without the need to seek the orders in court;

c) negotiate a more acceptable form of orders with the applicant; or

d) if negotiation is unsuccessful, indicate to the court that the defendant consents to certain lesser orders than those proposed by the applicant.

There are a number of factors to consider when deciding whether to oppose an interlocutory injunction, including:

a) The cost and inconvenience of interlocutory proceedings. In addition, if the matter is only over a small sum of money, both parties may face the inconvenience of litigating the interlocutory application in the NSW Supreme Court (or in some cases, the District Court) which has the power to make equitable injunctions, before transferring it to the Local Court or a specialist tribunal.

b) The prospects of success in opposing the injunction sought, especially in circumstances where the applicant does have “a serious question to be tried”.

c) The demoralising effect on the defendant if the order is made;
d) Whether it makes a significant difference to the operation of the defendant’s business if the order is made; and

e) If the order has the effect of deciding the proceedings (in which case the defendant should not consent to the order unless it is willing to concede the entire proceedings).

The second last point is particularly important. If the injunction sought does not make a significant difference to the day to day conduct of the defendant’s business (especially given the fact that, if successful in the final proceeding, the defendant is entitled to its costs of complying with any interlocutory injunction granted by the court), then it may be worthwhile for the defendant to simply consent to the order (without admission) to save costs. If the orders sought only bind the defendant, a further option is simply to agree to undertakings that have the same effect as orders without the need to have formal orders made.

In the alternative, if certain orders sought by the applicant are reasonable and/or something the defendant can live with but other orders are, in the defendant’s opinion unreasonable or unacceptable, then the parties may consider whether to negotiate a less onerous set of orders, or in the alternative, turning up to court with a set of proposed orders that the defendant can live with and suggesting that the court makes the defendant’s proposed set of orders rather than the applicants’ set. This turns the application into a question of the balance of convenience between the two sets of orders.

3) Do you want to keep your powder dry?

A further option available to defendants in circumstances where he defendant has some notice of the applicant’s intended application, would be to do nothing, at least regarding the initial application in which ex parte relief is sought. Once the ex parte interim application is granted you then challenge the injunctions at a later (but still reasonable) date.

This strategy may be appropriate in a number of circumstances including:

a) Where the defendant anticipates that the applicant will not be able to make its case good when the challenge to the injunction is brought. For example, an applicant may obtain an ex parte injunction restraining the sale of a property or the calling up of a bank guarantee on the basis that it anticipates receiving a sum of money or an offer to
re-finance in a couple of days. If acting for the defendant, it may be prudent to take no action in the meantime; either the money will come through and it will be paid out anyway, or if not, the basis on which the ex parte order was granted will fall away and the defendant will have excellent prospects of having it removed.

b) Where the defendant anticipates that a third party will either take action or refuse to take action that will make the basis for the injunction moot. For example a defendant may not wish to oppose an order that it cease trading on a certain day in circumstances where it is aware that the local council is likely to perform sidewalk repair on that day, necessitating closing on that day. A further example would be in circumstances where the defendant’s actions are causing nuisance to the applicant’s property, however it is likely that the applicant will lose possession of that property (either through mortgagee repossess or counsel’s resumption of land), resulting ultimately in the merits of the action becoming moot.

Relevant factors in a contested application for an interlocutory injunction

Let’s assume the applicant can’t live without the proposed injunction, the defendant can’t live with it and the parties can’t reach an accommodation for a more reasonable order. It is now time to look at how a court will decide a contested application for an interlocutory injunction.

To the extent that a party seeks to make any submissions on any of these points, they (with the exceptions of factors 3 and possibly 6) need to be supported by admissible evidence. When preparing evidence it is worthwhile bearing in mind s75 of the Evidence Act which provides that “In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.”

1) Serious question to be tried

The applicant must put on evidence and make submissions on this element. The applicant must put on evidence usually (the exceptions being particularly urgent cases) in admissible form, that demonstrate a basis that the applicant is entitled to relief. The respondent has more leeway. Determining whether to make submissions and put on evidence in relation to this element will depend significantly on the facts of the case and the basis for the application for injunction.
In applying for an interlocutory injunction, the applicant must show that there is a serious question of fact or law that ought to be tried. The test for “serious question” was set out in *Australian Broadcasting Corp v O'Neill*\(^4\) and is “whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief”. The general requirement is that the applicant must establish “a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial”.

In *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*\(^5\) Gleeson CJ concluded that there may be no basis for interlocutory relief in the absence of a “sufficiently plausible ground for the granting of final relief”.

Where a final hearing of a dispute is unlikely to occur because the grant or refusal of an injunction would virtually bring the dispute to an end, it has been said that the court should apply broad principles so as to avoid injustice. The defendant should not be precluded from going to trial because of the grant of an interlocutory injunction. While there is no fixed rule that an applicant can never obtain an interlocutory injunction (essentially granting the whole of the relief that would be sought at the trial), the applicant's prospects of success must be considered when granting an injunction that has the effect of bringing the dispute at an end.\(^6\)

2) **That attempts to rectify the situation other than order have failed and that there is a reason for urgency (and that the applicant has acted promptly)**

When applying for an interlocutory injunction, unless it is a particularly urgent situation, a court will normally expect to see evidence that the applicant has made reasonable attempts to rectify the situation and that such attempts were unsuccessful. Failure to make any such reasonable attempt may well have cost consequences. Therefore an applicant should put on evidence of any attempts made to rectify the situation, and if the applicant has delayed, evidence setting out the reasons for the delay.

\(^4\) (2006) 227 CLR 57

\(^5\) (2001) 208 CLR 199

Where an interlocutory or an interim injunction is sought, equitable defences are relevant. Such defences include:

1. unclean hands;

2. delay and “laches”; and

3. waiver, release or estoppel.

In particular delay is of significant practical importance for two reasons:

1) If there has been delay the defendant’s case will be strengthened if the delay has given them the impression that no application will be made and the defendant has ordered their affairs accordingly. Thus where delay is accompanied by or has resulted in prejudice to the defendant or third parties, there is a basis for denying interlocutory relief.

2) Secondly, in the case of an urgent interim injunction, the fact that the applicant has failed to act on their rights may lead to an inference that the matter is less than urgent, or that it is not necessary to make an interim injunction.

It is not clear whether mere delay is itself sufficient to deny relief. The issue that will be considered by the court is whether the delay has made it unjust to grant the injunction claimed. If there is considerable unexplained delay, a court may deny injunctive relief, particularly interim relief, on the basis of acquiescence, estoppel or balance of convenience. Delay may suggest that the applicant’s complaints are not as serious as the applicant claims, however the applicant may have any number of explanations for the delay, including:

1) because of the time needed to prepare for a complicated application;

2) because of a lapse of time during which the applicant had to find evidence;

3) because of an initial misapprehension of the applicant caused by the defendant; or

4) because of time spent awaiting legal advice.

In a matter in which the public interest is involved, courts will generally bear less regard to issues of delay then they would when the applicant is suing to protect their own interests. In
**Associate Minerals Consolidated Limited v Wyong Shire Counsel**\(^7\) the Privy Council stated that

“The injury to a public interest by the denial of relief, if extent and degree of irremediability, must be weight against any loss which the defendant may have sustained by the applicant’s standing by while the defendant incurs expense or, if such is the case, misleading the defendant into think that its activities were or would be permitted”.

### 3) Damages are an inadequate remedy

Where an application is made for an interlocutory injunction, it should not be granted where there is an adequate remedy in damages. Where damages are available as a remedy (but they are inadequate) the court in the exercise of its discretion will consider (among other things) “the extent to which any damage to the plaintiffs can be cured by payment of damages rather than by the granting of an injunction”\(^8\). The appropriate question should be: “is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?”\(^9\)

In most cases in which an injunction is sought, a remedy in damages is available but it is said to be insufficient. They key factor that courts will consider when determining to give the injunction is whether irreparable injury will occur if an injunction is not granted. In order to obtain an interlocutory injunction an applicant must show a threat of irreparable injury as a prerequisite, in the sense that there is a threat of injury which, if not prevented by injunction, cannot be afterwards compensated by damages. The question is whether the applicant ought to wait until trial for relief or be granted relief in the meantime by way of an interlocutory injunction. Therefore the applicant must put on evidence of irreparable injury as part of the application for an interlocutory injunction.

Irreparable injury will not be established if relief in monetary terms is possible\(^10\). See also *Goyal v Chandra*\(^11\), in which Brereton J at [43] said

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\(^7\) [1975] AC 538 at 560

\(^8\) *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153


\(^10\) *Cunnington Investments Pty Ltd v Matheson* [2009] FCA 1529, Goldberg J at [57]

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“Properly understood, the real question is whether final injunctive relief would be declined because damages would be a sufficient remedy; if it can be seen at the interlocutory stage that that would be so, then an interlocutory injunction would be declined.”

The practical impact of this is often forgotten by judges and lawyers in applications for interlocutory injunctions. If it is apparent that the failure to award an injunction will result in loss incurred by the applicant, but those costs are only monetary and can be fully compensated by the award of damages then a submission should be made to the court that it should not grant the injunction.

A similar question will arise if the defendant is prepared to offer an undertaking to the court not to do the acts complained of by the applicant. While the provision of an undertaking will not automatically result in the denial of an injunction, it may make it unnecessary to make an order, as no injury will occur in the absence of an order. Undertakings made to the court are generally enforceable in the same fashion as an injunction. Thus, a breach of such an undertaking may give rise to a contempt of court.

4) Failure to proffer an undertaking and/or failure to provide an adequate undertaking.

In the usual course of an application for an injunction, the applicant for an interlocutory or interim injunction will be asked to give the usual undertaking as to damages. The “usual undertaking as to damages” is an undertaking to submit to such order as the court may consider to be just for the payment of compensation, to be assessed by the court or as it may direct, to any person, whether or not a party, adversely affected by the operation of the interlocutory order or undertaking. When acting for an applicant, it is usually valuable to obtain instructions to indicate that the applicant is prepared to grant the usual undertaking.

11 (2006) 68 NSWLR 313
If the usual undertaking is not given, this will weigh heavily against granting the order\textsuperscript{12} but in exceptional cases, an injunction may be granted without an undertaking\textsuperscript{13}. However the applicant cannot be compelled to provide an undertaking.

The usual undertaking is usually that of the applicant personally. Where the undertaking is of little value because the applicant is of limited means, the balance of convenience may favour refusing the injunction. Where an applicant is outside the jurisdiction, the undertaking is often accepted from the applicant's solicitor. As the nature of the undertaking is that it is given to the court (and is not a contract between the applicant and defendant), the party which has given the undertaking can apply to be released from it.

In the case of \textit{Organic Marketing Australia Pty Limited v Woolworths Limited}\textsuperscript{14} OMA were seeking an interlocutory injunction stopping Woolworths from using the words “Honest to Goodness” in their advertising. Woolworths in their opposition to this order put on evidence that the direct cost of the campaign was $3 million, which would be lost in the event of an order. They also put on evidence as to the additional costs of the immediate cessation of the campaign including the loss of sales, the loss of customers to competitors, the loss of stock and the negative publicity for Woolworths and Margaret Fulton (who was featured in the campaign).

The court in refusing the injunction, found that, while the applicants had offered the usual undertaking as to damages there was no evidence to support the conclusion that the applicants could honour their undertaking to pay Woolworths’ damages in the event that Woolworths succeeded at trial. The court found that while there is no inflexible rule that the moving party should be denied interlocutory relief if it cannot offer a meaningful undertaking\textsuperscript{15}, the failure to offer an adequate undertaking does affect the balance of convenience (especially in circumstances where the applicants were not bringing this case in order to protect the public interest or advance a cause on behalf of a class of persons.)

\begin{itemize}
\item \textsuperscript{12} \textit{Donnelly v Amalgamated Television Services Pty Ltd} (1998) 45 NSWLR 570 at 575
\item \textsuperscript{13} \textit{Optus Networks Pty Ltd v Boroondara City} [1997] 2 VR 318; (1996) 136 FLR 117
\item \textsuperscript{14} [2011] FCA 279
\item \textsuperscript{15} \textit{Caravelle Investments v Martaban} [1999] FCA 1505; (1999) 95 FCR 85 at [25]
\end{itemize}
In *Frigo v Culhaci*\(^{16}\) the Court of Appeal indicated that they could not conceive of circumstances where an ex parte Mareva injunction should be granted without an undertaking as to damages and the absence of the undertaking from the applicant should lead to the dissolution of any ex parte Mareva orders made.

### 5) Balance of convenience

In the exercise of its discretion to grant an injunction, the court must make a determination as to the balance of convenience. That is, the court will balance the cost and inconvenience of the grant of the injunction to the defendant (if the defendant is successful at the ultimate determination of the proceeding) with the inconvenience of a denial of the grant of an injunction to the applicant (should the applicant prove to be successful).

The issue the court faces deciding whether to grant an interlocutory injunction was stated by Hoffman J in *Films Rover International Ltd v Cannon Film Sales Ltd*\(^{17}\):

> “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. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle”

Modern courts are, however, placing increasing importance on a flexible approach and rejecting a rigid formula for the assessment of balance of convenience\(^{18}\).

When acting for the defendant, it is important to be able to put on evidence, in reasonably admissible form, of the costs that an injunction is likely to impose on you. This enables you

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\(^{16}\) [1998] NSWSC 393

\(^{17}\) [1987] 1 WLR 670; [1986] 3 All ER 772

\(^{18}\) *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199
to be able to make the submission, as was made in Organic Marketing Australia Pty Limited v Woolworths Limited that an injunction should not be awarded because the costs of the injunction on the defendant are greater than the costs of not making the injunction on the applicant.

When acting for the applicant, the position is more complex. Usually the costs of a denial of the grant of an injunction are fairly self-evident and it is important to be able to put on some evidence about how the conduct sought to be restricted hurts the applicant. However depending on the likely approach of the Defendant, it may not be necessary to provide a detailed calculation of costs; such economic evidence is often difficult to prepare in the short-timeframe of an interlocutory injunction application.

6) Lack of candour
When appearing in an ex parte interim application, the applicant needs to disclose any evidence that will be adverse to the applicant’s claim. The applicant’s advocate should include any correspondence between the parties which tends to explain or justify the other party’s actions, and why those reasons are unacceptable to the applicant. The applicant will also need to identify any specific defence including discretionary considerations which would count against the applicant’s interlocutory claims.

If you are acting for the defendant in an application, and it is apparent that the applicant has not properly disclosed any evidence, the court has a discretion to set aside the orders on the grounds of a material non-disclosure by the applicants in the ex parte application. However the breach of the obligation of candour does not automatically lead to the interim injunction being set aside. In Savcor Pty Ltd v Catholic Protection International APS Gillard AJA at [33] set out the test about whether the orders will be set aside as follows

“In my opinion a court does have a discretion to not set aside an order despite a material non-disclosure or misrepresentation of law or fact. Setting aside does not follow as a matter of course. Relevant to the discretion is whether the material non-

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20 Eurogold Limited v Oxus Holdings (Malta) Limited [2007] FCA 811

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disclosure was serious or otherwise the importance or weight that should be attached to the omitted fact in the decision making process and also any hardship if the order was set aside. The approach is different if the plaintiff has acted culpably in the sense that the omission to disclose relevant matters was done deliberately to mislead the court. The most likely result in those circumstances would be that the order would be vacated.”

Depending on the circumstances of the case, if the applicant has omitted to disclose a fact at an ex parte hearing, it is almost always worthwhile raising that point before a judge at the subsequent return hearing. At worst, the fact that the applicant did not honour its disclosure obligation, which will affect its credibility with the judge when the matter is heard (especially in the Federal Courts, where the same judge will hear directions and final hearings) and at best will result in the setting aside of the ex parte order and an award of costs.

7) Form of order
As an applicant, the form of the interlocutory injunction should be crafted very carefully. If the order sought is too broad there is a risk that the defendant may not choose to oppose the injunction but rather form on the form of the order and argue that the applicant’s order is too broad, intrusive or unnecessary.

In Patterson v BTR Engineering (Aust) Ltd Gleeson CJ (as he then was) stated the principle that

“in framing the order counsel should bear in mind that a court exercising equitable jurisdiction generally will only grant to a plaintiff by way of interlocutory relief the minimum relief necessary to do justice between the parties.”

This is particularly relevant when dealing with freezing orders, in which orders restricting the encumbering or disposition of the defendant’s assets may be limited to the amount in controversy and further be limited to allow the defendant to have access to his or her assets.

21 [2005] VSCA 213
22 (1998) 18 NSWLR 319
for the purposes of paying for living expenses, debts and legal expenses, see *Frigo v Culhaci*\(^\text{23}\).

However this broad principle will also govern other applications for interim injunctions. If an interim injunction is necessary for the preservation of property, or preserving the operation of a business, or an asset until the hearing of the proceeding then the injunction should be sought which does that, but only to the minimum extent. For example, an application restraining the defendant making a particular representation that would have the effect of causing irreparable harm to a small business, may be limited to the particular geographical area of the applicant’s business, or restrictions could be made to the form in which the defendant makes a particular representation. Furthermore a court may raise an issue with a vague, poorly drafted order and prefer a more specific, limited order.

Ultimately the courts are concerned with the balance of convenience when making an injunction and may exercise their discretion to make a more limited injunction than sought if they reach a conclusion that the more extensive orders are unnecessary or that the impact of these orders are more significant on the defendant then the applicant.

**Summary**

When acting for a plaintiff, you are looking at what your client is trying to achieve with the proposed injunction. Once you have agreement on what your client is trying to achieve and the basis for the application (what right is being infringed) it is then time to martial the evidence and submissions to answer the six basic questions below.

When acting for a defendant the first question you need to ask is whether the injunction has been issued, and if not what is sought. The next question to consider is whether you can negotiate or obtain an acceptable outcome for your client, without the need to oppose an injunction, or if you have other reasons not to oppose the injunction.

If none of this is possible, and you have instructions to oppose an injunction, there are six basic questions on which you can make submissions when the matter is heard.

\(^{23}\) [1998] NSWSC 393
1) Is there a serious question to be tried?

2) Is there a reason for urgency and have attempts to rectify the situation other than an order have failed?

3) Are damages an adequate remedy?

4) Has the applicant agreed to provide the usual undertaking for damages and is that undertaking adequate?

5) Does the balance of convenience favour granting an injunction?

6) Is the form of order necessary and appropriate?

Best of luck!

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