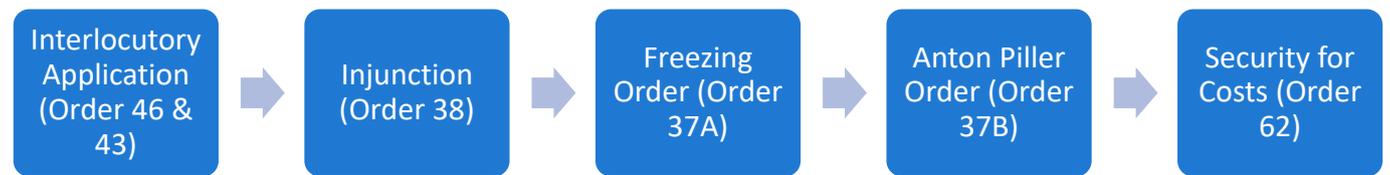


## Topic 7: Urgent Applications



### Interlocutory Applications (Order 46 & 43) – For injunction as per Order 38

#### Procedure for Applications – Order 46

##### Form

An application made on notice to any person shall be by **summons**, unless the Court otherwise orders (46.02(1)). An application by summons is made when the summons is filed in accordance with 46.04 (46.01(2)). Applications must be made on Form 46A (46.04(1)).

##### Giving Notice

Court may order that [plaintiff] give notice to any person having sufficient interest in the application (46.03).

##### Service (however ex parte applications may be appropriate)

Unless otherwise provided, [plaintiff] must serve a copy of **summons and affidavit in support** on every person whom notice to be given (46.05(1)). Service is to be made within a reasonable time before the day for hearing and in no case can be later than 2pm on the previous day/last day office was open (46.05(2)). [Plaintiff] can serve summons [defendant] personally before appearance (46.05(3)).

##### Party Absence

Where [defendant] is absent, court may hear application if satisfied of due service (46.07(1)).

Where [plaintiff] absent, court may dismiss application or make any other order (46.07(2)).

##### Setting aside order

The court may set aside or vary an order which affects a person if application was not made on notice to that person or person did not attend hearing of application (46.08)

### Affidavits in Support – Order 43

#### Form (43.01)

The affidavit in support must be in first person, state place of residence and occupation. Where deponent is a professional/making affidavit in professional capacity, states place of business, position, employer. The affidavit in support must use discrete paras numbered consecutively and be signed by deponent and jurat completed by qualified witness. Each page signed by witness and witness signs the jurat with statement of capacity in which they have authority to take the affidavit.

#### Content (43.03)

Usually affidavits need to be confined to facts based on deponent's own knowledge, but under (2) for interlocutory matters may make affidavits on basis on information and belief so long as you set out grounds for holding that belief.

Interlocutory affidavits failing to state source of information or belief may be inadmissible or of little weight

#### Illiterate or blind or interpreter

43.02: Illiterate or blind – under (1) witness can certify that the affidavit was read in presence of dep and they understood it, and under (2) if witness does not certify this it may be inadmissible unless court is satisfied of matters under (1)

43.02.1: Translator – must swear a second affidavit agreeing that the process conducted properly

### *Exhibits/Annexures*

Affidavits may annex/exhibit documents to which they refer to, either as the document itself or as a bundle (43.06). Bundle exhibits require certification in Form 43A.

### *Irregularities*

An affidavit may be used in evidence notwithstanding any irregularity of form with leave of the court (43.08).

### *File before use*

Affidavit must be filed in court and served before they can be used in proceedings (43.09).

**Ex parte applications** (applications without other party knowledge)

As [plaintiff] will seek to make the application ex parte to [why are they making it ex parte]. As the application will be made ex parte additional conditions must be met. Firstly, [plaintiff] must make **full and frank disclosure**. Secondly, [plaintiff] must make a **cost undertaking** and in the event of a failed application pay the costs.

## Injunctions (Order 38)

### *Interlocutory Injunctions*

The Supreme Court has inherent jurisdiction to grant an interlocutory injunction if just and convenient to do so (s37(1) SCA). In this case, [plaintiff] may seek to get an interlocutory injunctions to prevent [defendant] from [preventative action]. This can be granted at any stage, or in urgent circumstances before commencing a proceeding (r38.01).

In this case, it is likely that the circumstances are urgent, and the injunction may be granted without notice to [defendant] (r38.02(1)). As [plaintiff] will seek to make the application ex parte to [why are they making it ex parte]. As the application will be made ex parte additional conditions must be met. Firstly, [plaintiff] must make **full and frank disclosure**. Secondly, [plaintiff] must make a **cost undertaking** and in the event of a failed application pay the costs.

\*If P is making an application for injunction before proceedings commence, service of the notice of the application may be made at the time of serving the originating process – r38.02(2)

In determining whether an injunction is appropriate the elements outlined in **Castlemaine Tooheys** must be considered:

- Firstly, there must be a **serious question to be tried**. In this case, [plaintiff] has a strong [negligence/ACL claim] against [defendant]
- Secondly, **damages must be inadequate**. In this case, damages would be inadequate because if the injunction is not granted [consequence if injunction not granted (eg. loss of evidence)]
- Lastly, the **balance of convenes** must favour the granting an injunction. In this case, while it is likely that [defendant] may suffer some loss/inconvenience because of [why would D be inconvenienced], it does not outweigh the significant loss that [plaintiff] would suffer as a result of [loss plaintiff would suffer if injunction not granted].

The court may also consider some discretionary factors:

- **Inconvenience and hardship** that would be occasioned to the parties (*Would D suffer hardship?*)

- **Any acquiescence or delay** on the part of the application (because injunction is an equitable remedy) – have they acted quickly (*Did P bring the application quickly and act promptly?*)
- Whether **claim is frivolous or vexatious** (given equitable nature) (*Is it a genuine claim?*)
- **Desirability of preserving status quo** or preventing irreparable injury pending full hearing

On balance, it seems that the court would be likely to order an injunction to [what is the injunction doing (prohibitive)]. \*Go to Order 43 and 46 on how the application is made

#### Conditions on Interlocutory Injunctions

[Plaintiff] should note that there may be conditions attached to the interlocutory injunction.

#### Costs

Where there is an application made for an injunction before a trial (38.03(1)), the court may grant an injunction on condition that P gives security for costs and expenses of any person who may be affected by the injunction (38.03(2)).

#### Plaintiff undertaking re D's damages

- Not always required – consider whether it is in the interest of justice to require an undertaking
- Usually not required where:
  - OP is a corporation and P is an individual
  - P has limited funds

#### **Mareva Injunctions (Freezing Orders [Order 37A])**

[Plaintiff] will likely request a freezing order (mareva injunction) under Order 37A. As this will be an **ex parte** application, [plaintiff] is under a duty to make full and frank disclosure of all material facts to the Court (SCV General Practice Note 17 4.17).

- This includes any defence and anything the applicant is aware of that might make them unable to meet the usual undertaking for damages

Where you are seeking freezing orders against a **third party**, it must be very clear that they will dispose of assets – if there is some doubt the freezing order is unlikely to be granted

\*Freezing order is a very invasive order (high bar to prove it is necessary)

#### General Rule

Court may make freezing order with or without notice to [defendant] for purpose of preventing the frustration or inhibition of Court's process insofar as judgment may be unsatisfied (37A.02(1)). The order may restrain [defendant] from removing assets in or outside Australia or from disposing of, dealing with or diminishing the value of those assets. Freezing order may be issued in Form 37AA (37A.02(3)).

#### Who can freezing orders apply to?

- Party or a non-party (37A.04)
- Judgement debtors and prospective judgement debtors (37A.05(4))
- Third parties (37A.05(5))

#### Which assets can be covered

Given very wide interpretation – covers most things (37A.05(4) and (5), Practice Note clauses 4.6, 4.9-11)

#### Affidavit in Support (37.02(5), SCV General Practice Note 17 (4.18))

As per 37.02(5) and SCV General Practice Note 17 (cl 4.18) an affidavit in support must be filed. The affidavit filed in support of freezing order will address as best as possible the following:

- (a) Information about judgement obtained or if no judgement, the basis and amount of claim and – if application made ex parte – the A's knowledge about any possible defences
- (b) Nature and value of OP's (as known to P) – much homework (eg. subpoena bank)
- (c) Matters referred to in 37A.05: Danger of R or person in control of assets absconding, removing assets from Aus, dealing with assets or diminishing assets' value
- (d) Identity of others affected by freezing and how affected (business partners, spouses etc)

#### *Factors for Granting Order [judgement debtors – if judgement already against them] (37A.05(4))*

As per (37A.05(4)), the Court may make a freezing order against an actual/prospective judgement debtor if satisfied that a judgement or prospective judgement of the court will be wholly or partly unsatisfied because any of the following might occur –

- (a) The def/person in question absconds; or
- (b) The assets of the def/person in question might be –
  - i) remove from Australia or from a place inside or outside Australia; or
  - ii) Disposed of, dealt with or diminished in value

#### *Factors for Granting Order [non-judgement debtors (party or third party)] (37A.05(5))*

(37A.05(5)) Grounds for granting freezing order if satisfied that:

- (a) **Danger that judgement will be unsatisfied:** Danger that judgement will be wholly/partly unsatisfied because third party holds/is using power of disposition over assets or third party is in possession/control/influence concerning assets; or
- (b) Process available in court that will allow P to disgorge assets from third party if a judgement was made

#### *Service of Order*

Order will be served together with a copy of the summons, material relied on by P, transcript of an oral submission and originating motion (or drafts of any of these if not yet filed) (37A.07)

#### *Ancillary Order*

Court may make ancillary order where appropriate – made to elicit information re assets relevant to (prospective) freezing order or to determine whether freezing order should be made. Court should consider factors in 37A.05.

#### *Costs*

Court can order costs at it sees appropriate re order made, including but not limited to order re costs of person affected by freezing order (37A.08).

#### **Anton Piller Orders (Search Order [Order 37B])**

- Made ex parte – to ensure party not alerted and made aware allowing them to get rid of the documents
- More common for commercial premises, rather than residential (don't want to impose on peoples rights)
- Significant invasion of privacy

As per r37B.02(1), the court may make an order in/before proceeding with or without notice to [defendant] for the purpose of securing or preserving potentially relevant evidence and requiring [defendant] to permit entry accordingly. Seizure of evidence is allowed. [Plaintiff] must make the application in Form 37BA.

#### *Factors to making application*

The court may make the search order if satisfied that r37B.03(1):

- (a) Applicant has a strong prima facie case on an accrued cause of action; and

- (b) The potential or actual loss/damage to applicant will be serious if order not made; and
- (c) There is sufficient evidence re [defendant] that:
  - i) D possesses important evidentiary material; and
  - ii) A real possibility exists that D might destroy/make evidence unavailable

The court should also consider SCV Practice Note 16 (37B.02(3)) factors:

- Implications of ex parte nature
- Undertakings as to damages
- Full and frank disclosure
- Behaviour of applicant (Adani)

*Affidavit in Support* (37B.03(2)) \*specific rules for search orders

Application shall be supported by affidavit in support, containing (with court's discretion):

- (a) Description of things/categories in relation to which order is sought;
- (b) The address or location of premises and whether they are private or business
- (c) Why order is sought, including assessment of real possibility of destruction
- (d) Prejudice, loss or damage P may suffer if order not granted
- (e) Name, address, form and experience of independent solicitor to serve and supervise
- (f) If residential premise to be searched, whether only occupant likely to be female, under 18 or any vulnerable person (due to mental incapacity or English ability)

\*Affidavit must give full and frank disclosure putting all relevant evidence before Court supporting its case and supporting case that order should not be granted

\*Affidavits in support needed to be clear and concise

### *Undertakings*

Applicant must give usual undertaking to damages (if Court deems [defendant] suffered damage due to order) and to pay independent solicitor's reasonable costs and disbursements (37B.03(3)).

### *Independent Solicitor*

Court must appoint one or more independent solicitors who must be prepared to give such undertakings as the Court requires to supervise execution of the search order (37B.06(1)).

SCV Practice Note 16 4.3: Search party must include independent solicitor (note other restrictions on search party membership)

### *Terms of Search Order* (37B.05(1))

Terms of search order may include:

- (a) Direction to person to permit named persons to enter and take steps according to terms
- (b) To provide information, things or service
- (c) Allowing named person to take and retain anything described in the order
- (d) D not to disclose order to other except for purpose of obtaining legal advice or representation for specified period no longer than 3 days
- (e) D to refrain from doing any act as Court considers appropriate

### **Security for Costs (Order 62) (only Defendant can apply for these)**

► **Circumstances that P won't pay costs if ordered against them**

The court may make a security for costs order if there are circumstances that suggest there is some danger that [plaintiff] will leave costs unsatisfied (62.02(1)). This includes where:

- (a) Plaintiff is ordinarily a resident out of Victoria;

- (b) Plaintiff is a corporation or sues for another's benefit and reason to believe plaintiff has insufficient Vic assets
- (c) Plaintiff has proceeding in another court for same claim
- (d) Address of plaintiff not stated or stated incorrectly in originating process
  - \*62.02(2) says that this is not a reason where the error was innocent and without intention to deceive
- (e) P has changed address after commencement to avoid consequences of proceeding

#### Factors to Consider

- Strength and bona fide nature of P's case
  - If strong prima facie case, giving security may undermine ability to have case determined on its merits
- Degree of hardship on parties if security is offered or not
- Timelines of application for SCO
- Whether or not application is oppressive (i.e. intends to deny impecunious plaintiff the right to sue)
- Financial weakness of corporate P is grounds for ordering SCO. Not true for individuals

#### Miscellaneous Rules

- Court has full discretion as to the security (62.03)
- Where P fails to give security, court can dismiss P's claim (62.04)
- Court may set aside or vary any order requiring P to give security for costs (62.05)
- Given the burden on P, D may need to make an undertaking as to costs in return

#### Failure to give security

- If P fails to give ordered security, Court may dismiss P's claim (62.04)

### Topic 8: Gathering Evidence (Discovery)

► Consider the evidence individually – eg. contract, communications

#### Discovery under the CPA

Duty of Disclosure (s26 CPA)

As per S26 CPA, parties must disclose to other parties the existence of all documents which are, or have been, in the person's possession, custody or control that they are aware of and which they consider, or ought to reasonably consider, to be critical to the resolution of the dispute. This obligation continues for the duration of the proceedings.

According to the explanatory memorandum *critical* means documents that are those which a party would reasonably be expected to have relied on when forming the claim as well as documents that party knows will adversely affect their case. This is a rather high bar. In this case, it seems that [document] was not essential to form [plaintiff's case] and therefore may not be deemed a critical document as per s26 CPA.

*Ask: Are the documents essential to forming P's case?*

- S26(1) CPA does not override the law of privilege (s26(3) CPA)
- Any documents disclosed under s26 CPA cannot be sued for anything else other than for the purposes of the proceeding in which they were disclosed (s27 CPA)
- Other party must disclose these documents at the earliest reasonable time after they become aware of the existence of the documents or at another time as directed by the court (s26(2) CPA)

#### Discovery Between Parties (Order 29)