

Interlocutory Applications and Directions Hearings in the Employment & Industrial List, Supreme Court of Victoria

Speech given by The Hon. Associate Justice Ierodionou*

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Introduction

1. Justice McDonald, members of the profession and other supporters, good afternoon. I would like to begin by acknowledging the traditional custodians of the land on which we meet today. I offer my respects to their elders, past and present, and extend respect to those with Aboriginal and Torres Strait Island heritage here today.
2. Today I will be discussing interlocutory applications and directions hearings in the Employment & Industrial List of the Supreme Court of Victoria ('the List'). I will update you on arrangements for 2017, and also discuss the common types of interlocutory applications being made in the List. I will share some practical suggestions with you regarding the List.
3. Justice McDonald will share his insights regarding the List generally. His Honour will also discuss applications for interlocutory injunctions.

2017 Arrangements

4. As you will be aware, during 2016, directions and applications in the List have been listed once a month. The List has grown to a point where it can be justified to allocate two days a month for directions and applications in the List. These dates will shortly be listed on the Court's website.
5. During 2016, the List days for directions and applications have been on Fridays. In 2017, the List days will move to Mondays.

*Associate Justice of the Supreme Court of Victoria. I would like to thank my Associate, Kalina Sobczak, for her editorial assistance.

Practical Suggestions

6. I want to offer some practical suggestions for interlocutory applications and directions in the List.
7. If you have not already, please familiarise yourself with the List page on the Supreme Court of Victoria website. I know that our associates will be happy if you read the information on that page before contacting them with queries. Many of the answers can be found there. If you go to the 'Law and Practice' tab on the website, you will see a drop down menu under the heading 'Specialist Areas of Law', and you will see a link to the List page there¹. The List Practice Note is on the List page. So are the standard directions and the interlocutory application form. That form must accompany each summons.
8. In light of the overarching obligations under the *Civil Procedure Act 2010* ('the Act'), prior to the directions hearings parties are encouraged to confer and email to chambers a minute of proposed consent orders executed by the parties in a PDF and an editable version by 4:00pm two days prior to the directions hearing. If appropriate the Court may make orders on the papers dispensing with the requirement of appearances².
9. In relation to applications; before issuing a summons, you will need to complete an interlocutory application form and contact the Registry Applications Coordinator for a hearing date. Putting aside urgent matters such as interlocutory injunction applications, the Registry Applications Coordinator will generally give you a hearing date on one of the fortnightly List days. However, if the matter is over two hours in duration, you will be allocated a special fixture listing. I encourage you to contact the other party's legal practitioners to discuss the time estimate so that it can be as realistic as possible.

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<http://www.supremecourt.vic.gov.au/home/law+and+practice/specialist+areas+of+law/employment+and+industrial/employment+and+industrial>.

² Practice Note No.2 of 2016, Employment and Industrial List, Supreme Court of Victoria, Common Law Division.

10. On occasion parties have contacted chambers attempting to have applications listed on a 'liberty to apply' basis or have sought to bring applications at the directions hearing. In both circumstances they have been directed to issue a summons.
11. In addition to the usual requirements for filing, a scanned copy of any materials parties intend to rely on (including a copy of any exhibits to any affidavits and an outline of submissions) should be emailed to chambers by 1:00pm two days prior to the hearing. Parties are also encouraged to arrange transcript of the hearing³.
12. Putting to one side interlocutory injunctions, the most common types of interlocutory applications in our List concern discovery, objections to subpoenas, pleading amendments, and security for costs. These are all matters of practice and procedure. As you all know, it is imperative to identify the applicable principles. In matters of practice and procedure, these principles are not always from employment and industrial cases. I will give some examples to illustrate.
13. A recent decision in a defamation proceeding provides guidance on discovery: see *Hanks v Johnstone (No 3)*⁴. The decision considers the reasonable search obligation in r 29.01.1(5) of the *Supreme Court (General Civil Procedure) Rules 2015*. It concerned whether or not there was an obligation to recover the back up of the plaintiff's deleted text messages. The back up was stored in his Apple iCloud account. Justice John Dixon ordered that the defendant obtain software to access the iCloud and provide it to the plaintiff. The plaintiff would then access the backed up messages in the iCloud and assess whether or not they were discoverable. His Honour stated:

As s 55(4) [of the Civil Procedure Act] permits, I will order that the defendant purchase and make available to the plaintiff a licensed copy of the

³ Practice Note, above n 2.

⁴ [2016] VSC 629.

Wondershare Dr.Fone or equivalent software with appropriate instructions for its use or indemnify the plaintiff in respect of that expense. Following that search a further affidavit can be provided by the plaintiff confirming the search process undertaken and the discoverable documents, if any, which were found.⁵

14. Justice Elliott's recent decision in *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd*⁶ outlines applicable principles in respect of discovery, legal professional privilege and waiver. Amongst other things, the decision makes rulings on whether privilege could be maintained over documents relating to an investigation report, and over internal law firm documents such as administrative task lists.
15. The Court of Appeal decision in *Mandie v Memart Nominees Pty Ltd*⁷ outlines applicable principles in respect of amendment of pleadings. The decision specifically deals with objections to pleadings on the basis they would not survive a summary judgment application. It considers how the Act applies in that context. The principles were applied in a recent ruling in the List; *Bannon v Nauru Phosphate Royalties Trust (No 2)*⁸.
16. Justice Sifris' recent decision *Finance & Guarantee Company Pty Ltd v Auswild & Ors (No 2)*⁹ concerns an application to amend a statement of claim in the context of a pleading of dishonesty. It provides useful guidance in respect of such pleadings.
17. Turning now to the example of applications for security of costs; disputes sometimes arise over the form of security. Justice Hargrave recently ruled on

⁵ [2016] VSC 629 [40].

⁶ [2016] VSC 311.

⁷ [2016] VSCA 4.

⁸ [2016] VSC 558.

⁹ [2016] VSC 559.

whether a deed of indemnity may be adequate security. See: *Australian Property Custodian Holdings Ltd (in liq) (rec and mgr apptd) v Pitcher Partners*¹⁰.

18. As you all know, we must all comply with the overarching obligations in the Act. I often ask parties how that Act applies to the application they are making. Be prepared to answer that question. A recent decision in the List which highlights how the Act applies to discovery and subpoenas is the decision of Justice J Forrest in *Volunteer Fire Brigades Victoria Inc v Country Fire Authority*¹¹. The decision also contains useful outlines of applicable principles in respect of discovery and subpoenas.
19. The Law Library of Victoria has an excellent fortnightly bulletin which contains catchwords and links to all decisions published in our Court, including decisions on practice and procedure. The bulletin is free. I encourage you to visit the Law Library of Victoria website and sign up to it.

Practical Suggestions - Summary

20. In summary, I offer the following six practical suggestions:
 1. Familiarise yourself with the List page on the Court website;
 2. Confer with the other party's legal practitioners in relation to a minute of consent order and email the minute to chambers for the orders to be made on the papers avoiding the need for appearances;
 3. Prior to contacting the Registry Applications Coordinator for the return date for a summons in the List, liaise with the other party to discuss an estimate of the duration, and in particular whether it will be in excess of two hours;

¹⁰ [2016] VSC 399.

¹¹ [2016] VSC 573.

4. In addition to the usual requirements for filing, email a scanned copy of any materials you intend to rely on (including a copy of any exhibits to any affidavits and an outline of submissions) to chambers two days prior to the hearing;
5. Directions hearings are for timetabling issues. If there is an application that needs to be made, it should be done by summons, in accordance with the Rules; and
6. Sign up to the Law Library of Victoria fortnightly bulletin.