



Professional Development
Young Lawyers Lecture Series 2008

Interlocutory Injunctions, Mareva
Orders and other Applications

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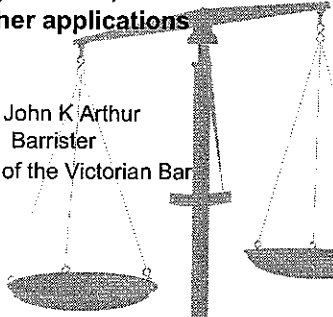
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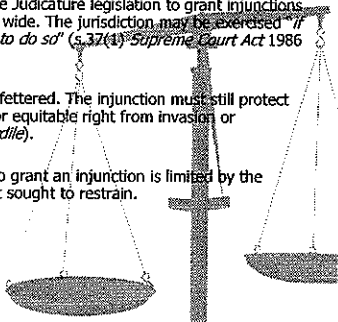
Interlocutory injunctions, Mareva orders and other applications

by John K Arthur
Barrister
Member of the Victorian Bar



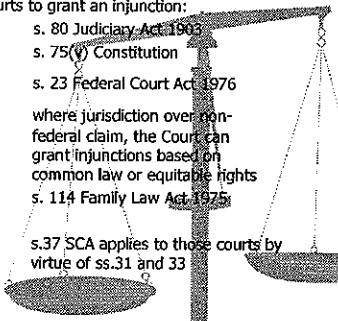
The jurisdiction to grant injunctions Introduction

- The jurisdiction under the Judicature legislation to grant injunctions is discretionary and very wide. The jurisdiction may be exercised "if it is just and convenient to do so" (s.37(1) *Supreme Court Act 1986* (Vic.).
- The jurisdiction is not unfettered. The injunction must still protect the existence of a legal or equitable right from invasion or threatened invasion (*Cardile*).
- The power of the court to grant an injunction is limited by the nature of the act which it sought to restrain.



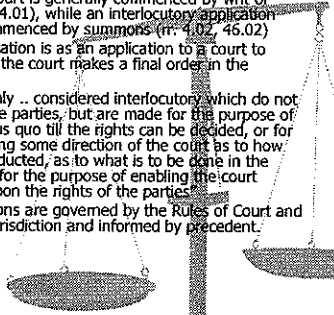
The jurisdiction to grant injunctions

- The power of various courts to grant an injunction:
 - High Court: s. 80 *Judiciary Act 1903*
s. 75(v) *Constitution*
 - Federal Court : s. 23 *Federal Court Act 1976*
where jurisdiction over non-federal claim, the Court can grant injunctions based on common law or equitable rights
 - Family Court: s. 114 *Family Law Act 1975*
 - County Court & Magistrates' Court: s.37 *SCA* applies to those courts by virtue of ss.31 and 33



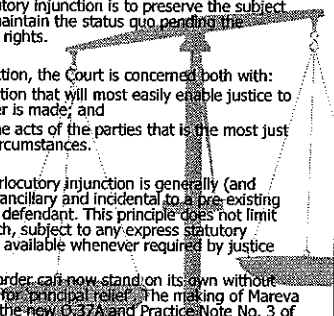
Interlocutory Applications

- A proceeding in the Court is generally commenced by writ or originating motion (r. 4.01), while an interlocutory application made on notice is commenced by summons (rr. 4.02, 46.02)
- An interlocutory application is an application to a court to make an order *before* the court makes a final order in the proceeding ..
- 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."
- Interlocutory applications are governed by the Rules of Court and the Court's inherent jurisdiction and informed by precedent.



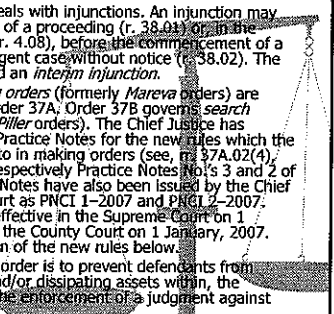
Purpose, and nature, of an interlocutory injunction

- 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.
- In granting such an injunction, the Court is concerned both with:
 - the maintenance of a position that will most easily enable justice to be done when its final order is made; and
 - an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.
- 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 (Cardile).
- It is clear that a freezing order can now stand on its own without the need for an application for principal relief. The making of Mareva orders is now governed by the new O.37A and Practice Note No. 3 of 2006 (discussed below).



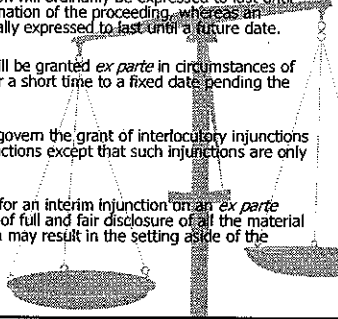
Interlocutory Applications and injunctions under the Rules of Court

- Order 38 of the Rules deals with injunctions. An injunction may be granted at any stage of a proceeding (r. 38.01) or, in the certain circumstances (r. 4.08), before the commencement of a proceeding and in an urgent case without notice (r. 38.02). The latter is commonly called an *interim injunction*.
- Applications for *freezing orders* (formerly *Mareva* orders) are dealt with in the new Order 37A; Order 37B governs *search orders* (formerly *Anton Piller* orders). 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 (see, rr. 37A.02(4), 37B.02(3)). These are respectively Practice Notes No's 3 and 2 of 2006. Identical Practice Notes have also been issued by the Chief Judge of the County Court as PNCL 1-2007 and PNCL 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.
- The object of a freezing order is to prevent defendants from removing assets from and/or dissipating assets within the jurisdiction to frustrate the enforcement of a judgment against them.



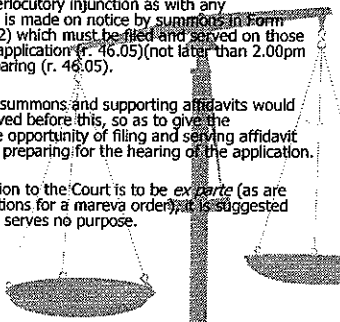
Procedure – interim/interlocutory injunctions

- An interlocutory injunction will ordinarily be expressed to last until the hearing and determination of the proceeding, whereas an interim injunction is usually expressed to last until a future date.
- The 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.
- The considerations that govern the grant of interlocutory injunctions also govern interim injunctions except that such injunctions are only granted sparingly.
- An applicant in applying for an interim injunction on an *ex parte* basis, has a special duty of full and fair disclosure of all the material facts the breach of which may result in the setting aside of the order.



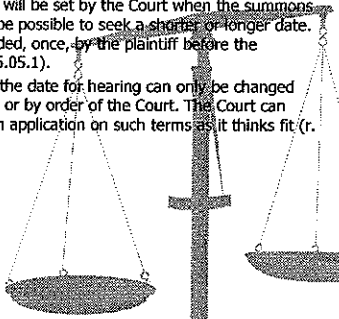
Procedure – interim/interlocutory injunctions

- An application for an interlocutory injunction as with any interlocutory application, is made on notice by summons in form 46A (r. 4.01, 4.02, 46.02) which must be filed and served on those entitled to notice of the application (r. 46.05) (not later than 2.00pm on the day before the hearing (r. 46.05)).
- Practically speaking, 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 are many if not most applications for a *mareva* order), it is suggested that short service usually serves no purpose.



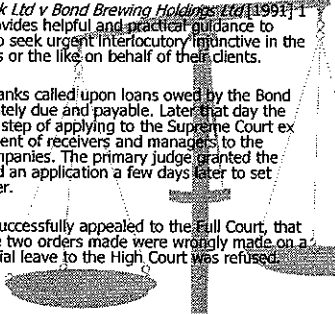
Procedure – interim/interlocutory injunctions
(cont'd)

- 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. Such date may be amended, once, by 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 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)).



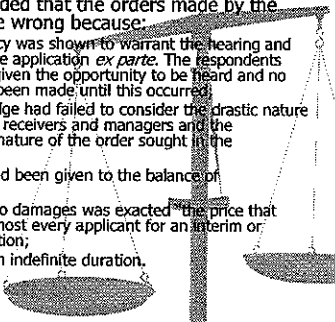
The Bond Brewing case

- *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386 at 540-542 provides 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.
- On 29.12.89 various banks called upon loans owed by the Bond companies as immediately due and payable. Later that day the banks took the drastic step of applying to the Supreme Court *ex parte* for the appointment of receivers and managers to the assets of the Bond companies. The primary judge granted the application and refused an application a few days later to set aside the *ex parte* order.
- The Bond companies successfully appealed to the Full Court, that Court deciding that the two orders made were wrongly made on a number of bases. Special leave to the High Court was refused.



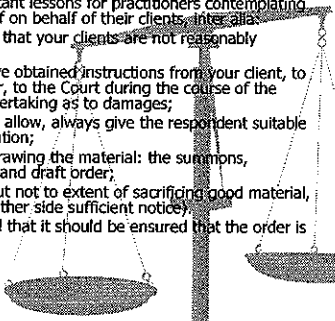
The Bond Brewing case

- The Full Court decided that the orders made by the primary judge were wrong because:
 - no sufficient urgency was shown to warrant the hearing and determination of the application *ex parte*. The respondents should have been given the opportunity to be heard and no order should have been made until this occurred;
 - the learned trial judge had failed to consider the drastic nature of order appointing receivers and managers and the particularly drastic nature of the order sought in the circumstances;
 - no consideration had been given to the balance of convenience;
 - no undertaking as to damages was exacted – the price that must be paid by almost every applicant for an interim or interlocutory injunction;
 - the order was for an indefinite duration.



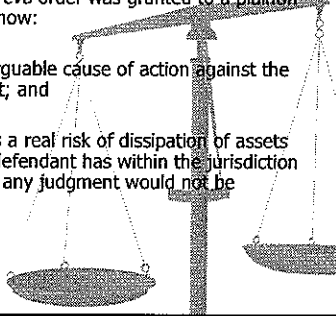
The Bond Brewing case

- This case sets out important lessons for practitioners contemplating urgent interlocutory relief on behalf of their clients. *Inter alia*:
 - don't ask for orders that your clients are not reasonably entitled to;
 - 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;
 - if the circumstances allow, always give the respondent suitable notice of the application;
 - take great care in drawing the material: the summons, supporting affidavit and draft order;
 - act expeditiously (but not to extent of sacrificing good material, and not giving the other side sufficient notice).
- It might be added as well that it should be ensured that the order is duly authenticated.



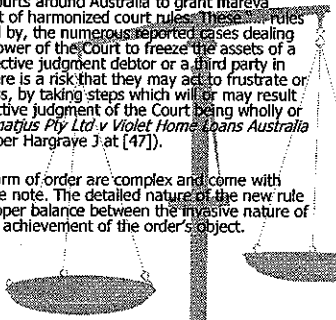
Freezing orders pursuant to r. 37A

- 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.



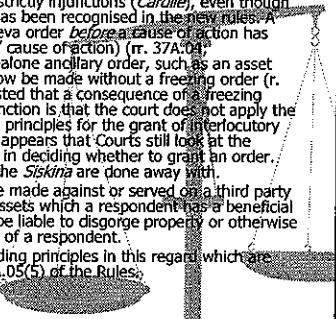
Freezing orders under r. 37A

- 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" (*Robmatjus Pty Ltd v Violet Home Loans Australia Pty Ltd* [2007] VSC 165 per Hargrave J at [47]).
- The new rules and the form of order are complex and come with the guidance of a practice note. The detailed nature of the new rule and form is to keep a proper balance between the invasive nature of the order and the proper achievement of the order's object.



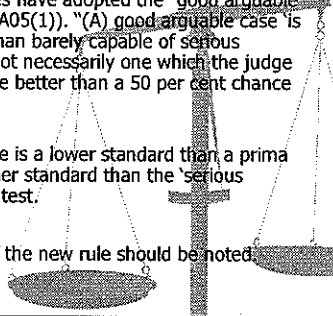
Freezing orders under r. 37A (cont'd)

- *Mareva* orders are not strictly injunctions (*Cardile*), even though they are related. This has been recognised in the new rules. A court may make a *mareva* order *before* a cause of action has accrued (a 'prospective' cause of action) (r. 37A.01, 37A.05(1)(b)). A stand-alone ancillary order, such as an asset disclosure order, can now be made without a freezing order (r. 37A.03(1)). It is suggested that a consequence of a freezing order not being an injunction is that the court does not apply the usual test or organizing principles for the grant of interlocutory injunctions. However it appears that Courts still look at the balance of convenience in deciding whether to grant an order. Restraints imposed by the *Siskina* are done away with.
- 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 who might be liable to disgorge property or otherwise contribute to the assets of a respondent.
- *Cardile* set out the guiding principles in this regard which are now embodied in r. 37A.05(5) of the Rules.



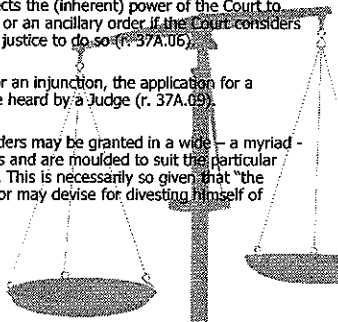
Freezing orders under r. 37A (cont'd)

- The harmonized rules have adopted the "good arguable case" test (see r. 37A05(1)). "(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 chance of success".
- A good arguable case is a lower standard than a prima facie case but a higher standard than the 'serious question to be tried' test.
- The precise terms of the new rule should be noted.



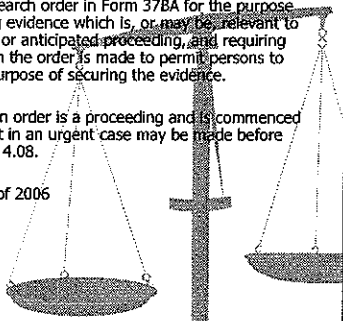
Freezing orders under r. 37A (cont'd)

- 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 (r. 37A.06).
- As with applications for an injunction, the application for a freezing order must be heard by a Judge (r. 37A.09).
- Freezing or Mareva orders may be granted in a wide – a myriad – range of circumstances and are moulded 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".



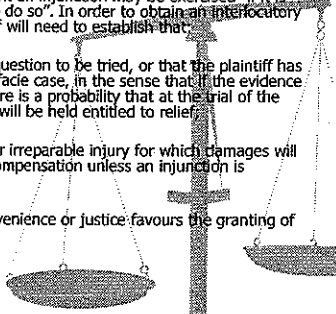
Search orders under r. 37B

- The court may make a search order in Form 37BA 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.
- An application for such an order is a proceeding and is commenced by originating motion but in an urgent case may be made before commencement under r. 4.08.
- See Practice Note No. 2 of 2006



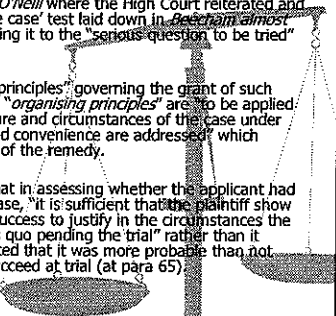
The test for the grant of an interlocutory injunction

- 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 will need to establish that:
 - 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
 - he or she will suffer irreparable injury for which damages will not be adequate compensation unless an injunction is granted; and
 - the balance of convenience or justice favours the granting of an injunction.



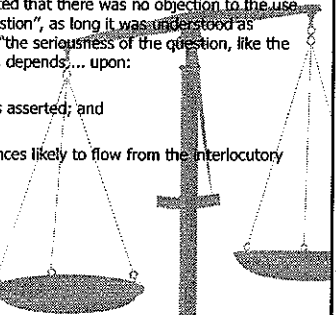
The test for the grant of an interlocutory injunction (cont'd)

- This test was clarified in *O'Neill* where the High Court reiterated and explained the 'prima facie case' test laid down in *Beecham* almost 40 years previous preferring it to the "serious question to be tried" test.
- O'Neill "has restated the principles" governing the grant of such injunctions. 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" which emphasises the flexibility of the remedy.
- The majority 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 (at para 65).



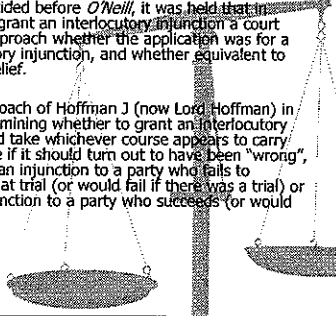
The test for the grant of an interlocutory injunction (cont'd)

- The majority in *O'Neill* 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".



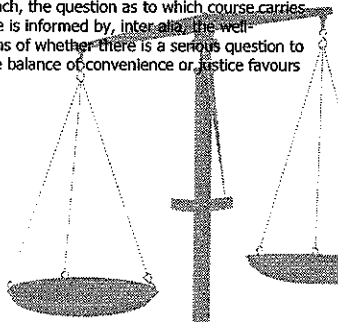
The test for the grant of an interlocutory injunction (cont'd)

- In *Bradto* which was decided before *O'Neill*, it was 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.
- *Bradto* adopted the approach of Hoffman J (now Lord Hoffman) in *Films Rover* 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).



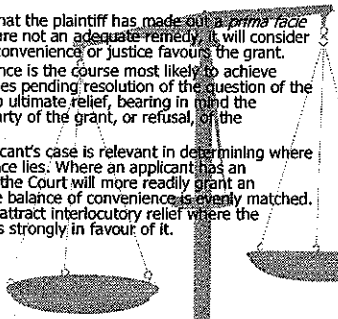
The test for the grant of an interlocutory injunction (cont'd)

- Under the *Bradto* approach, the question as to which course carries the lower risk of injustice is informed by, *inter alia*, the well-established 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]).



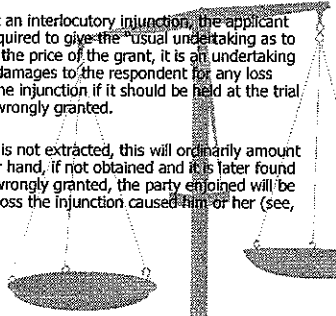
Balance of convenience

- If the Court is satisfied that the plaintiff has made out a *prima facie* case and that damages are not an adequate remedy, it will consider whether the balance of convenience or justice favours the grant.
- The 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.
- 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.



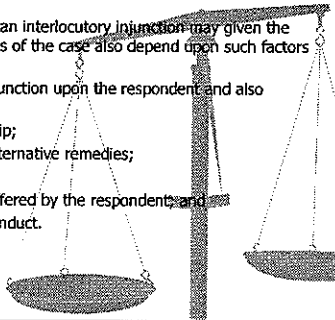
The usual undertaking as to damages

- 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, 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.
- If the usual undertaking is not extracted, this will ordinarily amount to an error. On the other hand, if not obtained and it is later found that the injunction was wrongly granted, the party enjoined will be without remedy for any loss the injunction caused him or her (see, *Bond Brewing case*).



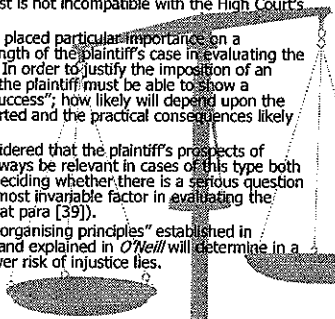
Other factors relevant in determining whether to grant interlocutory injunctive relief

- 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.



Are *Bradto* and *O'Neill* compatible?

- Lower risk of injustice test is not incompatible with the High Court's decision in *O'Neill*.
- In *O'Neill* 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"; 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 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 (at para [39]).
- It is suggested that the "organising principles" established in *Beacham* and reiterated and explained in *O'Neill* will determine in a given case where the lower risk of injustice lies.



Circumstances where interlocutory injunctions are commonly granted – Pt 1

Interlocutory injunctions may be granted in a wide – a myriad – range of circumstances

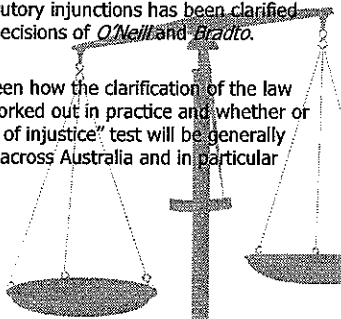
- to restrain the shipowners from disposing of the insurance proceeds of a ship (which had sunk and was a total loss) or removing them out of the jurisdiction, injunction granted: *The Siskina*
- to restrain the defendant from offering for sale its antibiotic which it was alleged contained the plaintiff's patented substance, injunction granted: *Beecham, above* (see also *Magna Alloys*)
- to restrain the defendant from seizing a quantity of barley in solos at the plaintiff's premises, injunction granted: *Australian Coarse Grain Pool P/L v Barley Marketing Board of Qld*
- by the alleged equitable owner of a second hand motor vehicle to restrain the defendant from disposing of it, injunction granted: *Gedburry P/L v Michael David Kennedy Autos*;
- to compel the defendants to supply intermedicatives and

Circumstances where interlocutory injunctions are commonly granted – Pt 2

- to restrain mortgagee exercising its power of sale over the plaintiff's home: *Rawcliffe v Custom Credit Corp*;
- 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: *Patrick Stevedores Operating No 2 P/L & Ors v Maritime Union of Australia & Ors*;
- 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: *Clarey v Thomson and Ors*;
- 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: *Bradto, above*;
- to restrain appointment of a receiver: *First Capital Group Ltd v Wentworth Mutual Investment Management Pty Ltd*;
- application by plaintiff to restrain defendants from infringing its trademarks, injunction refused.

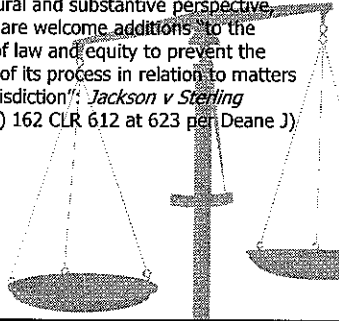
Conclusion

- The law of interlocutory injunctions has been clarified by the important decisions of *O'Neill* and *Bradto*.
- It remains to be seen how the clarification of the law in *O'Neill* will be worked out in practice and whether or not the "lower risk of injustice" test will be generally adopted by courts across Australia and in particular the High Court.



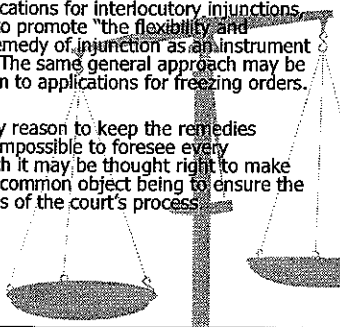
Conclusion

- 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": *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 (per Deane J)



Conclusion

- 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" (*Bratton*). 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 - the common object being to ensure the ultimate effectiveness of the court's process.



Interlocutory Injunctions, Mareva 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" (s. 37(1) *Supreme Court Act 1986* (Vic.)). 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" (*Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [31] per Gaudron, McHugh, Gummow and Callinan JJ).
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 (s. 80 *Judiciary Act 1903* (Cth.)). It has original jurisdiction to grant injunctions pursuant to s. 75(v) *Constitution* where an injunction is sought against an officer of the Commonwealth. The Federal Court has no general equitable jurisdiction but has the power to award appropriate relief where it has jurisdiction (s. 23 *Federal Court Act 1976* (Cth.)) and is given specific grants of power by certain Acts such as the ADJR Act. 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 (s. 79 *Judiciary Act 1903* (Cth.)). The Family Court (s. 114 *Family Law Act 1975* (Cth.)) and State District Courts are given power to grant injunctions by statute. The County Court and the Magistrates' Court have jurisdiction to grant an injunction. Section 37 of the *Supreme Court Act 1986* applies to those courts by virtue of ss 31 and 33. (see TLA [1.30]; [2.6.180]; Williams, *Civil Procedure Victoria*).

Proceedings and applications in the Court:

3. A proceeding in the Victorian Supreme or County Court is generally commenced by writ or originating motion (r. 4.01) while an interlocutory application, made on notice to any person, is commenced by summons (rr. 4.02, 46.02). An interlocutory application is as 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: *Encyclopaedic*

Australian Legal Dictionary. 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": Cotton LJ in *Gilbert v Endean* (1878) 9 Ch D 259 at 268.

4. Such applications are governed by the Rules of Court as well as the inherent jurisdiction of the Court and are informed by precedent.

Purpose, and nature, of an interlocutory injunction:

5. 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 (*Waikato (Pty) Ltd and Anor v Kaplan and Anor* [2002] VSC 310 at [33] per Gillard J). 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.
 (*Equitable Remedies*, 6th Ed. at pp. 446-7).
6. 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 (N Williams QC, *Civil Procedure Victoria*, Lexis Nexis at para.[38.01.245]; *The Siskina* [1979] AC 210, 256; *Waikato*, above, at [35]-[39] referring to Spry, *Equitable Remedies*, 5th edn, 323. It is clear that a freezing order can now stand on its own without the need for an application for 'principal relief'. The making of Mareva orders is now governed by the new O.37A and Practice Note No. 3 of 2006 (discussed below).

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

7. Order 38 of the Supreme Court and County Court Rules 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).
8. Applications for *freezing orders* (formerly known as *Mareva* 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.

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 3 and 2 of 2006. Identical 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:

9. 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*". Such an injunction will continue until a named day, usually no more than a day or two after the date of the order, or until further 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 (Williams at para. [38.01.280]). This contrasts with an interlocutory injunction which is ordinarily expressed to last until the hearing and determination of the proceeding. The considerations that govern the grant of interlocutory injunctions also govern interim injunctions (*The Principles of Equity*, Parkinson Ed. Lawbook, 2003, at pp. 662) except that such injunctions are only granted sparingly (*National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386). The 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.
10. 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 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.
11. 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 be 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 (*The Principles of Equity*, Parkinson (Ed.), 2nd Ed. at pp. 662-663).

12. 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)(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.
13. 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)).
14. 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 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)).
15. 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 attend 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 at 540-542 (FC)(special leave refused: *National Australia Bank Ltd v Bond Brewing Holdings Ltd* (1990) 169 CLR 271) continues to provide helpful and practical guidance to practitioners minded to seek urgent interlocutory injunctive relief 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);
 - (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 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;
 - (d) take great care in drawing the material: the summons, supporting affidavit and draft order; and
 - (e) act expeditiously (but not to extent of sacrificing good material, and not giving the other side sufficient notice).

It might be added as well that it should be ensured that the order is duly authenticated.

Freezing orders under O. 37A:

22. 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.
[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].
23. 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" (*Robmatjus Pty Ltd v Violet Home Loans Australia Pty Ltd* [2007] VSC 165 per Hargrave J at [47]).
24. *Mareva* orders are not strictly injunctions (*Cardile*), even though they are related. This underlying principle has been recognised in the new rules. For one thing, a court may make a *mareva* order *before* a cause of action has accrued (a 'prospective' cause of action)(rr. 37A.04; 37A.05(1)(b)). A stand-alone ancillary order, such as an asset disclosure order, can now be made without a freezing order (r. 37A.03(1)). 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" (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). However it appears that most Courts will still look at the balance of convenience in deciding whether or not to grant an order. Restraints imposed by the *Siskina* decision are done away with (see *ibid*, Biscoe).
25. 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 out 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 (see *Federal Civil Litigation Precedents*, Lexis Nexis at [85,090]).
26. The harmonized rules have adopted the "good arguable case" test (see r. 37A05(1)). "(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 chance of success' (*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). 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 (*Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622; [1968] ALR 469). A good arguable case appears to be a higher standard than the 'serious question to be tried' test applicable in applications for interlocutory injunctions (*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)" (but now see *O'Neill's case*).

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.
- (3) A freezing order may be in Form 37AA.

The requirements for supporting affidavits are set out in r. 37A.02(5) and for authentication and service, of the order and supporting material (r. 37A.07(2)).

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 sets out circumstances in which the Court may make a freezing order or an ancillary order against a defendant or judgment debtor. The rule applies if judgment has been given in favour of an applicant by the court or in the case of a foreign judgment if r. 37A.05(2) applies, or the applicant has a good arguable cause of action on an accrued or prospective cause of action that is justiciable in the court or in the case of a 'foreign cause of action' if r. 37A.05(3) applies. Then r. 37A.05(4) provides that:

- (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:

- (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.

[see *ibid*, *Robmatjus Pty* at para [48] – 51)].

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 (r. 37A.06). As with applications for an injunction, the application must be heard by a Judge (r. 37A.09).
29. In the recent case of *Zhen v Mo & Ors* [2008] VSC 300, Justice Forrest summarized the applicable legal principles 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 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]

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 (*Cardile*);
 - (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 (*McLellan v Klein* [2007] FCA 1576);
 - (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 (*Aymban Pty Ltd v Grove Park Pty Ltd* [2007] NSWSC 1089);
 - (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 (*Zhen v Mo*);
 - (e) against non-parties related to 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* (*Robmatjus*).

Search orders under O.37B:

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 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 2 of 2006 paras 4, 5”. (see Williams in *Civil Procedure Victoria* (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”.
33. 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.
- (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.)
34. 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* [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. *Tymbook Pty Ltd v State of Victoria*; *Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65 at [84]).
36. The test for the grant of an interlocutory injunction was clarified by the important recent High Court decision of *Australian Broadcasting Corp v. O’Neill* (2006) 227 CLR 57; 229 ALR 457; 80 ALJR 1672; [2006] HCA 46. *O’Neill* reiterated and explained the ‘prima facie case’ test laid down in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 (*Beecham*), 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* [1975] AC 396 at 407. 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 (at para 65).
37. 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” (Gleeson CJ and Crennan J in *O’Neill* at para 19) which emphasises the flexibility of the remedy.

38. 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” (*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)).
39. In the Victorian case of *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.
40. In *Bradto* the Victorian Court of Appeal adopted the approach of Hoffman J (now Lord Hoffman) in *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1WLR 670 at 680-681, 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).
41. 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]).
42. 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 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 (at para [39]). 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.

43. In recent Victorian cases which have followed *Bradto* reference has been made to *O'Neill* without noting any conflict between the two cases. Indeed in *Petros v Biru* [2006] VSC 383, the opinion was expressed (at para [9]) 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”. While there has been some support for the “lower risk of injustice” test it remains to be seen whether Courts around Australia and especially the High Court will adopt it in dealing with applications for interlocutory injunction.

Balance of convenience:

44. 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 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.
45. 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 (*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).

The usual undertaking as to damages:

46. 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:

47. 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 (Jacobs, 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).
48. 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 (eg. *Goldstraw v Goldstraw* [2002] VSC 491 at [30]; *Schmidt v 28 Myola Street P/L* (2006) 14 VR 447).

Instances of where interlocutory injunctions granted:

49. Interlocutory injunctions may be granted in a wide – a myriad - range of circumstances, including, applications :
- (a) to compel the defendant to pull down so much of a building which he had erected which obstructed the plaintiff's ancient lights: *Von Joel v Hornsey* [1895] 2 Ch 774;
 - (b) to compel the defendant to pull down a fence, injunction refused: *Shepherd Homes Ltd v Sandham* [1970] 3 WLR 348 per Megarry J (explained by Hoffman J in *Films Rover*);
 - (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: *Siskina (Owners of Cargo Lately Laden on Board) and Ors v. Distos Compania Naviera* [1979] AC 210; [1977] 3 W.L.R. 818;
 - (d) to restrain the defendant from offering for sale its antibiotic which it was alleged contained the plaintiff's patented substance, injunction granted: Beecham, above (see also *Magna Alloys & Research P/L v Coffey & Ors* [1981] VR 23; *Beltech Corporation Ltd v Wyborn* (1988) 92 FLR 283);
 - (e) to restrain the defendant from seizing a quantity of barley in solos at the plaintiff's premises, injunction granted: *Australian Coarse Grain Pool P/L v Barley Marketing Board of Qld* (1982) 46 ALR 398
 - (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: *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148;
 - (g) by the alleged equitable owner of a second hand motor vehicle to restrain the defendant from disposing of it, injunction granted: *Gedbury P/L v Michael David Kennedy Autos* [1986] 1QdR103;
 - (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: *Businessworld Computers P/L v Australian Telecommunications Commission* (1988) 82 ALR 499;
 - (j) to restrain bank from enforcing its securities, injunctions refused: *Nicholas John Holdings P/L & Ors v ANZ Banking Group Ltd & Ors* [1992] 2 VR 715;
 - (k) to restrain mortgagee exercising its power of sale over the plaintiff's home, injunction granted: *Rawcliffe v Custom Credit Corp* (1994) ATPR 41-292;
 - (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: *Patrick Stevedores Operating No 2 P/L & Ors v Maritime Union of Australia & Ors* (1998) 195 CLR 1

- (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 (*Clarey v Thomson and Ors* [2000] VSC 400);
- (n) to restrain the broadcasting of a film of a "brush tail possum processing plant", injunction refused on appeal (*ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; (2001) 185 ALR 1; [2001] HCA 63);
- (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: *Melbourne University Student Union Inc (in liq) v Ray & Ors* [2006] VSC 205 per Hollingworth J (where Her Honour relied upon *Bradto*);
- (r) to restrain appointment of a receiver, injunction granted (*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: *Live Earth Resource Management Pty Ltd v Live Earth LLC* [2007] FCA 1034 (relying upon O'Neill and *Beecham*).

Conclusion:

50. The law of interlocutory injunctions has been clarified by the important decisions of O'Neill and *Bradto*. It remains to be seen how the clarification of the law in O'Neill will be worked out in practice and whether or not the "lower risk of injustice" test will be generally adopted by courts across Australia and in particular the High Court.
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" (*Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 per Deane J).
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" (*Bradto*). 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 (Lord Goff of Chieveley in *South Carolina Insurance Co v Arrurantie Maatschappij* [1987] AC 24 at 44) - the common object being to ensure the ultimate effectiveness of the court's process.

Dated: October, 2008

J.K. Arthur, Isaacs Chambers, Melbourne

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