Interlocutory Injunctions, Freezing Orders and other applications

In this seminar it is proposed to discuss the legal rules and principles applied by Victorian Courts in determining applications for interlocutory injunctions and Freezing or Mareva orders.

The jurisdiction to grant injunctions:

Introduction:

1. The jurisdiction to grant injunctions, as provided by the Judicature legislation, which is enjoyed by Supreme Courts across Australia, is discretionary and very wide. Simply the jurisdiction may be exercised *"if it is just and convenient to do so"*[1]. This power however "does not confer an unlimited power to grant injunctive relief. Regard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights. The situation thus confirmed by these authorities reflects the point made by Ashburner that "the power of the court to grant an injunction is limited by the nature of the act which it is sought to restrain"[2].

2. The High Court has the remedial and procedural powers of the State where the High Court is sitting when the matter is not governed by Federal legislation or the Constitution[3]. It has original jurisdiction to grant injunctions pursuant to s. 75(v) *Constitution* where an injunction is sought against an officer of the Commonwealth. Each of the Federal Court, Federal Magistrates' Court and Family Court, and the County Court and Magistrates' Courts, being courts of statutory jurisdiction, have no jurisdiction beyond that which Parliament has given it and lack the inherent power exercisable by the Supreme Court as a court of common law. These courts have an implied statutory jurisdiction. The Federal Court has no general equitable jurisdiction but has the power to award appropriate relief where it has jurisdiction[4]. It has an "inherent or implied power to make an interlocutory order which is necessary to enable it to perform its function as such a court"[5] and is given specific grants of power by certain Acts such as the ADJR Act[6]. If the Federal Court has jurisdiction in respect of a non-federal claim which is part of a controversy which has a substantial federal element (its accrued or associated jurisdiction), the Court can grant injunctive relief relying on common law or equitable rights[7]. The Family Court has jurisdiction to grant injunctive relief under s. 114 *Family Law Act* 1975 (Cth.). State District and County Courts and Local and Magistrates' Courts are given power to grant injunctions by statute. Section 37 *Supreme Court Act* 1986 applies to the County and Magistrates' Court in this State by virtue of ss 31 and 33 of that

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[1] s. 37(1) *Supreme Court Act* 1986 (Vic.)
[2] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 ("Cardile") at [31] per Gaudron, McHugh, Gummow and Callinan JJ
[3] s. 80 *Judiciary Act* 1903 (Cth.)
[4] s. 23 *Federal Court Act* 1976 (Cth.)
[5] Lindgren J in *Williams v Minister for the Environment and Heritage* (2003) 199 ALR 352 at 356; [2003] FCA 627; BC200303217
[6] eg. s. 16(1)(d)
[7] s. 79 *Judiciary Act* 1903 (Cth.)

Act[8]. Thus the Magistrates' Court, like the County Court has an equitable jurisdiction within its jurisdictional limitations as extensive as the Supreme Court[9].

Proceedings and applications in the Court:

3. A proceeding in the Victorian Supreme or County Court is generally[10] commenced by writ or originating motion (r. 4.01) or in the Magistrates' Court, a complaint (r. 4.04(1)) while an interlocutory application, made on notice to any person, is commenced by summons (rr. 4.02, 46.02)(there is no r. 4.02 in the Magistrates' Court).

4. An interlocutory application is an application to a court to make an order *before* the court makes a final order in the proceeding. Interlocutory applications may be made in relation to the preparation of a matter for trial or in relation to preserving the subject matter of the dispute pending the final order of the court[11]. Applications are "... only .. considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties"[12].

5. Such applications are governed by the Rules of Court (referred to below) as well as the inherent or implied statutory jurisdiction of the Court and are informed by precedent.

Purpose, and nature, of an interlocutory injunction:

6. The purpose of an interlocutory injunction is to preserve the subject matter of a dispute and to maintain the status quo pending the determination of the parties' rights[13]. According to Dr Spry, in granting such an injunction, the Court is concerned both with:
   (a) the maintenance of a position that will most easily enable justice to be done when its final order is made; and
   (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances[14].

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[8] see *Thomson Laws of Australia* [1.30]; [2.6.180]
[9] s. 31(a) *Supreme Court Act* 1986 (Vic); s. 49 *County Court Act* 1958 (*Civil Procedure Victoria* ("CPV") at [1781.0], Vol. 2
[10] A proceeding under the *Corporations Act* 2001 (Cth) is commenced by originating process: r. 2.2(1)(a) of Ch V of the Rules.
[11] *Encyclopaedic Australian Legal Dictionary*, Lexis Nexis
[12] Cotton LJ in *Gilbert v Endean* (1878) 9 Ch D 259 at 268
[13] *Waikato (Pty) Ltd and Anor v Kaplan and Anor* [2002] VSC 310 at [33] per Gillard J
[14] *Equitable Remedies*, 6th Ed. LBC, at pp. 446-7

7. While the right to obtain an interlocutory injunction is generally (and possibly invariably) merely ancillary and incidental to a pre-existing cause of action against the defendant, this principle does not limit the Court's jurisdiction which, subject to any express statutory restriction, is unlimited and available whenever required by justice[15]. It is clear that a freezing order can now stand on its own without the need for an application for 'principal relief' (see r. 37A.04) The making of freezing (formerly known as *Mareva* orders) orders is now governed by the new O.37A and Practice Note No 5 of 2010 effective from 3 May 2010 (which replaced Practice Note No. 3 of 2006 (discussed below)).

The rules of court which govern applications for injunctions and freezing/search orders:

8. Order 38 of the Supreme Court, County Court and Magistrates' Court Rules[16] deals with injunctions. An injunction may be granted at any stage of a proceeding (r. 38.01) or, in the circumstances referred to in r. 4.08, before the commencement of a proceeding and in an urgent case without proper notice; an *interim injunction* (r. 38.02). At VCAT the power to grant injunctions is contained in s. 123

9. Applications for *freezing orders*, the object of which is to prevent defendants from removing assets from and/or dissipating assets within, the jurisdiction to frustrate the enforcement of a judgment against them, are dealt with in the new Order 37A of the Rules. Order 37B governs *search orders* (formerly *Anton Piller* orders). In Victoria the Chief Justice has authorised the issue of Practice Notes for the new rules which the Court is to have regard to in making orders under them (see, rr. 37A,02(4), 37B.02(3)). These are respectively Practice Notes No.'s 5 and 6 of 2010. Equivalent Practice Notes have also been issued by the Chief Judge of the County Court as PNCI 1–2007 and PNCI 2–2007. The new rules became effective in the Supreme Court on 1 September, 2006 and in the County Court on 1 January, 2007. There will be a discussion of the new rules below.

Procedure – interim injunctions/interlocutory injunctions:

10. An injunction which is granted in an urgent case where it was not possible or not appropriate to give proper notice to the defendant is called an "*interim injunction".* An interim injunction will be granted *ex parte* in circumstances of urgency. It is granted for a short time to a fixed date pending the hearing of both sides, usually no more than a day or two after the date of the order. The injunction is merely an interim or temporary injunction and will lapse after the named day unless continued by order of the court made on or before that day[17]. This contrasts with an interlocutory injunction which is ordinarily expressed to last until the hearing

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[15] *CPV* at para.[38.01.245]; *The Siskina* [1979] AC 210, 256; *Waikato*, above, at [35]-[39] referring to Spry, *Equitable Remedies*, 5th edn, 323

[16] which reads: "The Court may grant an injunction at any stage of a proceeding or, in the circumstances referred to in Rule 4.08, before the commencement of a proceeding."

[17] *CPV* at para. [38.01.280]

and determination of the proceeding. The considerations that govern the grant of interlocutory injunctions also govern interim injunctions[18] except that such injunctions are only granted sparingly[19].

11. In an urgent case then (commonly where a mareva or freezing order (and now see. O 37A) is sought), the applicant will often initially apply to the Court *ex parte* by way of an interim application. This may take place before any proceeding has issued (see r. 4.08). If an interim injunction or freezing order is granted, the further hearing of the application will be adjourned for a week or so to enable the proceeding to be filed and the respondent served with the originating process, summons, affidavit material and an authenticated copy of the 'interim' order (or if the proceeding is already filed and served with the summons, affidavit and order). At the interlocutory hearing, at which all parties are present, the Court will adjudicate upon whether or not an interlocutory injunction should be granted, and if so upon what terms and conditions.

12. In applying for an interim injunction on an *ex parte* basis, there is an important principle that the applicant has a special duty of full and fair disclosure of all the material facts. Materiality is a question for the judge and includes facts known to the plaintiff and those that would have been known had proper inquiries been made. What are proper inquiries will depend on the circumstances. Where there has been material or substantial non-disclosure, the interim injunction will be generally dissolved or discharged[20].

13. An application for an interlocutory injunction, like any other interlocutory application, is made on notice by summons in Form 46A (r. 46.04) which must be filed and served on those entitled to notice of the application (r. 46.05)(and not later than 2.00pm on the day before the hearing (r. 46.05). Practically speaking, particularly with applications for interlocutory injunctions, the summons and supporting affidavits would ordinarily need to be served before this, so as to give the respondent, a reasonable opportunity of filing and serving affidavit material in response and preparing for the hearing of the application. Unless the initial application to the Court is to be *ex parte* (as of course are many if not most applications for a mareva order), it is suggested that short service usually serves no purpose, other than necessitating the adjournment of the hearing.

14. If the defendant is to be given notice but has not yet filed an appearance, then the summons and affidavits must be served personally (r. 46.05(3)).

15. The date for the hearing will be set by the Court when the summons is filed, although it may be possible to seek a shorter or longer date if required. Such date may be amended, once, by

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[18] *The Principles of Equity*, Parkinson Ed., Lawbook, 2003, at pp. 662
[19] *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386
[20] *The Principles of Equity*, Parkinson (Ed.), 2nd Ed. at pp. 662-663

the plaintiff before the summons is served (r. 46.05.1). Once it has been served the date for hearing can only be changed – by an adjournment of the hearing - by consent of the parties or by order of the Court. The Court can adjourn the hearing of an application on such terms as it thinks fit (r. 46.06(1)).

16. If the respondent to the application fails to appear, the application can proceed and be heard unopposed on proof of service of the respondent (r. 46.07). The respondent who did not appear at the hearing can apply under r. 46.08 to set aside the order.

The Bond Brewing case:

16. The case of *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386[21] continues to provide helpful and practical guidance to practitioners minded to seek urgent interlocutory injunctive in the form of freezing orders or the like on behalf of their clients.

17. Various banks had provided financial facilities to Bond Brewing Holdings Ltd and its operating subsidiaries ("the Bond companies"). In December, 1989, the banks served notices of default and to remedy upon the Bond companies. On Friday, 29 December the banks declared that all moneys owing under the facilities were immediately due and payable, requiring immediate payment of all moneys owing. Shortly after 2.15pm on that day, the banks applied *ex parte* to the Supreme Court for orders appointing receivers and managers to the assets of the Bond companies. Beach J, heard, and, granted the application.

18. On Tuesday, 2 January, 1990, the Bond companies applied for orders rescinding or vacating the previous order. Beach J dismissed the application. The Bond companies successfully appealed to the Full Court. The Full Court held that both the order appointing receivers, as well as the order refusing to set aside the original order, were wrong.

19. Among other things, the Full Court decided that the orders made by the primary judge were wrong because:
    (a) no sufficient urgency was shown as to warrant the hearing and determination of the application on an *ex parte* basis. The respondents should have been given the opportunity to be heard and no order should have been made until this occurred;
    (b) the learned trial judge had failed to consider the drastic nature of an order appointing receivers and managers and the particularly drastic nature of the order sought in the circumstances;
    (c) no consideration had been given to the balance of convenience;
    (d) no undertaking as to damages was exacted "the price that must be paid by almost every applicant for an interim or interlocutory injunction (VR at 559);

[21] at 540-542 (FC) (special leave refused: *National Australia Bank Ltd v Bond Brewing Holdings Ltd* (1990) 169 CLR 271

(e) the order was for an indefinite duration.

20. An unfortunate result of the case was that in the absence of the usual undertaking as to damages, the Bond companies as the party enjoined, were without remedy for the loss which the injunction caused them.

21. This case sets out important lessons for practitioners contemplating urgent interim or interlocutory relief on behalf of their clients, inter alia:

(a) don't ask for orders that your clients are not reasonably entitled to (don't look for too good a result (!));

(b) ensure that you have obtained instructions from your client, to offer, and then offer, to the Court during the course of the application, the undertaking as to damages;

(c) if the circumstances allow (which may well not be the case with most applications for freezing orders), always give the respondent suitable notice of the application; and

(d) take great care in drawing the material: the summons, supporting affidavit and draft order.

General principles applicable to appeals of interlocutory injunctions:

22. Generally in respect of an interlocutory order, an appeal does not lie to the Court of Appeal from, the trial division of the Supreme Court, or from the County Court except with leave[22]. From the Magistrates' Court the aggrieved party must apply for judicial review under O. 56 in respect of such an order[23]. An exception, in so far as the Supreme Court and County Court is concerned, are cases of granting or refusing an injunction or appointing a receiver[24]. The legislature has nevertheless made it clear that in general appeals from interlocutory orders are to be discouraged. The same is the case in respect of exercises of discretion in matters of practice and procedure[25]. An order for an interlocutory injunction is a matter of practice and procedure[26]. As such the Court of Appeal must exercise particular caution in reviewing the decision of the primary judge, and it will not intervene unless an error in principle is disclosed, or the decision appealed works a substantial injustice to one of the parties[27].

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[22] In respect of an order of the County Court leave of the Court of Appeal: s. 74(2D) *County Court Act* 1958 (Vic), and in respect of an order of the trial division of the Supreme Court, the Judge of the Court or Associate Judge constituting the Trial Division or of the Court of Appeal: s. 17A(4)(b) *Supreme Court Act* 1986 (Vic).

[23] for prerogative relief in the nature of certiorari on the ground of error on the face of the record, want or excess of jurisdiction, or denial of procedural fairness: CPV at [I 56.01.100]

[24] s. 17A(4)(b)(ii) *Supreme Court Act* 1986

[25] see, *CPV* at para 64.01.425

[26] *Mendonca v Mason* [2013] VSCA 280 per Priest JA (with Santamaria JA agreeing) at [34] citing *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177 (Gibbs CJ, Aickin, Wilson and Brennan JJ).

[27] ibid, *Mendonca v Mason* [2013] VSCA at [34]

Freezing orders:

23. Mareva orders are not strictly injunctions[28], even though they are related to such relief. For one thing, a court may make a mareva order *before* a cause of action has accrued (a 'prospective' cause of action). A stand-alone ancillary order, such as an asset disclosure order, can now be made without a freezing order. It is suggested that "one consequence of a freezing order not being a species of injunction is that the court does not operate in the conceptual frame appropriate to decisions about whether to grant an interlocutory injunction of asking whether there is a serious question to be tried and, if so, where the balance of convenience lies"[29]. However it appears that most Courts will still look at the balance of convenience in deciding whether or not to grant an order. The restraints imposed by the *Siskina* decision are done away with (see ibid, Biscoe).

24. A freezing order may be made against or served on a third party who holds or controls assets which a respondent has a beneficial interest, or made against a third party who might be liable to disgorge property or otherwise contribute to the assets of a respondent. *Cardile* set outs the guiding principles in relation to the making of freezing orders against third parties which are now embodied in r. 37A.05(5) of the Rules[30].

25. Traditionally a *mareva* order was granted to a plaintiff who was able to show:
    (a) a good arguable cause of action against the defendant; and
    (b) there was a real risk of dissipation of assets that the defendant has within the jurisdiction such that any judgment would not be satisfied[31].

25. The power of superior courts around Australia to grant mareva orders is now the subject of harmonized court rules. These "… rules reflect, and are informed by, the numerous reported cases dealing with the extraordinary power of the Court to freeze the assets of a judgment debtor, prospective judgment debtor or a third party in circumstances where there is a risk that they may act to frustrate or inhibit the Court's process, by taking steps which will or may result in a judgment or prospective judgment of the Court being wholly or partly unsatisfied"[32].

26. The harmonized rules have adopted the "good arguable case" test. According to Biscoe QC (ibid), "a good arguable case 'is one which is more than barely capable of serious argument, and yet not necessarily one which the judge considers would have better than a 50 per cent

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[28] Ibid, *Cardile*
[29] P. Biscoe QC, Transnational Freezing Orders (2006) 27 ABR 161 citing Davis v Turning Properties Pty Ltd & Turner (2005) 222 ALR 676 at [37] per Campbell J
[30] see *Federal Civil Litigation Precedents*, Lexis Nexis at [85,090]
[31] see, eg. *Bayley Walk Pty Ltd v Bayley Views Pty Ltd* [2006] VSC 213 per Warren CJ.; *Victoria University of Technology v. Wilson* [2003] VSC 299 per Redlich J; *Tymbook Pty Ltd v State of Victoria; Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65
[32] *Robmatjus Pty Ltd v Violet Home Loans Australia Pty Ltd* [2007] VSC 165 per Hargrave J at [47]

chance of success'[33]. A good arguable case is a lower standard than a prima facie case which means 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'[34]. A good arguable case appears to be a higher standard than the 'serious question to be tried' test previously applicable in applications for interlocutory injunctions[35].

27. The precise terms of the new rule should be noted carefully, inter alia:

Rule 37 A.02(1) provides:

(1) The Court may make an order (a "freezing order"), upon or without notice to the respondent, for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.

Rule 37 A.03 provides for the making of ancillary orders:

(1) The Court may make an order (an "ancillary order") ancillary to a freezing order or prospective freezing order as the Court considers appropriate.
(2) Without limiting the generality of paragraph (1), an ancillary order may be made for either or both of the following purposes —
    (a) eliciting information relating to assets relevant to the freezing order or prospective freezing order;
    (b) determining whether the freezing order should be made.

Rule 37 A.05(4) sets out circumstances in which the Court may make a freezing order or an ancillary order against a defendant or judgment debtor. That rule provides:

(4) The Court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied because any of the following might occur —
    (a) the judgment debtor, prospective judgment debtor or another person absconds; or
    (b) the assets of the judgment debtor, prospective judgment debtor or another person are —
        (i) removed from Australia or from a place inside or outside Australia; or
        (ii) disposed of, dealt with or diminished in value.

Rule 37 A.05(5) sets out circumstances in which the Court may make a freezing order or an ancillary order against a person other than the judgment debtor or prospective judgment debtor - a "third party". The rule provides:

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[33] *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft,* GmbH ('The Niedersaschen') [1983] 2 Lloyd's Rep 600 at 605; [1984] 1 All ER 398 at 404 per Mustill J
[34] *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622; [1968] ALR 469
[35] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* at [13] per Gleeson CJ citing *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 151

(5) The Court may make a freezing order or an ancillary order or both against a person other than a judgment debtor or prospective judgment debtor (a "third party") if the Court is satisfied, having regard to all the circumstances, that —

(a) there is a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied because —

(i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or

(ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or

(b) a process in the Court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment of the Court, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgment or prospective judgment[36].

28. Nothing in O. 37A affects the (inherent) power of the Court to make a freezing order or an ancillary order if the Court considers it is in the interests of justice to do so.

29. In the recent case of *Zhen v Mo & Ors* [2008] VSC 300, Justice Forrest summarized the applicable legal principles[37] as follows:

[22] First, that a freezing order, by its very nature, is a drastic remedy and a court must exercise a high degree of caution before taking a step which will interfere with a party's capacity to deal with his or her assets.[3]
[23] Second, the order is not designed to provide security for the applicant's claim.[4] It is solely directed to preserving assets from being dissipated, thereby frustrating the court process.[5]
[24] Third, the applicant bears the onus both in satisfying the Court that the order should be continued and in satisfying the Court as to the amount which is to be the subject of the order.
[25] Fourth, that an order can only be made on the basis of admissible evidence which supports the contentions made by the party seeking the order. Speculation and guesswork is no substitute for either the facts or inferences properly drawn from proved facts.[6]
[26] Fifth, that before such an order can be made it is necessary that the applicant establish:
(a) an arguable case against the defendant;[7] and
(b) that there is a danger that the prospective judgment will be wholly or partly unsatisfied as a result of the defendant's actions in either removing the assets or disposing or dealing with them so as to diminish their value.[8]
[27] Sixth, the balance of convenience must favour the granting of the freezing order.[9]
[28] Seventh, that there is no set process determining the exact nature of an order. The order will be framed according to the circumstances of the case.[10]
[29] Eighth, the applicant must establish with some precision the value of prospective judgment. The order should not unnecessarily tie up a party's assets and property.[11]
[30] Finally, there may be discretionary considerations which militate against the granting of a freezing order, such as delay in bringing the application on before the court or a lack of candour in the materials placed before the court.[12]

Notes:
3 *Cardile v LED Builders Pty Ltd* (1998) 198 CLR 380, [51]; Practice Note 3 of 2006 4 *Jackson v Sterling Industries* (1987) 162 CLR 612 at 621 and 625 5 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1, [73] 6 *Hartwell Trent (Aust) Pty Ltd v Tefal Societe Anonyme* [1968] VR 3 at 13 7 *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49 at 49 8 R 37 A.02(1) Under the general

[36] see ibid, *Robmatjus* at para [48] – 51], and see *Talacko v Talacko* [2009] VSC 349.
[37] In *DCT v Ekelmans* [2013] VSC 346 per Judd J at [22] his Honour adopted the summary of the applicable principles by Forrest J in *DCT v AES Services (Aust) Pty Ltd* [2009] VSC 418 where his Honour adopted his own summary of principles in *Zhen v Mo & Ors* above.

law the plaintiff must establish that there is a real risk of assets being disposed of: *Cardile* [122] 9 *Consolidated Constructions Pty Ltd v Bellenville Pty Ltd* [2002] FCA 1513 10 *Jackson v Sterling Industries* (1987) 162 CLR 612 at 621 11 *Cardile* [124] 12 *Cardile* [58][38]

Undertakings may be offered, and accepted, in lieu of a freezing order[39].

Instances of where freezing orders have been granted:

30. Freezing or Mareva orders may be granted in a wide – a myriad - range of circumstances, moulding the order to suit the particular exigencies of the case. This is necessarily so given that "the schemes which a debtor may devise for divesting himself of assets (are) legion". Some instances where freezing or mareva orders have been granted are as follows:

(a) against a third party who had been transferred an asset of, and by, the defendant[40];
(b) by a liquidator of a company against the respondents who were paid a sum of money by the company which had the effect of depriving the company the ability of paying a debt and who had an arguable cause of action against them for recovery of the sum as a voidable transaction[41];
(c) by a second mortgagee against a mortgagor and his sons who had procured an assignment of the first mortgagee's mortgage, and then exercised the power of sale to sell the property to the sons, such that the proceeds of sale were insufficient to pay out the second mortgage[42];
(d) against the former defacto partner of the plaintiff against who the plaintiff had a good arguable case under Part IX *Property Law Act* 1958 (Vic) and for other relief where the defendant had forged the plaintiff's signature on bank documents and set up another corporate structure through which to carry on the parties' business[43];
(e) against non-parties related a defendant/mortgage originator to which the plaintiff referred loan applications which allegedly owed the plaintiff moneys in the form of up-front, and a trailer, fees. The defendant had entered into several transactions which had had the effect of disposing of all its assets. Freezing orders were made against non-parties who had allegedly received the defendant's assets under r. 37A.05(5) and *Cardile*[44].

Search orders:

31. "The court may make a search order for the purpose of securing or preserving evidence which is, or may be, relevant to an issue in a proceeding or anticipated proceeding, and requiring the person against whom the order is made to permit persons to enter premises for the purpose of securing the evidence: r 37B.02(1). The person who applies for a search order is called the "applicant", and the person against whom the order is sought or made the "respondent". Ordinarily, application for a search order is made without notice to the respondent. An application for a search order is a proceeding, and must be commenced by originating motion. In an urgent case, the application can be made before an originating motion is filed. See r

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[38] see, *Deputy Commissioner of Taxation v AES Services (Aust) Pty Ltd* [2009] VSC 418; *Deputy Commissioner of Taxation v Gashi* [2010] VSC 120; *Allomak Ltd v Allan* [2010] VSC 187; *E-Fullfillment.com Pty Ltd v Panache Global Holdings Pty Ltd* [2010] VSC 188 (application to discharge).
[39] *Ma v Luo* [2010] VSC 329
[40] ibid, *Cardile*
[41] *McLellan v Klein* [2007] FCA 1576
[42] *Aymban Pty Ltd v Grove Park Pty Ltd* [2007] NSWSC 1089
[43] *Zhen v Mo*, ibid
[44] *Robmatjus*, ibid

4.08, and note the reference to a draft originating motion in Form 37BA Sch C. A form of search order is contained in Form 37BA. The form may be adapted to meet the circumstances of the particular case. See Practice Note No 6 of 2010 para 5. (see CPV (at [37B.01.5]ff).

The test for the grant of an interlocutory injunction:

32. The jurisdiction to grant an injunction may be exercised "if it is just and convenient to do so". In order to obtain an interlocutory injunction, the plaintiff needs to establish that:
    (a) there is a serious question to be tried, or that 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;
    (b) he or she will suffer irreparable injury for which damages will not be adequate compensation unless an injunction is granted; and
    (c) the balance of convenience or justice favours the granting of an injunction[45].

33. The test for the grant of an interlocutory injunction was clarified by the important High Court decision of *Australian Broadcasting Corp v. O'Neill*[46]. *O'Neill* reiterated and explained the 'prima facie case' test laid down in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[47], stating that the doctrine established in that case should be followed, preferring it to the "serious question to be tried" test enunciated by Lord Diplock in *American Cyanamid*[48]. Gummow and Hayne JJ (with whom Gleeson CJ and Crennan J agreed) explained that in assessing whether the applicant had made out a prima facie case, "it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial" rather than it needing to be demonstrated that it was more probable than not that the plaintiff would succeed at trial[49].

34. The so called "*organising principles*" are "to be applied having regard to the nature and circumstances of the case under which issues of justice and convenience are addressed"[50] which emphasises the flexibility of the remedy. It has been suggested in relation to the second element (b), that not only must damages be an adequate remedy, but the defendant must be in a *financial position to pay them*: *American Cyanamid Co. v Ethicon Ltd*[51].

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[45] These three elements are termed as the "*organising principles*" in *O'Neill* by Gleeson CJ and Crennan J at [19] Mason CJ's summary of principle in *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153-4 approved of by Gleeson CJ in *ABC v Lenah Game Meats* (2001) 208 CLR 199; [2001] HCA 63 at para 13 as clarified in *Australian Broadcasting Corp v. O'Neill* (2006) 227 CLR 57; 229 ALR 457; 80 ALJR 1672; [2006] HCA 46 at [19] per Gleeson CJ and Crennan J agreeing with the explanation of the organising principles in the reasons of Gummow and Hayne JJ at [65]-[72]
[46] (2006) 227 CLR 57; 229 ALR 457; 80 ALJR 1672; [2006] HCA 46
[47] (1968) 118 CLR 618 (*Beecham*)
[48] [1975] AC 396 at 407
[49] at para 65
[50] Gleeson CJ and Crennan J in O'Neill at para 19
[51] [1975] AC 396 (*American Cyanamid*) at 407-408 per Lord Diplock

35. The “organising principles” are not entirely separate but must be examined together (eg. *Bradto* at [84]).

36. The majority stated that there was no objection to the use of the phrase “serious question”, as long it was understood as conveying the notion that “the seriousness of the question, like the strength of the probability, depends ... upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought”. “How strong that probability (or likelihood) needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks”[52].

37. In the Victorian case of *Tymbook Pty Ltd v State of Victoria; Bradto Pty Ltd v State of Victoria*[53] *(“Bradto”)* which was decided before *O’Neill*, the Court of Appeal held that in determining whether to grant an interlocutory injunction a court should take the same approach whether the application was for a prohibitory, or a mandatory, injunction, and whether equivalent to final or merely interim relief. Prior to *Bradto*, it was uncertain in Victoria whether a different test should be applied in these circumstances.

38. *In Bradto* the Victorian Court of Appeal adopted the approach of Hoffman J (later Lord Hoffman) in *Films Rover International Ltd v Cannon Film Sales Ltd*[54], that in determining whether to grant an interlocutory injunction, a 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 of granting an injunction to a party who fails to establish his or her right at trial (or would fail if there was a trial) or in failing to grant an injunction to a party who succeeds (or would succeed at trial). (Interestingly, this is a stated basis for requiring the plaintiff to provide an undertaking as to damages, in case the decision to grant the injunction should be wrong).

39. The question as to which course carries the lower risk of injustice is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant (at para [35]).

40. In *O’Neill* while confirming the orthodox approach or “organising principles” discussed in *Bradto*, the High Court placed particular importance on a consideration of the strength of the plaintiff’s case in evaluating the first element of the test. In order to justify the imposition of an interlocutory injunction, the plaintiff must be able to show a “sufficient likelihood of success”. As has been noted how likely will depend upon the nature of the rights asserted and the practical consequences likely to flow from the grant. In *Bradto* the Court considered that the plaintiff’s prospects of succeeding at trial will always be relevant in cases of this type both “as

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[52] *Beecham* at CLR p. 622 quoted by Gummow and Hayne JJ in *O’Neill* at para 65 and see generally, Gummow and Hayne JJ (at para 65-72) with whom Gleeson CJ and Crennan J agreed (at para 19)
[53] (2006) 15 VR 65
[54] [1987] 1WLR 670 at 680-681

a necessary part of deciding whether there is a serious question to be tried" and as an almost invariable factor in evaluating the balance of convenience[55]. The assessment of the strength of the probability of success is an essential factor in deciding which course - whether or not relief should issue and, if so, on what terms – carries the lower risk of injustice. While this is the case, it is suggested that there will be other factors which are relevant having regard to the nature and circumstances of the case.

41. While it is clear that the *prima facie case* test laid down in *O'Neill* represents the law in Victoria[56] and the common law of Australia[57], in relation to the grant of interlocutory injunctions, in Victorian cases which have followed *Bradto,* reference has been made to *O'Neill* without noting any conflict between the two cases. Shortly after *Bradto* in *Petros v Biru*[58], the opinion was expressed[59] that the lower risk of injustice test "is complementary to the approach recently articulated by the High Court, and is not in conflict with it. (The Hoffman test) is, in essence, a test that assists a court in determining where the balance of convenience lies in a particular matter, bearing in mind that that question is influenced by the strength of each party's case". There has been considerable support for the "lower risk of injustice" test since *Bradto* was decided in Victoria[60] often resulting in a 'melding' of principles derived from *O'Neill* and *Bradto*[61], often emphasising *Bradto*'s lower risk of injustice test in relation to the balance of convenience factor[62], and some support in other jurisdictions around Australia[63].

Balance of convenience:

42. If the Court is satisfied that there is a serious question to be tried, (or that the plaintiff has made out a prima facie case) and that damages are not an adequate remedy, it must go on to consider whether the balance of convenience or justice favours the grant of an injunction. The

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[55] at para [39]
[56] eg. *NT Consulting Services Pty Ltd v Own Investments Pty Ltd* [2013] VSC 508; *Mendonca v Mason* [2013] VSC 516 per Macaulay J; aff'd. on appeal *Mendonca v Mason* [2013] VSCA 280 at [36]-[39]
[57]
[58] [2006] VSC 383
[59] at para [9]
[60] eg. *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 per Hansen J; *M3 Holdings Australia Pty Ltd v 420 Spencer Nominees Pty Ltd & Ors* [2007] VSC 396; *Tabet v Commonwealth Bank of Australia Ltd* [2008] VSCA 197; *Integrated Group Ltd v Dillon* [2009] VSC 361 per Hargrave J; *Perfection Fresh Australia Pty Ltd v Melbourne Market Authority* [2013] VSCA 254 at [75]; *Joiner v Firstmac Finance Pty Ltd* [2013] VSC 633
[61] eg *Environment East Gippsland Inc v VicForests* [2009] VSC 386 per Forrest J at [62]; *AGL HP1 Pty Ltd v Alanvale Pty Ltd* [2012] VSC 192 at [39]; *NT Consulting Services Pty Ltd v Own Investments Pty Ltd* [2013] VSC 508; *Mendonca v Mason* [2013] VSC 516 per Macaulay J
[62] *Johnson v Morrison* [2009] VSC 72; ibid, *Environment East Gippsland Inc v VicForests*; *Matejka v Hodge* [2009] VSC 580 per Ross J at [20]; *NT Consulting Services Pty Ltd v Own Investments Pty Ltd* [2013] VSC 508; *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530 per Macaulay J; *West Coast Developments Pty Ltd v West Coast Commercial Pty Ltd* [2013] VSC 617 per Robson J at [33]; *Hawthorn v Seven Network Ltd* [2013] VSC 352 per Elliott J; *Mendonca v Mason* [2013] VSC 516 per Macaulay J
[63] *Conquo v Jackson* [2009] FCA 45 per Sundberg J; *Australian and International Pilots Association v Qantas Airways Ltd* [2011] FCA 1487 per Dodds-Streeton J

balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction.

43. The strength of the applicant's case is relevant in determining where the balance of convenience lies. Where an applicant has an apparently strong claim, the Court will more readily grant an injunction even when the balance of convenience is evenly matched. A weaker claim may still attract interlocutory relief where the balance of convenience is strongly in favour of it. In *O'Neill* the assessment of the likelihood of the plaintiff being successful at trial was critical in determining the first element or organising principle[64].

The usual undertaking as to damages:

44. Before a Court will grant an interlocutory injunction, the applicant will almost always be required to give the "usual undertaking as to damages". Described as the price of the grant of an interlocutory injunction, it is an undertaking by the applicant to pay damages to the respondent for any loss sustained by reason of the injunction if it should be held at the trial that the injunction was wrongly granted.

Other factors relevant in determining whether to grant interlocutory injunctive relief:

45. Whether or not to grant an interlocutory injunction may, given the nature and circumstances of the case, also depend upon such factors as the effect of the injunction upon the respondent and also upon third parties, questions of hardship, the availability of alternative remedies, delay, any undertakings offered by the respondent, and the respondent's conduct[65].

46. It may be noted that the test for the maintenance of a caveat over TLA land in Victoria is the same as for an interlocutory injunction[66]. In Piroshenko v Grojsman Warren CJ made it clear that applications under s 90(3) *Transfer of Land Act* must now be decided in accordance with the "prima facie case" test as articulated by the High Court in O'Neill[67].

Instances of where interlocutory injunctions granted:

47. Interlocutory injunctions may be granted in a wide – a myriad - range of circumstances, including, applications :

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[64] *O'Neill* per Gleeson CJ and Crennan J at para 19 and Gummow and Hayne JJ at para 65-72; *Bullock v Federated Furnishing Trades Society of Australasia (No 1)* (1985) 5 FCR 464 at 472

[65] *Injunctions: Law and Practice Online*: Jacobs et al, at [1.160]-[1.210]); as to so called "constant supervision" requirement, see *Patrick Stevedores Operations No 2 P/L & Ors v Maritime Union of Aust & Ors* (1998) 195 CLR1 at pp. 46-47

[66] eg. *Goldstraw v Goldstraw* [2002] VSC 491 at [30]; *Schmidt v 28 Myola Street P/L* (2006) 14 VR 447; *Piroshenko v Grojsman* [2010] VSC 240; BC201003764 per Warren CJ

[67] at [14]-[23)

(a) to compel the defendant to pull down so much of a building which he had erected which obstructed the plaintiff's ancient lights[68];
(b) to compel the defendant to pull down a fence, injunction refused[69];
(c) to restrain the shipowners from disposing of the insurance proceeds of a ship (which had sunk and was a total loss) or removing them out of the jurisdiction, injunction granted[70];
(d) to restrain the defendant from offering for sale its antibiotic which it was alleged contained the plaintiff's patented substance, injunction granted[71];
(e) to restrain the defendant from seizing a quantity of barley in solos at the plaintiff's premises, injunction granted[72]
(f) to restrain the state of South Australia from enforcing against the goods of the plaintiff in interstate trade or commerce, provisions of the Beverage Container Act 1975 (SA), injunction refused[73];
(g) by the alleged equitable owner of a second hand motor vehicle to restrain the defendant from disposing of it, injunction granted[74]
(h) to compel the defendants to supply internegatives and music and effects tracks for three films to enable dubbing of film in Italian in time for their release in Italy, mandatory interlocutory injunction granted: *Films Rover*, above;
(i) to compel the respondent to restore telephone services disconnected by it, injunction granted on terms, including payment into court of moneys owing[75];
(j) to restrain bank from enforcing its securities, injunctions refused[76];
(k) to restrain mortgagee exercising its power of sale over the plaintiff's home, injunction granted[77];
(l) to restrain a group of companies from disposing or divesting themselves of any of their assets or undertaking, except in the ordinary course of its business, injunction granted[78];
(m) by the vendor/plaintiff against the Registrar of Titles to restrain registration of a transfer and a mortgage where the plaintiff claimed her signature on the transfer was a forgery, injunction granted[79];
(n) to restrain the broadcasting of a film of a "brush tail possum processing plant", injunction refused on appeal[80];
(o) for a mandatory interlocutory injunction compelling the defendants to pay the plaintiffs sums of money in effect applying for summary judgment, injunction refused (*Waikato* above);
(p) by the State of Victoria to restrain the lessees of The Palace nightclub and the Palais Theatre from obstructing access for the State to conduct tests on the premises to ascertain whether asbestos or other hazardous chemicals present, injunction granted: *Bradto*, above;
(q) to restrain the defendant from publishing certain information on a website, injunction refused[81];
(r) to restrain appointment of a receiver, injunction granted[82];

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[68] *Von Joel v Hornsey* [1895] 2 Ch 774
[69] *Shepherd Homes Ltd v Sandham* [1970] 3 WLR 348 per Megarry J (explained by Hoffman J in *Films Rover*)
[70] *Siskina (Owners of Cargo Lately Laden on Board) and Ors v. Distos Compania Naviera* [1979] AC 210; [1977] 3 W.L.R. 818
[71] *Beecham*, above; see also *Magna Alloys & Research P/L v Coffey & Ors* [1981] VR 23; *Beltech Corporation Ltd v Wyborn* (1988) 92 FLR 283
[72] *Australian Coarse Grain Pool P/L v Barley Marketing Board of Qld* (1982) 46 ALR 398
[73] *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148
[74] *Gedbury P/L v Michael David Kennedy Autos* [1986] 1QdR103;
[75] *Businessworld Computers P/L v Australian Telecommunications Commission* (1988) 82 ALR 499
[76] *Nicholas John Holdings P/L & Ors v ANZ Banking Group Ltd & Ors* [1992] 2 VR 715
[77] *Rawcliffe v Custom Credit Corp* (1994) ATPR 41-292
[78] *Patrick Stevedores Operating No 2 P/L & Ors v Maritime Union of Australia & Ors* (1998) 195 CLR 1
[79] *Clarey v Thomson and Ors* [2000] VSC 400
[80] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; (2001) 185 ALR 1; [2001] HCA 63
[81] *Melbourne University Student Union Inc (in liq) v Ray & Ors* [2006] VSC 205 per Hollingworth J (where Her Honour relied upon *Bradto*)
[82] *First Capital Group Ltd v Wentworth Mutual Investment Management Pty Ltd* [2007] WASC93 per Hasluck J where his Honour referred to and relied upon *O'Neill* at [74]ff

(s) application by plaintiff to restrain defendants from infringing its trademarks, injunction refused[83];
(t) restraining the Registrar of Titles from giving effect to a vesting order in favour of the defendants[84];
(u) by an environmental group to restrain VicForests (the statutory body established to carry out logging operations in State forests) from carrying out timber harvesting operations to protect endangered species[85].

Conclusion:

50. The decisions of *O'Neill* and *Bradto* remain seminal precedents in elucidating the "organising principles" which govern the grant of interlocutory injunctions in Victoria.

51. From both a procedural and substantive perspective, orders 37A and 37B are welcome additions "to the armoury of a court of law and equity to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction"[86].

52. In dealing with applications for interlocutory injunctions, courts have sought to promote "the flexibility and adaptability of the remedy of injunction as an instrument of justice"[87]. The same general approach may be perceptible in relation to applications for freezing orders. Indeed there is every reason to keep the remedies "unfettered" as it is impossible to foresee every circumstance in which it may be thought right to make them available[88]. The common object being to ensure the ultimate effectiveness of the court's process.

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[83] *Live Earth Resource Management Pty Ltd v Live Earth LLC* [2007] FCA 1034 (relying upon *O'Neill* and *Beecham*
[84] *Johnson v Morrison* [2009] VSC 72
[85] *Environment East Gippsland Inc v VicForests* [2009] VSC 386
[86] *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 per Deane J
[87] *Bradto* at [35]
[88] Lord Goff of Chieveley in *South Carolina Insurance Co v Arrurantie Maatschappij* [1987] AC 24 at 44