



Précis Paper

Interlocutory Injunctive Relief

In this edition of BenchTV Garry McGrath SC and Kevin Tang (Barrister) discuss aspects of interlocutory injunctive relief. The discussion is approached from the overarching perspective of points which a lawyer bears in mind when considering whether to make, and making, an application for interlocutory relief.

Discussion Includes

- Points which run through a lawyer's mind when making an interlocutory application in the Supreme Court
- Ex parte applications and urgency
- Problems arising from the need to act quickly when making an interlocutory injunction
- Types of interlocutory injunctions entertained by the Court
- Injunctive orders sought in employment situations, 6 Meaning and use of phrase 'whether usual undertaking as to damages can be proffered'

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1. Requirements for making an interlocutory injunctions.

The presenters discuss the critical elements which must be satisfied in making an interlocutory injunction. The first of these is to show the Court that there is a legal or equitable right which you are wishing to litigate. The second requirement is to establish a prima facie case, establishing that you will be able to maintain that legal or equitable right at hearing. This is achieved through the quick gathering of evidence, by affidavit if possible. The third requirement is to satisfy the Court that the 'balance of convenience', that is, that on balancing both parties' interests, that the most convenient thing for the Court to do is to grant the injunction which is being sought.

2. Ex parte applications and urgency.

The circumstances in which it is appropriate to make an ex parte application for an interlocutory injunction are discussed. In particular, the advantages of giving the respondent party advance notice of your intention to make application are discussed, as opposed to not giving notice, which can put at risk the property or right that is being sought to be preserved. Advantages of giving advance notice include that the Court is more inclined to give injunctive relief if the other side is present, and that the other side will, more often than not, give consent to the injunction (to enable them to consider it), or proffer an undertaking in the same terms. A significant problem with giving advance notice is discussed, namely the problem of urgency. Solicitors will need, in a short time and on an urgent basis, to prepare a summons. The summons will concern final relief and interlocutory relief sought, and affidavit in support, and draft order. The essential quality of a draft order consists in the fact that, without one, the order cannot be taken out immediately.

3. Types of interlocutory injunctions entertained by the Courts.

The presenters discuss several different kinds of interlocutory injunctions including Mareva orders, Anton Pillar orders, freezing orders, confidential information and search and seize orders. Reference is made to PRACTICE NOTE SC Gen 13 and PRACTICE NOTE SC Gen 14 which contain precedents for Anton Pillar orders and freezing orders. Particular attention is paid to orders sought in the employment context, for example in a situation where an employee quickly leaves an employer with a view to being employed by a competitor of that employment, taking with them client. The presenters discuss several different kinds of interlocutory injunctions including Mareva orders, Anton Pillar orders, freezing orders, confidential information and search and seize orders. Reference is made to PRACTICE NOTE SC Gen 13 and PRACTICE NOTE SC Gen 14 which contain precedents for Anton Pillar orders and freezing orders. Particular attention is paid to orders sought in the employment context, for example in a situation where an employee quickly leaves an employer with a view to being employed by a competitor of that employment, taking with them client.

4. 'Whether usual undertaking as to damages can be proffered'.

The meaning and use of this phrase is discussed. Referring back to the earlier discussion of the need for a solicitor to prepare a bundle of documents at short notice, it is pointed out that the solicitor must also be in a position to reassure Court that the client can give the usual undertaking as to damages. The purpose of the usual undertaking is discussed with reference to the example of freezing order which stops a party using money or information or from otherwise exercising their rights such that it causes them damage. The necessity for a solicitor to disclose relevant information concerning the value of a client's undertaking is discussed. It is noted that the absence of such disclosure may result automatically in the loss of an injunction. The potential requirement for security for an undertaking is also discussed. The element of risk in making application for interlocutory injunctions is noted in the context of the need for solicitors to consider what damages might flow from an undertaking, and to inform their client that they may be liable for the damage.

5. 'Balance of convenience'.

Referring back to the earlier discussion of the three factors which a solicitor must establish in seeking an interlocutory injunction, the presenters discussion in detail the use and meaning of the phrase: 'balance of convenience'. The Court's exercise of determining the balance of convenience is discussed. For example, if the Court were to find that damages would be an adequate remedy, it may decline to make the interlocutory injunction. Another consideration of the Court is whether any proffered undertaking to damages and security is sufficient to protect potential risk to respondent.

BIOGRAPHY

Garry McGrath SC

Barrister - Eight Wentworth Chambers, Sydney

Garry commenced his professional career in 1979 where he practised as a solicitor for 5 years before coming to the bar in 1984. Garry has since practised as a barrister and was appointed Senior Counsel in 2010. Garry is in full time practice at the private bar including commercial law, equity, common law, employment/industrial relations, work health and safety.

Kevin Tang

Barrister - Eight Wentworth Chambers, Sydney

Kevin commenced his professional career as a solicitor in the large firms in Sydney practising in commercial litigation. Prior to coming to the Bar he was a Judge's Associate to the Hon PA Bergin and Pembroke J in the Equity Division of the Supreme Court. Since coming to the Bar in 2013, he has appeared regularly in commercial and equity matters, and takes a particular interest in real property, corporations, wills and trusts. He has also acted in charitable trust matters and takes an interest in ecclesiastical law. Outside of those areas he has appeared in appellate courts and other jurisdictions and has tutored in contract law at the University of Sydney Law School.

BIBLIOGRAPHY

Practice Notes

PRACTICE NOTE SC Gen 13

PRACTICE NOTE SC Gen 14

Legislation

Pt 25 *Uniform Civil Procedure Rules 2005* (NSW)

Pt 25 *Uniform Civil Procedure Rules 2005* (NSW)