Bullfry and 'the storm before the calm'

(Being a personal reminiscence of Justice Ian Sheppard and a disquisition on a technical point of Equity practice)

Proust's remembrance of things past was triggered by the taste of cake and tea, Bullfry's by the terms of the Short Minutes granted the day before. In his absence (at an early lunch) his junior had ill-advisedly consented to the interim disposition of hard-fought interlocutory proceedings 'until further order'! Was Bullfry now *Brimauded*?

There is nothing more disturbing to the assumed equanimity of a callow, and thrusting, Equity junior than to be '*Brimauded*'[1] – that is the polite, colloquial way of describing the unfortunate forensic gaffe of consenting to an interlocutory order 'until further order', and thus not being able to reventilate the matter in the absence of new facts, until its final hearing, and ultimate determination.

The precise operation of *Brimaud v Honeysett*[2] has been explored by Ball J in *Abraham v Abraham*[3] and Brereton J in *Hancock v Rinehart*[4] which repay close reading by all those who practise in the 'whispering' jurisdiction.

It was a subject dear to Bullfry's heart because he once nearly suffered the ghastly fate of being *Brimauded* before Mr Justice Ian Sheppard, in circumstances set out more fully below.

Older practitioners will remember that great advocate and jurist, Justice Ian Sheppard – 'the storm before the calm'. Roddy Meagher gave a customarily picaresque insight into the origins of that sobriquet when speaking at Sir Laurence Street's farewell.[5]

> I first met Mr LW Street when I was an articled clerk. On behalf of an unfortunate plaintiff I had to brief the fashionable junior, Mr Ian Sheppard, in the District Court. The other side has secured Mr Street's services. The plaintiff's evidence in chief went as planned. Mr Street then began cross-examining in a very gentle voice. Within twenty minutes I noticed that he was saying to our client, 'Everything you said to Mr Sheppard was false, wasn't it?', and he said 'Certainly, Mr Street'. Then Mr Street said in a quiet voice, 'You are a fraud, aren't you?' and he said, 'Certainly, Mr Street'.
>
> Outside the Court, after our humiliation, there was a terrible scene. In those days Mr Sheppard seemed to suffer from a physical affliction which I can only described as seeming like having epileptic fits. He went bright purple in the face, his neck swelled like a lizard and he seemed to go into an ungovernable rage. *There was a storm before every calm.* He went into another of his fits and then said to our client, 'Why did you tell Mr Street the opposite of what you told us in conference?', and he received the reply, 'But Mr Street is so nice. I didn't want to upset him'.

Bullfry's own experience of 'the storm before the calm' in a *Brimaud* context was as follows. He had foolishly allowed solicitors for the oil company to appear at the first return of an injunction involving a petrol retail licensing agreement under the Commonwealth Act, and a newly appointed federal judge (formerly a solicitor) granted the plaintiffs an injunction, 'until further order' and stood the matter over until the next Monday.

When a young Bullfry then appeared before Sheppard J on the return day the full force of the storm before the calm hit him – he was told that the form of the order meant that he was now shut out until the final hearing unless there was some change in circumstance – and there was none. Slowly, slowly, tossed upon stormy seas, Bullfry managed to point out with studied politeness that the previous tribunal was new to the granting of injunctions, and that an examination of his other orders made it clear that the entire regime was only interlocutory and designed to hold the fort over a weekend. The calm descended, the matter continued, to what result Bullfry no longer recalled.

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Bullfry had come across his Honour much earlier in his career when instructing the Crown prosecutor in Canberra in a most serious matter involving co-defendants who had broken into a home in dead of night and tied up and wounded the occupants with a view to gaining access to their business premises.

One of the defendants turned Queen's Evidence, and Sheppard J came down to Canberra to clear the Assizes before one of Canberra's notoriously soft juries. The remaining accused asserted, with some justification, that he had been assaulted by the Victorian Armed Robbery Squad into whose tender hands he had fallen when arrested in Melbourne, and before his extradition to Canberra. As a result , so he said, his coerced

confession was inadmissible. He gave a dock statement to that effect. Eventually, after a protracted hearing the jury acquitted him.

The result surprised Sheppard J. He observed that he could not understand the verdict of the jury at all and that they would all be required for the panel for the next day's trials on the morrow. The question of the disposition of the accused then arose.

With the jury still sitting and listening, Sheppard J innocently inquired whether or not the accused might be released. Mr Crown informed the court that that would not be possible. Oh – why was that? He was wanted on a drug charge in Adelaide, he was wanted for extradition to New Zealand for armed robbery, there were outstanding warrants in Queensland.

Was anything known of him? The 'priors' sheet for a man of only 24 almost reached the floor when it was unfolded. Bullfry turned and looked at the jury who all appeared stupefied with this information and sat agog like clowns in the Easter Show side-show game. (The next day every single 'tainted' juror was struck).

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Bullfry had last heard Sheppard J at a reader's dinner many years ago – there he had told the story of his commencing new at the bar and receiving a call from his senior Equity opponent who asked if he might speak to him. The opponent arrived at his chambers and said, 'I am afraid that your summons is defectively drafted – this is the way you should plead it' and handed over a polished draft! He urged on his listeners to maintain the same level of collegiality and camaraderie. Bullfry last saw him valiantly walking up Phillip Street with his affliction clearly upon him.

But what is the meaning of 'until further order'? In *Abraham v Abraham* the defendants sought a peremptory order pursuant to section 74MA[6] of the *Real Property Act 1900* to compel the plaintiff to withdraw a caveat lodged over property where the plaintiff had been residing for many years. The dispute was between siblings variously contending that possession should be restored to the first defendant, the registered proprietor and youngest brother of the plaintiff, or that it should be sold and the resulting fund placed in court. As part of the dispute, the plaintiff had refused to vacate the premises, and had removed a 'For Sale' sign on them, and changed the locks.

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An order had been made granting the plaintiff leave to lodge a fresh caveat (after the first had lapsed) and ordering an injunction against the first defendant 'until further order' from seeking to eject the plaintiff. That order was made by consent with the usual undertaking as to damages.[7] The first defendant had continued to defray the mortgage but was relevantly 'under water' when his outgoings, including the mortgage, were taken into account. Time had passed and the first defendant feared that the undertaking as to damages would in the event of his success prove worthless because of the asset position of the plaintiff.

But were the defendants caught because of the 'until further order' position? As McLelland J had noted in the classic decision,[8] the practice had developed of not varying an interlocutory regime after a substantive and contested hearing unless there has been a material change in the circumstances, or fresh evidence has come to light'.

But what if, as here, the original orders had been made by consent? Does a consent order operate as an agreement between the parties so as to prevent any subsequent variation? As Lord Denning MR had observed in *Siebe Gorman & Co Ltd v Pneupac Ltd*[9] , the concept of an order 'by consent' is ambiguous. On the one hand it may evidence a real contract between the parties – if that is so, then the court will only interfere with it on the same bases as it will with any other contract. Or it may connote 'without objection', in which case it can be altered or varied as any other order not made by consent.

After a detailed analysis of the competing authority and arguments, Ball J concluded[10] that:

> whether it is in the interest of justice to vary consent orders depends in large measure on what was in the mutual contemplation of the parties at the time the original orders were made. Where no compromise is involved and a party simply consents to interlocutory orders, it can be more readily be inferred that that consent was not intended to operate for an indefinite period of time.

In *Hancock v Rhinehart*[11] Brereton J noted that the 'rule' in *Brimaud* flows from the fact 'that it would be productive of great injustice and waste of time and resources if there were no limit on the power of a party to have any interlocutory application or order relitigated at will, and held that the ordinary rule of practice was that an application to set aside, vary or discharge an interlocutory order must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application'.

Much will depend upon the particular context but if, as in *Hancock* an initial application to set aside a notice to produce has been litigated unsuccessfully, the court will be astute to prevent what is, in effect, a 'second bite at the cherry' by not permitting that party subsequently to narrow the issues in the main proceeding in order to blunt the impact of the unsuccessful application. To do so would controvert the expectation that the parties would put forward their best case on the first hearing.

Endnotes

1. *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44.
2. [2012] NSWSC 254.
3. [2015] NSWSC 1311.
4. The occasion is recorded in *Bar News*, Autumn 1989 at page 19.
5. Such an application must meet the usual standard for the grant of an interlocutory injunction: *Buchanan v Crown and Gleeson Business Finance Pty Ltd* [2008] NSWSC 1465 at [6] per Brereton J; *Lew v Bluescope Distribution Pty Ltd* [2010] NSWSC 794 at [5] per Pembroke J; *Bayblu Holding Pty Ltd v Capital Finance Australia Ltd* [2011] NSWSC 39 at [19] per Campbell JA all cited by Ball J in Abraham at [8]. In the case of an application under section 74MA, it is the caveator who bears the onus of proving that there is a serious question to be tried, and that the balance of convenience favours the continuation of the caveat. See, generally, L Aitken,''Many shabby manoeuvres' – the use and abuse of caveats in theory and practice' (2005) 26 Aust BR 205; L Aitken, 'Current issues with caveats – a pan-Australian conspectus' (2010) 84 ALJ 22
6. This factor is highly relevant: *Szanto v Bainton* [2011] NSWSC 278 at [3] per White J.
7. (1988) 217 ALR 44 at 46.
8. [1982] 1 LWLR 185 at 189.
9. At [17].
10. [2015] NSWSC 1311 at [7].