

Supreme Court of Victoria

Practice Note No. 4 of 1993

Urgent ex parte applications

The Chief Justice has approved the issue of the following practice note:

It is thought that it may be useful to publish for the information of the profession a practice note setting out some of the matters that may fall to be considered when an application is made ex parte for urgent interim relief.

This practice note must be read in conjunction with earlier practice notes dealing with applications in the Practice Court including, in particular, the note published at [1984] VR 320 concerning urgent applications after the court has risen.

It is not intended that this practice note should do more than deal with some matters that may commonly be encountered and it is not to be taken as in any way fettering the discretion of the judge hearing the matter or relieving the practitioner making the application of the duty to bring to the attention of the judge any matter that may bear upon the exercise of that discretion in the particular matter.

First it will be necessary to show why the application is made without notice (even if only informal notice or short notice) to the opposite party, and why the urgency of the case is such that an order should be made before appropriate notice is given to that party.

If it is shown that an order should be made notwithstanding that no notice has been given to the opposite party, that order will ordinarily extend for no more than the shortest period that must elapse before the matter can be brought back on notice to the opposite party.

A draft of the order sought should be provided to the judge. Ordinarily it may be expected that an order made ex parte will contain the following elements:

1. An undertaking as to damages given on behalf of the applicant. That undertaking will usually take the form: "The plaintiff (by its counsel) undertakes to abide by any order the court may make as to damages in case the court should hereafter be of opinion that the defendant shall have sustained any by reason of this order which the plaintiff ought to pay."

In cases where it is thought that the undertaking of the applicant may be insufficient protection for the defendant as, for example, where the applicant is impecunious or has no assets within the jurisdiction, it may be that the applicant will be required to provide a bond or other security in support of his undertaking or to offer an undertaking by some more suitable person.

2. The time to which any restraint contained in the order will run.
3. Directions about service of the summons for interlocutory relief, affidavits and the order on opposite parties and return of the application inter partes (at the earliest possible time) and, if necessary, orders abridging times.
4. If the application is made before issue of the writ:
 - (a) directions about issue of the writ and a summons and their service, including the time within which service is to be effected (or an undertaking to the like effect);
 - (b) directions about swearing and serving affidavits recording any material placed before the court orally on the hearing of the ex parte application;
 - (c) an undertaking on behalf of the applicant to pay the fee due on originating process and the application for interim relief.

(Any order made should be entitled "In the matter of a proposed action between [the proposed plaintiff] and [the proposed defendant]".)

5. Costs.

Ordinarily costs will either be reserved generally or be costs in the subsequent inter partes application.

Order

Dated this 1st day of November 1993

AR TRAVES
Senior Associate to the Chief Justice