

**Speech by The Hon. Justice B J Preston
Chief Judge, Land and Environment Court of New South Wales**

‘Injunctions in planning and environmental cases’

**Australasian Conference of Planning and Environment Courts and Tribunals
(ACPECT)**

30 August 2012, Bunker Bay, Western Australia

A. INTRODUCTION

Judgments given by a court can be of four types: executory, declaratory, constitutive or investitive, and interlocutory or procedural judgments.

An executory judgment is coercive in that it may be enforced by execution.¹ In the case of an executory judgment, the court determines the respective rights, duties or obligations of the parties and then orders the defendant to act in a certain way, such as by an order to pay damages or to refrain from interfering with private or public rights. If the order is disregarded, it can be enforced by official action, such as by levying execution against the defendant’s property, or by fining or imprisoning the person disregarding the order for contempt of court.²

A constitutive or investitive judgment creates a new right in the successful party.³ An example is a planning or environment court or tribunal upholding an appeal against a decision-maker’s refusal of development consent and granting that consent. This creates the right for the applicant to undertake the proposed development.

An interlocutory or procedural judgment does not finally determine rights, but imposes a specified liability on one of the parties, or adjusts rights between them for the time being or during the pendency of the proceedings.⁴

¹ Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (LawBook Co, 2009) 1076 [16.750].

² The Right Hon. The Lord Woolf and J Woolf, *The Declaratory Judgment*, (Sweet & Maxwell, 4th ed, 2001) 1 [1-02].

³ Young, Croft and Smith, above n 1, 1076 [16.750].

⁴ *Ibid.*

A declaratory judgment is a final statement by the court pronouncing upon the existence or non-existence of a legal state of affairs.⁵ A declaratory judgment is a final judgment, non investitive and not followed by any process by way of execution.⁶ An example of this type of judgment is a court declaring that an existing use of land is in breach of planning laws, or that a breach of environmental legislation, such as a prohibition on the clearing of native vegetation, has occurred.

This paper is concerned with executory judgments in the form of final injunctions and interlocutory judgments in the form of ex parte, interim or interlocutory injunctions.

B. INJUNCTIONS

1. Jurisdiction to grant injunctions

Injunctions can be equitable, legal or statutory. Equitable injunctions are injunctions formerly granted by the Court of Chancery (now any court of equity) in its exclusive jurisdiction in aid of some equitable right or title or to award equitable relief.⁷

Legal injunctions are injunctions formerly granted by a court of equity in its auxiliary jurisdiction to restrain the threatened infringement or the continued or repeated infringement of some legal right, including a breach of tort, such as nuisance, or statutory right, or legal title⁸ or by a court of common law, exercising the power conferred by the Common Law Procedure Acts.⁹ The judicature system fused the administration of law and equity by creating one court with the power to grant all remedies formally granted by either, but it did not enlarge the powers.¹⁰

Statutory injunctions are injunctions which a statute provides may be granted by a court requiring a person not to breach, or to cease breaching, that statute.¹¹ An example is s 124 of the *Environmental Planning and Assessment Act 1979* (NSW)

⁵ Woolf and Woolf, above n 2, 1 [1-02].

⁶ Young, Croft and Smith, above n 1, 1076 [16.750].

⁷ R Meagher, D Heydon and M Leeming, *Equity Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 704 [21-015].

⁸ *Ibid* 708 [21-025].

⁹ *Ibid* 714 [21-060].

¹⁰ *Ibid* 716 [21-065], 718 [21-075].

¹¹ *Ibid* 816 [21-530].

which provides that the Land and Environment Court of NSW may make an order, in the nature of a prohibitory injunction, restraining a breach of that Act, or an order, in the nature of a mandatory injunction, requiring restoration of damage caused by the breach.

The types of injunctions that a court can grant will depend on the court's charter and jurisdiction to hear and dispose of different causes of action in equity, common law or under statute.

The Land and Environment Court, although constituted as a superior court of record, does not exercise the exclusive equitable jurisdiction of the Supreme Court of NSW and hence cannot issue equitable injunctions in aid of equitable rights or title. It can, however, grant legal injunctions by reason of being vested with the Supreme Court's jurisdiction to make declarations of right in relation to, and to enforce, any right, obligation or duty conferred or imposed by specified planning and environmental statutes (that is to say, legal rights, duties or obligations).¹² The Supreme Court's jurisdiction to grant legal injunctions comprises the former auxiliary jurisdiction of the equity court and the former jurisdiction of the court of common law conferred by the Common Law Procedure Act, which jurisdictions after the introduction of the judicature system were both able to be exercised by the Supreme Court.

The jurisdiction to make declarations of right in relation to, and enforce, rights, obligations and duties under statutes is a component of that broader jurisdiction of the Supreme Court. The Land and Environment Court does not, however, have common law jurisdiction to grant legal injunctions in aid of other legal rights or title, such as to restrain the commission of a tort such as private or public nuisance.

In addition, the Land and Environment Court is vested with jurisdiction under various statutes to issue statutory injunctions to remedy or restrain breaches of those statutes.¹³

¹² Section 20(2) of the *Land and Environment Court Act 1979* (NSW).

¹³ Section 20(1) of the *Land and Environment Court Act 1979* (NSW) lists the statutes empowering the Court to issue statutory injunctions.

Other courts or tribunals dealing with planning or environmental matters, however, may have limited jurisdiction to grant injunctions. Inferior courts or tribunals do not have the jurisdiction of the Supreme Court of the State to grant equitable or legal injunctions. However, the inferior court's charter may give some power to grant certain types of legal injunctions.¹⁴ Statutes might also vest the inferior court or tribunal with specific power to issue statutory injunctions to remedy or restrain certain statutes, such as planning laws.¹⁵

Ascertaining the jurisdiction of the court or tribunal to issue the different types of injunctions is important, not only to ensure that the court or tribunal acts within jurisdiction, but also because the criteria to be considered in determining whether to grant an injunction varies depending on the type of injunction. For example, the requirement that a plaintiff have a proprietary interest is applicable to equitable injunctions in the auxiliary jurisdiction of the court of equity,¹⁶ but not for injunctions to restrain a breach of a statutory right, or injunctions in the exclusive jurisdiction of the court of equity or in the common law jurisdiction conferred by the Common Law Procedure Act.¹⁷

2. Situations in which injunctions might be granted

In the field of planning or environmental law, the most common situations in which a plaintiff might seek an injunction are:

- (a) *to protect a private right*: this requires, of course, that the plaintiff prove that it possesses some legal right which has been, is being, or is threatened to be,

¹⁴ For example, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 123 (injunctions, including interim injunctions); *State Administrative Tribunal Act 2004* (WA) s 90 (interim injunctions); *Environment Resources and Development Court Act 1993* (SA) s 28A (restraining orders); *District Court of Queensland Act 1967* (Qld) s 69(2)(b); (injunctions, including interim, interlocutory or final);

¹⁵ *Sustainable Planning Act 2009* (Qld) s 440(2) (Planning and Environment Court may make orders involving non-compliance with Acts) s 456(7) (orders about a declaration made by the Planning and Environment Court); *Land Use Planning and Approvals Act 1993* (Tas) s 64 (Tasmanian Resource Management and Planning Appeal Tribunal may grant injunctions, including ex parte, interlocutory and final).

¹⁶ Meagher, Heydon and Leeming, above n 7, 709 [21-035].

¹⁷ *Ibid* 773 [21-330].

infringed by the defendant.¹⁸ An example is the interference with a person's right to use and enjoy their property by acts of trespass or nuisance;

- (b) *to enforce a private statutory right*: this is where a statute, expressly or by necessary implication, confers on individuals a right which each individual can enforce by injunction;¹⁹
- (c) *to protect a public right*: this is where there is a public right which is threatened to be, or is being, violated, such as by a public nuisance; and
- (d) *to enforce a public right or restrain a public wrong*: this is where a statute prohibits certain conduct, such as use of land contrary to planning legislation. A defendant who breaches a statutory prohibition commits a public wrong. The statutory prohibition creates a corresponding public right that it not be infringed. The Attorney-General, the traditional guardian of the public welfare, either by him or her self or on the relation of an individual, may sue to prevent violation of the public right.²⁰ Statutes may expand the class of persons who may sue to prevent violation of a public right. Examples are the numerous, open standing provisions in NSW planning and environmental laws which allow any person to bring proceedings for an order to remedy or restrain a breach of the laws.²¹

3. Types of injunctions

The term 'injunction' has no fixed definition and it is legal usage which decides which court orders are to be identified as injunctions.²² Nevertheless, court orders that have been identified as injunctions can be variously classified by:

- (a) *the nature of the rights they seek to protect or enforce*: whether equitable, legal or statutory rights;

¹⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199 and Meagher, Heydon and Leeming, above n 7, 709, [21-035].

¹⁹ Meagher, Heydon and Leeming, above n 7, 738, [21-170].

²⁰ *Ibid* 740 [21-180].

²¹ For example, s 123 of the *Environmental Planning and Assessment Act 1979* (NSW).

²² *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390.

- (b) *the nature of the wrongs they seek to restrain or remedy: quia timet* injunctions are granted against apprehended or threatened wrongs which have not yet been committed and are distinguished from injunctions directed against the continuance or repetition of a wrong;
- (c) *the nature of the order:* negative or prohibitory injunctions forbid an act while positive or mandatory injunctions order an act to be done;
- (d) *whether the defendant has been served before an injunction is granted or afterwards:* an *ex parte* injunction is granted against a defendant who has not been served with the originating process while an *inter partes* injunction is granted against the defendant has been so served and after both parties have been heard; and
- (e) *the point of the trial at which the orders are made:* interim or interlocutory injunctions are granted before the full trial, to prevent irreparable damage by preserving the status quo for a short period, such as until the full trial or further order, while final or permanent injunctions are granted after a full hearing to settle the issues in the dispute finally.²³

4. Ex parte injunctions

Ex parte applications for injunctions are made before serving the defendant with the originating process and hence determined without hearing from the defendant. Usually, the plaintiff applies for an ex parte injunction simultaneously with filing the originating process.

The justification for an ex parte application is the urgency of the case by reason of the imminence of the threat to the plaintiff's rights or the subject matter of the proceedings, such as a component of the environment or cultural heritage, so that

²³ Meagher, Heydon and Leeming, above n 7, 703-704 [21-010].

even a small extra delay might impair the value of the plaintiff's rights or the subject matter of the proceedings.²⁴

Ex parte applications for orders should be the exception, not the rule, and reserved for cases of real urgency.²⁵ Courts favour *inter partes*, not *ex parte* applications. Usually, some notice can be given to the proposed defendant, such as by telephone, text, email or fax message, of the proposed application to the court in order to provide the defendant with an opportunity to be heard on the application. The court may decline to entertain an *ex parte* application of which no notice has been given. In *International Finance Trust Co Ltd v NSW Crime Commission*,²⁶ Heydon J said:

Another instructive aspect of equitable practice is afforded in relation to the question of whether an *ex parte* injunction should be granted at all. It was summarised thus by Lord Hoffman, delivering the opinion of the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd*:²⁷

'Although the matter is in the end one for the discretion of the judge, audi [alteram] partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act ... Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.'

A plaintiff seeking interlocutory injunctive relief should also give consideration to applying for an abridgement of time for service and return of the originating process seeking the interlocutory injunction rather than moving *ex parte*.²⁸

Because, in an *ex parte* application, the court is reliant on only one party, there is a higher duty on the *ex parte* applicants and their legal representatives to meet a high standard of candour and responsibility to bring to the notice of the court all facts

²⁴ Meagher, Heydon and Leeming, above n 7, 794 [21-425].

²⁵ Young, Croft and Smith, above n 1, 1055 [16.480].

²⁶ [2009] HCA 49; (2009) 240 CLR 319 at [150].

²⁷ [2009] 1 WLR 1405 at 1408 [13].

²⁸ Young, Croft and Smith, above n 1, 1055 [16.480].

material to the determination of the application, including facts which the absent party (if present) would have presumably relied upon in defence of the application.²⁹ The duty to disclose includes not only material facts known to the ex parte applicant but also the material facts it would have known if it had made reasonable inquiries.³⁰ A material fact is one that may be likely to influence the court when considering whether or not to grant the injunction.³¹

The rationale behind the duty of candour is that 'it is of utmost importance in the due administration of law that courts and the public are able to have confidence that an ex parte order has been made only after the party obtaining it has complied with its duty to disclose all relevant facts'.³²

An order obtained in breach of an ex parte applicant's duty of candour will almost invariably be set aside even if, on a fresh application following full disclosure, the applicant would be entitled to an order in similar terms.³³

The general rule that an injunction obtained in breach of the duty of candour will be discharged applies even though the non-disclosure was because something was forgotten, with no intent to conceal.³⁴ However, where an injunction is dissolved because of an infringement of the general rule, a fresh application may be made.³⁵

The principles for making an ex parte injunction are the same as for other interlocutory or interim injunctions.³⁶ However, the quality of evidence in support may not be as high as it would be to support a contested application.³⁷

²⁹ *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681-682; *Gerrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 676-679, 682) and Young, Croft and Smith above n 1, 1054-1055 [16.480].

³⁰ *Brink's Mat Ltd v Elcombe* [1988] 3 All ER 188 at 192; [1988] 1 WLR 1350 at 1356.

³¹ *South Downs Packers Pty Ltd v Beaver* (1984) 8 ACLR 999 at 1002.

³² *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 543.

³³ *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681-682; *Gerrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 678, 682).

³⁴ Young, Croft and Smith, above n 1, 1056 [16.490].

³⁵ *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 683; *Kaplan v Go Daddy Group* [2005] NSWSC 636 at [22].

³⁶ Young, Croft and Smith, above n 1, 1054 [16.480].

³⁷ *Ibid* 1055 [16.480].

A major discretionary factor in ex parte applications is delay. Even simple delay, as opposed to delay constituting laches or acquiescence, may result in an ex parte application being refused. By delaying even for a matter of weeks and approaching the court for relief after the injury or threat, and even if negotiations or administrative action might have been taking place, a plaintiff may demonstrate that the injury is not as serious or urgent as they contend. As Lord Langdale MR said in *Earl of Mexborough v Bower*:³⁸

With regard to the length of time, nothing can be more true than this – if parties come and ask for an injunction ex parte, the Court looks most minutely to the time in which they have permitted the matter complained of to proceed, and will not allow them to obtain an injunction in the absence of the other party, when they have themselves, sometime acquiesced. It is quite reasonable that that should be so, because the granting of an injunction ex parte is the exercise of a very extraordinary jurisdiction ... [T]herefore the time at which the Plaintiff first had notice of the subject of complaint, is looked to with the greatest care and jealousy.

If an ex parte injunction is granted by the Court, it will take one of two forms:

One form of injunction is that granted for a very short period within which notice is given to the defendant of its existence, so that the defendant may oppose any extension of it beyond that very short period. The second form of injunction is that granted until further order, but with liberty for the defendant to make a speedy application for it to be set aside. The former type of order is usually regarded as the most desirable.³⁹

An ex parte injunction should not be granted until trial without liberty to apply for speedy dissolution.⁴⁰

On the return date of the summons for an injunction which has already been granted ex parte 'until further order', the injunction should ordinarily be discharged unless the plaintiff demonstrates sufficient reason for its continuance.⁴¹

5. Interim and interlocutory injunctions

Nature of interim and interlocutory injunctions

³⁸ (1843) 7 Beav 127 at 131; 49 ER 1011 at 1013.

³⁹ *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at [149].

⁴⁰ *Ibid.*

⁴¹ *Resort Hotels Management Pty Ltd v Resort Hotels of Australia Pty Ltd* (1991) 22 NSWLR 730 at 731.

An interim injunction is a type of interlocutory injunction. An interim injunction is granted in cases of urgency and imminent threat to the plaintiff's rights or the subject matter of the proceedings. Because of the speed of the application and the lack of preparedness of the parties, an interim injunction is granted usually only for a short period of time to a named day. On that day, the plaintiff moves for an interlocutory injunction, both parties having had more opportunity to better prepare their respective cases in support or defence of the application for interlocutory injunctive relief. An interlocutory injunction is granted until the final hearing or final determination or further order.⁴²

The purpose of an interim or interlocutory injunction is usually to preserve the status quo, either, in the case of interim injunction, until the date of hearing of the application for an interlocutory injunction or, in the case of an interlocutory injunction, 'until the rights of the parties can be determined at the hearing of the suit'.⁴³ Put more broadly, 'the court's objective is to hold the balance as justly as possible until the substantive issues can be resolved'.⁴⁴

The status quo to be preserved is the state of affairs in the period immediately before the issue of the originating process claiming a permanent injunction or, if there be unreasonable delay between the issue of the originating process and motion for an interlocutory injunction, the period immediately before the motion.⁴⁵

The principles for the grant of an interim or interlocutory injunction are the same and involve the applicant showing that there is a serious question to be tried and that the balance of convenience favours the grant of an injunction.

⁴² Meagher, Heydon and Leeming, above n 7, 794 [21-420].

⁴³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at[9].

⁴⁴ Young, Croft and Smith, above n 1, 1038 [16.300].

⁴⁵ *Garden Cottage Food Ltd v Milk Marketing Board* [1984] AC 130 at 140, 155; *Liquorland (Aus) Pty Ltd v Anghie* (2001) 20 ACLC 58 at 71; *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at [3] and Meagher, Croft and Smith, above n 7, 775 [21-340].

Serious question to be tried

Satisfaction of the test of a serious question to be tried is an essential condition of obtaining interlocutory relief. The plaintiff must identify the legal (which may include statutory) or equitable rights which are to be determined at the trial and in respect of which final relief is sought (which need not be injunctive in nature). The court does not have jurisdiction to grant an interlocutory injunction when no legal (including statutory) or equitable rights are to be determined.⁴⁶

In the field of planning or environmental law, a common cause of action is a proceeding to remedy or restrain breaches of planning or environmental statutes. The court would, therefore, need to determine whether there is a serious question to be tried that the defendant is breaching or threatens to breach the statute concerned.⁴⁷

Balance of convenience

The next step is to determine whether the balance of convenience favours the grant rather than the refusal of the injunction. The phrase 'balance of convenience' is not a term of art. Meagher warns against 'hand-wringing anguish on the concept of "the balance of convenience", when all that can usefully be said on that topic can be deduced from its name'.⁴⁸ The balance of convenience simply means that the court must consider 'whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.'⁴⁹

⁴⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199 at [15], [16], [60]-[62], [91], [159] and [246].

⁴⁷ An example is *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 where the applicant brought proceedings to remedy and restrain breaches of the *Environmental Planning and Assessment Act 1979* in the grant by the council of development consent and in the subsequent notification of the development consent for a sand and gravel extraction quarry.

⁴⁸ R P Meagher, 'Equitable Remedies' (1974) 7(2) *Sydney Law Review* 313, 315.

⁴⁹ *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 623.

The greater the hardship to the defendant, the greater the reluctance of the court to grant the injunction. However, if an equal or greater hardship would be caused to the plaintiff by refusing an injunction, that reluctance will be dissipated.⁵⁰

In its consideration, the court looks at all of the factors which are relevant in the particular circumstances of the particular case. These include:

- (a) whether the plaintiff will suffer irreparable injury for which damages are not an adequate remedy if the injunction is not granted;
- (b) whether an undertaking as to damages is offered by the plaintiff;
- (c) where the status quo lies;
- (d) the nature of the interlocutory relief sought, whether prohibitory or mandatory;
- (e) the relative strength of each party's case;
- (f) any equitable considerations relevant to the type of injunction sought;
- (g) any prejudice to third parties;
- (h) any prejudice to the public interest; and
- (i) the time period before the final hearing.

These factors take on different significance in planning and environmental cases.

Irreparable injury

The requirement that a plaintiff would suffer irreparable injury to its legal rights for which damages are not an adequate remedy if the injunction is not granted, applies if the injunction is sought in the auxiliary jurisdiction of a court of equity in aid of a legal right (including a statutory right). It does not apply if the injunction is sought in the exclusive jurisdiction of a court of equity⁵¹ or in the common law jurisdiction.⁵² The reason it applies to an injunction in aid of legal rights is that a plaintiff cannot

⁵⁰ *Beese v Woodhouse* [1970] 1 All ER 769 at 771; [1917] 1 WLR 586 and Meagher et al, above n 7, 785 [21-380].

⁵¹ Meagher, Heydon and Leeming, above n 7, 776 [21-349] and Young, Croft and Smith, above n 1, 1045 [16.380].

⁵² Meagher, Heydon and Leeming, above n 7, 776 [21-345].

establish an equity to an injunction simply because a plaintiff's legal rights are in jeopardy. Damages are the common law remedy for breach of a legal right. If damages are an adequate remedy, the plaintiff should be relegated to that remedy. Only if damages are inadequate will an injunction be granted.⁵³

The requirement is less applicable where the legal right, in aid of which the interlocutory injunction is sought, is not a private legal right of the plaintiff, but rather a statutory, public right. This is the corresponding public right that statutory prohibitions, such as use of land contrary to planning or environmental laws, not be infringed. The statutory prohibition and the corresponding public right under a planning or environmental law upholds the public interest in the protection of the environment from harm, the orderly development and use of the environment, and the enforcement of the law.

Accordingly, irreparable harm does not need to be suffered by the plaintiff personally; harm to the public interest, including harm to the environment, the orderly development and use of the environment, and the enforcement of the law, will suffice.⁵⁴

Damages in these circumstances are not an adequate remedy because the nature of the action does not permit of an award of damages for the plaintiff. The plaintiff bringing civil enforcement proceedings to remedy or restrain a breach of a planning or environmental law or to judicially review governmental decisions or conduct under such a law is not entitled to an award of damages, hence damages are not an adequate remedy.⁵⁵

No proof of damage is required; damage is presumed to result from the infraction of the public right.⁵⁶ This is the situation where the application for interlocutory injunctive relief to prevent violation of the public right is brought by the Attorney-

⁵³ Meagher, Heydon and Leeming, above n 7, 712, [21-040].

⁵⁴ *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at [17]-[19] and cases therein cited.

⁵⁵ *R v Transport Secretary, ex parte Factortame Limited (No 2)* [1991] 1 AC 603 at 672-673 and *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at [16]-[29].

⁵⁶ Meagher, Heydon and Leeming, above n 7, 741 [21-180].

General, the traditional guardian of public welfare.⁵⁷ It has also been extended to individuals who are statutorily entitled to bring proceedings, in effect as private Attorneys-General, under open standing provisions to remedy and restrain breaches of planning or environmental statutes.

Undertaking as to damages

The court may consider whether the plaintiff offers an undertaking to pay for damages and whether the defendant will be adequately protected by the plaintiff's undertaking to pay damages. If damages would not provide an adequate remedy for the plaintiff, in the event of the plaintiff succeeding at trial (and hence an interlocutory injunction might be appropriate), the court considers:

whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.⁵⁸

A court cannot compel the giving of an undertaking; it can merely refuse injunctive relief if the undertaking is not given.⁵⁹

The appropriateness of requiring a plaintiff to give an undertaking as to damages may vary depending upon the nature of the proceedings. In public interest, environmental proceedings, such as to prevent violation of a public right by the contravention of a planning or environmental statute, an undertaking as to damages may be less appropriate.⁶⁰

⁵⁷ *Ibid* and *North Sydney Municipal Council v Ekstein* (1985) 54 LGRA 440 at 448 and cases cited therein.

⁵⁸ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408.

⁵⁹ Meagher, Heydon and Leeming, above n 7, 793 [21-410].

⁶⁰ *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGRA 1 at [29].

In *Ross v State Rail Authority (NSW)*,⁶¹ Cripps CJ considered the approach that the Land and Environment Court should take in relation to requiring an undertaking to pay damages in proceedings brought pursuant to open standing provisions such as s 123 of the *Environmental Planning and Assessment Act 1979*. Cripps CJ stated that

where a strong prima facie case has been made out that a significant breach of an environmental law has occurred, the circumstance that an applicant is not prepared to give the usual undertaking as to damages is but a factor to be taken into account when considering the balance of convenience.⁶²

This approach has been followed by the court many times in public interest litigation, so that the failure of an applicant claiming interlocutory injunctive relief to give an undertaking as to damages has been held not by itself to be determinative as to how the judicial discretion should be exercised.⁶³

The Land and Environment Court has adopted court rules giving effect to this approach. Part 4 r 4.2(3) of the *Land and Environment Court Rules 2007* provides:

In any proceedings on an application for an interlocutory injunction or interlocutory order, the Court may decide not to require the applicant to give any undertaking as to damages in relation to:

- (a) the injunction or order sought by the applicant, or
- (b) an undertaking offered by the respondent in response to the application,

if it is satisfied that the proceedings have been brought in the public interest.

However, if the plaintiff is a trade competitor of the defendant, notwithstanding the proceedings may be in the public interest, the failure to provide an undertaking as to damages may weigh against granting an interlocutory injunction.⁶⁴

⁶¹ (1987) 70 LGERA 91.

⁶² *Ross v State Rail Authority (NSW)* (1987) 70 LGERA 91 at 100.

⁶³ *Corkill v Forestry Commission (NSW)* (1990) 71 LGERA 116 at 120; *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 243; *Water Administration Ministerial Corporation v Auburn Council* [2000] NSWLEC 76 at [220]; *Williams v Homestake Australia Ltd* (2002) 119 LGERA 55 at 67; *Carriage v Stockland Development* [2004] NSWLEC 320 at [53]; *Baulkham Hills Shire Council v Dix Gardner Pty Ltd* [2004] NSWLEC 271 at [7]; *Marrickville Council v G & K Psakis Pty Ltd* [2004] NSWLEC 663 at [9], [14], [15]; and see also *Metroll Victoria Pty Ltd v Wyndham City Council* (2007) 152 LGERA 437 at [117].

⁶⁴ *Melville v Craig Nowlan & Associates Pty Ltd* (2002) 54 NSWLR 82; 119 LGERA 186 at [146] and *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at 12 [33]. See also re the plaintiff being a trade competitor: *GPT Re Ltd v Wollongong City Council (No 2)* [2006] NSWLEC 401; (2006) 151 LGERA 58 at 165-166 [30].

If an undertaking as to damages is given, it is given to the court and not to the enjoined party, so the termination of the injunction creates no right to damages in favour of that party. The enforcement of the undertaking is in the discretion of the court.⁶⁵ An inquiry as to those damages will only arise if the court decides that the injunction should not have been granted.⁶⁶ With regard to an inquiry pursuant to an undertaking of damages, see *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd*.⁶⁷

The status quo

The court may consider where the status quo lies and whether any alteration to the status quo would be irreparable. The basis for the grant of an interlocutory injunction is the need to preserve the status quo so that if, at the final hearing, the plaintiff obtains a judgment in its favour, the defendant will have been prevented from acting in the meantime in such a way as to make the judgment ineffectual.⁶⁸

The courts have emphasised that where other factors are evenly balanced, the status quo should be preserved.⁶⁹ In planning or environmental cases, preserving the status quo would include preserving the environment from harm, particularly irreversible damage.

Where the plaintiff's cause of action rests on an allegation that a statute is invalid, and the statute is one whose purpose is the promotion of the public welfare, such as a planning or environmental law, an interlocutory injunction may be refused. The presumption that a statute is valid until the court finally decides to the contrary will be sufficient to deny interlocutory injunctive relief.⁷⁰

⁶⁵ *Cirillo v Citicorp Australia Ltd* [2004] SASC 293 at [72].

⁶⁶ *Ibid* at [72]-[74] and *Redwin Industries Pty Ltd v Feetsafe Pty Ltd* [2002] VSC 427 at [45]-[48].

⁶⁷ (1979) 146 CLR 249.

⁶⁸ *Preston v Luck* (1884) 27 ChD 497 at 505; and *Heavener v Loomes* (1924) 34 CLR 306 at 326.

⁶⁹ *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 623; *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408; *Tableland Peanuts Pty Ltd v Peanut Marketing Board* (1984) 58 ALJR 283 at 284.

⁷⁰ *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; *Richardson v Forestry Commission* (1988) 164 CLR 261.

Nature of interlocutory relief sought

The court may consider the nature of the interlocutory injunctive relief sought, including whether it is prohibitory or mandatory. Interlocutory prohibitory injunctions are far more common and have been more readily granted than interlocutory mandatory injunctions.⁷¹ This is because mandatory injunctions carry a greater risk of injustice when granted at the interlocutory stage if the court makes the wrong decision, in the sense of granting an injunction to a party who fails to establish a right at the trial (or would fail if there was a trial). Some of the reasons for mandatory injunctions carrying a greater risk of injustice are:

- (a) a mandatory order usually goes further than the preservation of the status quo by requiring a party to take some new positive step or undo what the party has done in the past;
- (b) a mandatory order usually causes more waste of time and money if it turns out to have been wrongly granted than an order which merely causes delay by restraining the party from doing something which it appears at the trial that the party was entitled to do;
- (c) a mandatory order usually gives a party the whole of the relief which the party claims in the originating process and makes it unlikely that there will be a trial;
- (d) a mandatory injunction is often difficult to formulate with sufficient precision to be enforceable; and
- (e) a mandatory order is usually perceived as a more intrusive exercise of the coercive power of the state than an order requiring a party to temporarily refrain from action.

⁷¹ *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at 351; *Harrold Stephen & Co Ltd v Post Office* [1977] 1 WLR 1172 at 1180; *Parker v Camden London Borough Council* [1986] Ch 162 at 173-174.

The court is therefore usually more reluctant to make an interlocutory mandatory injunction than an interlocutory prohibitory injunction.⁷²

Nevertheless, the principles for the grant of interlocutory injunctions are the same, whether prohibitory or mandatory.⁷³ In either case, the court should grant an interlocutory injunction whenever refusing such relief would carry a greater risk of injustice than granting the relief.⁷⁴

An example where a mandatory interlocutory injunction might be granted is where the subject property would be in danger, for example, at risk of fire, flooding, or slip, and immediate action needs to be taken to abate that danger.⁷⁵

Relative strength of each party's case

The court may consider the relative strength of each party's case.⁷⁶ Courts in Australia have taken the view that the relative strength of each party's case should be considered along with all the other factors in evaluating the balance of convenience.⁷⁷

⁷² *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at 348-349; *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 at 680; *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at 13-14 [38].

⁷³ *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 at 680; *Tsimidopoulos v Mulson Holdings Pty Ltd* (1989) 1 WAR 359 at 368.

⁷⁴ *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 at 680.

⁷⁵ *Hepburn v Lordan* (1865) 2 H&M 345; 71 ER 497 (risk of fire to the plaintiff's property from the storage of combustible material on the defendant's premises) and *Pittwater Council v Martoriati* [2012] NSWLEC 131 (risk of land slippage and instability of house caused by defendant's excavation around and under the house).

⁷⁶ *Hubbard v Vosper* [1972] 2 QB 84 at 96.

⁷⁷ *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 155; *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533 at 536; *Jarasius v Forestry Commission (NSW)* (1989) 69 LGERA 156 at 161-163; *Silktone Pty Ltd v Devreal Capital Pty Ltd* (1990) 21 NSWLR 317 at 326, 333; *Optus Networks Pty Ltd v Stonnington City Council* [1996] 2 VR 209 at 213; (1996) 90 LGERA 100 at 103-104; *Botany Municipal Council v Minister for Transport and Regional Development* (1996) 90 LGERA 81 at 86; *Bridgetown/Greenbushes Friends of the Forrest Inc v Executive Director, Department of Conservation and Land Management* (1997) 18 WAR 102 at 106-107; 125; 93 LGERA 436 at 438, 447; *Williams v Homestake Australia Ltd* (2002) 119 LGERA 55 at [54], [65], [73]; *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at 14 [41].

Where the interlocutory injunction will, in a practical sense, determine the dispute, the plaintiff's case may need to be stronger before the court may decide to grant an interlocutory injunction.⁷⁸

Equitable considerations

The court may consider whether there are equitable considerations such as delay, laches, acquiescence, fraud and unclean hands, justifying the granting or the refusal of an interlocutory injunction.⁷⁹ Delay in seeking interlocutory injunctive relief, in particular, will be a significant factor against granting interlocutory relief.⁸⁰

Prejudice to third parties

The court may consider whether hardship might be inflicted by an interlocutory injunction on an innocent third party not joined in the proceedings, or the public.⁸¹ Conversely, the court may consider the detriment that may be caused to third persons or to the public generally if an injunction were to be refused.⁸²

The public interest

The court may consider the public interest. The public interest is multi-faceted and may be in favour or against the grant of an interlocutory injunction.

⁷⁸ *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533 at 536; and Young, Croft and Smith, above n 1, 1042 [16.350]; and Meagher Heydon and Leeming, above n 7, 782-783 [21-370].

⁷⁹ I C F Spry, *The Principles of Equitable Remedies*, (LawBook Co, 8th ed, 2010) 488-500.

⁸⁰ *Carlton and United Breweries Pty Ltd v Bond Brewing NSW Ltd* (1987) 76 ALR 633 at 688; *Jarasius v Forestry Commission (NSW)* (1989) 69 LGERA 156 at 164-167; *Armidale Local Aboriginal Land Council v Transgrid* [2000] NSWLEC 141 at [15] and [16]; *Bush v Minister for Local Government* (2002) 124 LGERA 256 at [22]-[23]; *Waverley Council v Ligertwood* [2003] NSWLEC 172 at [18] and [21]; and *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at 15 [43], [50].

⁸¹ *Perrey v Mordiesel Co Pty Ltd* [1976] VR 569 at 576; *Silkstone Pty Ltd v Devreal Capital Pty Ltd* (1990) 21 NSWLR 317 at 324, 332; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 42 at [65]; *Water Administration Ministerial Corporation v Auburn Council* [2000] NSWLEC 76 at [203], [206]; *Blacktown City Council v Wilkie* [2001] NSWLEC 91 at [17]-[18]. See also Spry, above n 79, 402-403.

⁸² *Attorney General v Guardian Newspapers* [1987] 1 WWL 1248 at 1287-1288, 1291, 1292, 1299, 1300 and Spry, above n 79, 403 and 473-474.

There is the public interest in the proper enforcement of public welfare statutes, such as planning and environment laws. In *Warringah Shire Council v Sedevcic*,⁸³ Kirby P stated that a public interest exists 'in the orderly development and use of the environment' and that there is purpose in 'upholding, in the normal case, the integrated and coordinated nature of planning law. Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy. Damage may be done to the environment which it is the purpose of the orderly enforcement of environmental law to avoid.'⁸⁴ There is also the public interest in the reliable and predictable public administration of the law.⁸⁵ There is the public interest in protecting the environment and components of it, and cultural heritage.⁸⁶

Time period before final hearing

The court may consider the time period before the final hearing. This can alter where the balance of convenience lies. If there will be a long period until the final hearing, the grant of an interlocutory prohibitory injunction restraining a defendant from carrying out activities may cause considerable hardship to the defendant, such as where its business is being restrained. Conversely, if an interlocutory prohibitory injunction is not granted, considerable injury may be caused to a plaintiff, the environment or the public interest, by the defendant carrying out its activities over a lengthy period. A shorter period until the final hearing lessens the risk of such respective injuries.⁸⁷

⁸³ (1987) 10 NSWLR 335 at 339-340.

⁸⁴ See also *Ellison v Warringah Shire Council* (1985) 55 LGERA 1 at 13; *Jarasius v Forestry Commission (NSW)* (1989) 69 LGERA 156 at 161; *South Sydney City Council v Rennoc Australia Pty Ltd* [2003] NSWLEC 45 at [12]; and *R v Transport Secretary; ex parte Factortame Limited (No 2)* [1991] 1 AC 603 at 673.

⁸⁵ *Ellison v Warringah Shire Council* (1985) 55 LGERA 1 at 13; *Jarasius v Forestry Commission (NSW)* (1989) 69 LGERA 156 at 161-162; *Bridgetown/Greenbushes Friends of the Forest Inc v Department of Conservation of Land Management* (1987) 18 WAR 102 at 106-107; 93 LGERA 436 at 438.

⁸⁶ *Carriage v Stockland (Constructors) Pty Ltd* [2002] NSWLEC 117 at [39]; *Williams v Homestake Australia Ltd* (2002) 119 LGERA 55 at [53]; *Carriage v Stockland (Constructors) Pty Ltd* [2002] NSWLEC 216 at [33]; *Williams v Director General National Parks and Wildlife Service* [2002] NSWLEC 235 at [68]-[73], [77], [98].

⁸⁷ *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at [58].

If the court is able to expedite the final hearing of the proceedings, this may be a factor weighing against granting an interlocutory injunction.⁸⁸ An early final hearing avoids the awkward assessment of competing hardships by the parties, third parties and the public, and hearing the case twice.⁸⁹

Duration of interlocutory injunction

An interlocutory injunction will last for whatever time it is expressed to last. Usually, it is expressed to last until the final hearing or further order. Whilst it lasts, the court will not, except in exceptional circumstances, entertain an application to dissolve it.⁹⁰

6. Final injunctions

Final injunctions can be in nature negative or prohibitory, restraining some actual or threatened act, or positive or mandatory, ordering some act to be taken.

In planning and environmental cases, prohibitory injunctions will usually be to restrain the defendant from breaching a planning or environmental statute, such as using land contrary to the legislation. The breach can be an actual breach, or an apprehended or threatened breach. This is made explicit for statutory injunctions. For example, under s 122(a) of the *Environmental Planning and Assessment Act 1979* (NSW), a breach of the Act includes not only a contravention of or failure to comply with the Act, but also a threatened or an apprehended contravention of, or a threatened or apprehended failure to comply with, the Act.

Mandatory injunction can be of three kinds: restorative, enforcing and preventative. A restorative injunction compels a person to repair the consequences of some wrongful act done by the person, such as:

- (a) demolish a house or other building erected in contravention of planning or environmental legislation⁹¹ or other illegal building works;⁹²

⁸⁸ *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at 17 [59].

⁸⁹ Young, Croft and Smith, above n 1, 1039 [16.330].

⁹⁰ Meagher Heydon and Leeming, above n 7, 790 [21-405].

- (b) remove illegal fill or waste on land;⁹³ and
- (c) rehabilitate and revegetate land cleared illegally.⁹⁴

An enforcing injunction compels the defendant to perform some obligation, such as to comply with conditions of a statutory approval governing the defendant's use of the land. A mandatory injunction is not, however, a substitute for mandamus to enforce compliance by a public official with a positive duty under a statutory enactment.⁹⁵

A preventative injunction compels the taking of steps to prevent the occurrence of further damage, even though the breach of law has been completed.⁹⁶

7. Practicalities of making restorative orders

Restoration of harm caused to the environment by reason of a violation of a public right or breach of a planning or environmental law may require a staged approach over an extended period of time. The court may need to be involved in ordering investigation, monitoring and reporting to the court and maintain ongoing supervision and direction of the restoration over time. Two cases illustrate this iterative, restorative approach.

In *Great Lakes Council v Lani*,⁹⁷ the defendant illegally cleared native vegetation comprising an endangered ecological community, and illegally placed fill without

⁹¹ *Shire of Hornsby v Danglade* (1928) 29 SR (NSW) 118; 45 WN (NSW) 197; *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19 at 36; *Tynan v Meharg* (1998) 101 LGERA 255 at 260; and *Barton v Orange City Council* [2008] NSWLEC 104 at [54].

⁹² *Glaser v Poole* [2010] NSWLEC 143 at [77]; *Canterbury City Council v Mihalopoulos* [2010] NSWLEC 248 at [51], [52]; *Woollahra Municipal Council v Sahade* [2012] NSWLEC 76 at [88].

⁹³ *Director-General, Department of Environment, Climate Change and Water v Venn* [2011] NSWLEC 118; and *Director-General, Department of Environment, Climate Change and Water v Venn (No 3)* [2012] NSWLEC 31; *Pittwater Council v Martoriati* [2012] NSWLEC 131 at [90], [100].

⁹⁴ *Great Lakes Council v Lani* [2007] NSWLEC 681; (2007) 158 LGERA 1; and *Director-General, Department of Environment and Climate Change and Water v Venn* [2011] NSWLEC 118; *Director-General, Department of Environment, Climate Change and Water v Venn (No 3)* [2012] NSWLEC 31.

⁹⁵ Meagher Heydon and Leeming, above n 7, 808 [21-475].

⁹⁶ *Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia* [1998] HCA 30; (1998) 195 CLR 1 at [33].

development consent. In the illegal clearing proceedings, the appropriate remedy was for the defendant to revegetate the endangered ecological community. However, further information was needed to determine the performance standard to which restoration should be directed. There was a need for a baseline survey of adjoining, uncleared area. There was also uncertainty as to the methods of restoration, and their likely success. To reduce this uncertainty, a step-wise approach involving investigation, monitoring and adaptive management was needed.

Accordingly, the Court made injunctive orders that involved:

- (a) an order restraining future clearing by or on behalf of the respondent;
- (b) appointment of a bush regenerator and an ecologist;
- (c) the bush regenerator carrying out weed infestation control measures and removing timber within specified periods of time;
- (d) the ecologist installing fauna nest boxes and carrying out a baseline survey within specified periods of time;
- (e) the respondent paying the cost and expenses of the bush regenerator and the ecologist carrying out such work;
- (f) the provision by the respondent to the Council of the instructions to and the reports from the bush regenerator and the ecologist;
- (g) the relisting of the proceedings before the Court after the carrying out of the above work to determine whether, and if so what, further injunctive orders should be made by the Court; and
- (h) granting liberty to the parties to apply to the Court to revoke, vary or supplement these orders.⁹⁸

In the illegal filling proceedings, the defendant had placed fill on low-lying land, including a wetland. Restoration would involve removal of fill as well as reconstruction of a wetland. These works too involved uncertainty and a precautionary step-wise approach was appropriate. Accordingly, the injunctive orders involved:

- (a) the respondents removing the fill placed on the land;
- (b) the respondent completing construction of a wetland in the southern part of the land (the southern wetland) in accordance with a plan and a letter annexed to the draft orders;
- (c) the respondent giving notice to the Council prior to carrying out such works and permitting officers of the Council to be present during the carrying out of such works;

⁹⁷ [2007] NSWLEC 681; 158 LGERA 1.

⁹⁸ *Great Lakes Council v Lani* [2007] NSWLEC 681; (2007) 158 LGERA 1 at [13] and [46].

- (d) the relisting of the proceedings before the Court after the carrying out of the works to determine whether, and if so what, further injunctive orders should be made; and
- (e) granting liberty to the parties to apply to the Court to revoke, vary or supplement the orders.⁹⁹

In *Director-General of the Department of Environment, Climate Change and Water v Venn*, the defendant was found by the Court to have illegally cleared vegetation comprising two endangered ecological communities and to have illegally placed fill in the cleared areas on land adjoining the defendant's land. Restoration of the land depended on first ascertaining the nature and extent of the illegal fill. The plaintiff governmental agency was concerned that the fill might contain contamination, as asbestos had been found in the fill. There was a need, therefore, for a step-wise approach of investigation and report to the Court of the nature and extent of the fill and, in light of the results of this investigation of the fill, formulation of appropriate orders for removal or rehabilitation of the fill, then regeneration and restoration of the endangered ecological communities. The Court so ordered.¹⁰⁰

8. Discretion not to grant an injunction

Courts have a discretion whether to grant equitable, legal or statutory injunctions.

An injunction issued in a court of equity's exclusive or auxiliary jurisdiction is an equitable remedy and is in the discretion of the court. The reason is that an injunction is part of the remedial jurisdiction of a court of equity.¹⁰¹ In the auxiliary jurisdiction, where the injunction is sought in aid of a legal right (including a statutory right), if the court of equity considers that the remedies available at common law, such as damages, are inadequate, it can grant an injunction to give the plaintiff more effective relief. If, however, the court considers that it is not just or expedient to do

⁹⁹ *Great Lakes Council v Lani* [2007] NSWLEC 681; (2007) 158 LGERA 1 at [14], [46].

¹⁰⁰ *Director-General, Department of Environment, Climate Change and Water v Venn* [2011] NSWLEC 118 at [348]; *Director-General, Department of Environment, Climate Change and Water v Venn (No 2)* [2011] NSWLEC 232 at [39]; *Director General, Department of Environment, Climate Change and Water v Venn (No 3)* [2012] NSWLEC 31 at [29].

¹⁰¹ Young, Croft and Smith, above n 1, 1033-1034 [16.240].

so, it can leave the plaintiff to his or her rights at common law. The discretion is as to the remedy which the court will provide for the invasion of the plaintiff's rights.¹⁰²

The discretion applies even in public law cases where the plaintiff, including the Attorney-General, seeks to enforce or prevent violation of a public right.¹⁰³ Even in cases in its exclusive jurisdiction, a court of equity can decide in its discretion not to grant an injunction, and instead award damages under Lord Cairns' Act, although this would be rare.¹⁰⁴

The courts also have a discretion whether to grant statutory injunctions. The statutory power to grant an injunction to remedy or restrain a breach of the statute is usually expressed in discretionary terms, such as 'may make such order as it thinks fit'. This discretionary statutory power enables the court to not only grant appropriate injunctive relief, but also to withhold relief. In *F Hannan Pty Ltd v Electricity Commission of NSW (No 3)*,¹⁰⁵ Street CJ, in considering the power of the Land and Environment Court of NSW under s 124(1) of the *Environmental Planning Assessment Act 1979* (NSW) to make 'such order as it thinks fit to remedy or restrain' a breach of that Act, said:

Well-established canons of construction require a mandatory significance to be placed upon the phrase in subs (1) 'may make such order as it thinks fit to remedy or restrain the breach'. Where an actual or threatened breach has been established the Court is obliged to consider what should be done to remedy or restrain the breach. In determining this, the Court is given an extremely wide charter. Falling expressly within that charter are the powers in subs (2) to restrain an infringing use, to require demolition or removal of an infringing building or work and to require reinstatement so as to efface the consequences of the infringement. These are but three ways open to the Court to discharge its duty under s 124(1) to make 'such order as it thinks fit'. This last-mentioned phrase empowers the Court to mould the manner of its intervention in such a way as will best meet the practicalities as well as the justice of the situation before it. In *Re Victorian Farmers' Loan and Agency Co Ltd* (1897) 22 CLR 629 it was stated (at 635):

¹⁰² *Bristol City Council v Lovell* [1998] 1 WLR 446 at 453; 1 All ER 775 at 782; *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380 at 396 [32]; Meagher Heydon and Leeming, above n 7, 712 [21-040]; Young, Croft and Smith, above n 1, 1017 [16.50].

¹⁰³ *Attorney-General v Greenfield* (1961) 62 SR (NSW) 393; 79 WN (NSW) 241; 6 LGRA 230; *Attorney General v BP (Australia) Ltd* (1964) 83 WN (NSW) (Pt 1) 80 at 88; 12 LGRA 209 at 218; *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 559-560; [1974] 2 NSWLR 681 at 692.

¹⁰⁴ Young, Croft and Smith, above n 1, 1034 [16.240].

¹⁰⁵ (1985) 66 LGRA 306 at 311.

'It must be remembered that under s 145 the Court may make such order as to it may seem fit, which means, as I understand it such an order as the Court thinks just.'

This was quoted with approval in *Queensland Estates Pty Ltd v Co-ownership Land Development Pty Ltd* [1969] Qd R 150 at 157. If, in a particular case, there is an actual or threatened breach, but either within its discretion or for other valid reasons, the Court does not 'think' that any order is 'fit' to remedy or restraining such breach, then relief will be withheld. Its obligation to 'make such order as it thinks fit' necessarily postulates being able to formulate such an order. If the Court ultimately decides that there is no order 'fit' or just to meet the case, a decision to this effect will be a proper discharge of the Court of its jurisdictional duty under s 124.

In *Warringah Shire Council v Sedevcic*,¹⁰⁶ Kirby P held:

The discretionary power conferred on the Court by s 124 of the Act is wide. Relevantly to the present case, it is as wide as the discretion enjoyed by the Supreme Court in its equitable jurisdiction.¹⁰⁷

In determining the appropriate exercise of the discretionary power to issue or to withhold a statutory injunction, the Court may consider a number of factors, including:

- (a) *the nature of the breach*: a court may be more inclined to withhold injunctive relief if the breach complained of is a purely technical breach which is unnoticeable other than to a person well versed in the relevant law.¹⁰⁸ Conversely, a court will be less inclined to withhold relief if the breach is serious and caused harm to the environment, the public or the public interest;¹⁰⁹
- (b) *the adverse or beneficial effect of the breach on the environment*: a court may be more inclined to withhold relief if the breach complained of, far from having an adverse effect on the environment or the amenity of the locality, in reality has been shown to have a beneficial effect;¹¹⁰

¹⁰⁶ (1987) 10 NSWLR 335 at 339.

¹⁰⁷ Citing *Attorney-General and Down County Council v Newry No 1 Rural District Council* [1933] NI 50 and *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1974] 2 NSWLR 681 at 692.

¹⁰⁸ *Parramatta City Council v R A Motors Pty Ltd* (1986) 59 LGRA 121 at 125-126 and *Warringah Shire Council and Sedevcic* (1987) 10 NSWLR 335 at 339.

¹⁰⁹ *Director-General, Department of Environment, Climate Change and Water v Venn* [2011] NSWLEC 118 at [338].

¹¹⁰ *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339.

- (c) *the public interest in the enforcement and administration of the law:* there is a public interest in the proper enforcement of public welfare laws such as planning and environment laws. In *Warringah Shire Council v Sedevcic*¹¹¹ Kirby P said:

In exercising the discretion, it must be kept in mind that the restraint sought is not, in its nature, the enforcement of a private right, whether in equity or otherwise. It is the enforcement of a public duty imposed by or under an Act of Parliament, by which Parliament has expressed itself on the public interest which exists in the orderly development and use of the environment: *Attorney-General v BP (Australia) Ltd* (1964) 83 WN (NSW) (Pt 1) (NSW) 80 at 87; 12 LGRA 209 at 218. Because s 123 of the Act permits any person (and not just the Attorney-General or a person with a sufficient interest), to bring proceedings in the Court for an order to remedy or restrain a breach of the Act, there is indicated a legislative purpose of upholding, in the normal case, the integrated and co-ordinated nature of planning law. Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy. Damage may be done to the environment which it is the purpose of the orderly enforcement of environmental law to avoid.¹¹²

There is also the public interest in the proper and reliable public administration of environmental laws.¹¹³ There is the public interest in protecting the environment and components of it.¹¹⁴

- (d) *the identity of the plaintiff:* where the application for the enforcement of planning or environmental laws is made by the Attorney-General, a local council, a public official or a public authority with the responsibility of administration of the planning and environment laws, a court may be less likely to deny equitable relief than it would in litigation between private citizens.¹¹⁵ Such public persons and bodies are seen as the proper guardians

¹¹¹ Ibid at 339-340.

¹¹² See also *North Sydney Municipal Council v Ekstein* (1985) 54 LGERA 440 at 450; *Lane Cove Council v Sarkozy* (1996) 130 LGERA 240 at 245-246 and *Tynan v Meharg* (1998) 101 LGERA 255 at 259-260.

¹¹³ *North Sydney Municipal Council v Ekstein* (1985) 54 LGERA 440 at 449, 451 and *Ellison v Warringah Shire Council* (1985) 55 LGERA 1 at 13.

¹¹⁴ *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; (2007) 160 LGERA 1 at [56]; *Director-General, Department of Environment, Climate Change and Water v Venn* [2011] NSWLEC 118 at [339].

¹¹⁵ *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 559-560; [1974] 2 NSWLR 681 at 692; *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 340.

of public rights. Their interest is deemed to be protective and beneficial, not private or pecuniary;¹¹⁶

- (e) *the conduct the subject of the breach of law*: where the injunctive relief is sought against a static development, such as the erection of a building, which, once having occurred, can be only be remedied at great cost or inconvenience, the discretion to withhold mandatory injunctive relief for the removal of the development might be more readily exercised than where what is involved is a continuing breach by conduct, such as the use of a building, which could quite easily be modified to bring it into compliance with the law.¹¹⁷ This is a reflection of the judicial balancing of, on the one hand, the public interest in equal compliance with the law and, on the other hand, the degree of irremediability occasioned by the breach and the expense or inconvenience which would follow the law's enforcement.¹¹⁸ However, there is no 'hard and fast exception' that the discretion to decline injunctive relief will always be exercised in the case of static development. The courts have ordered static developments, such as buildings and homes erected in breach of planning laws, to be demolished.¹¹⁹

Mere hardship to a defendant in complying with a mandatory order to remove illegal development does not necessarily compel refusal of a mandatory injunction. If the defendant has committed the acts constituting the breach of law, such as erecting the building or other static development, knowing them to be unlawful, no amount of hardship may avail the defendant;¹²⁰ and

- (f) *delay, laches and acquiescence*: the existence of delay, laches or acquiescence before bringing proceedings to remedy or restrain a breach of the law, may influence a court to decline injunctive relief.¹²¹ However, these

¹¹⁶ *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 340; *Director-General, Department of Environment, Climate Change and Water v Venn* [2011] NSWLEC 118 at [340].

¹¹⁷ *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 340.

¹¹⁸ *Ibid.*

¹¹⁹ See for example *Tynan v Meharg* (1998) 101 LGERA 255 at 260 and *Barton v Orange City Council* [2008] NSWLEC 104 at [50], [54].

¹²⁰ *Morris v Redland Bricks Ltd* [1970] AC 652 at 666 and see Meagher Heydon and Leeming, above n 7, 809 [21-480].

¹²¹ *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339.

factors will operate in different ways depending on the identity of the plaintiff. For example, what would amount to laches in the case of a private plaintiff might not amount to laches when the plaintiff is the Attorney-General who represents the public interest.¹²² Laches will also not be a disqualifying factor to the same extent where the statute breached protects the public interest.¹²³

9. Suspending or staying the operation of an injunction

The operation of a final injunction can be suspended or stayed. The court's discretion permits the court to soften, according to the justice of particular circumstances, the application of the law which, although right in the general, may produce an unjust result in the particular circumstances. One way this softening can be achieved is by postponing the effect of injunctive relief.¹²⁴

Instances where courts have suspended the operation of a prohibitory or mandatory injunction include:

- (a) suspending a prohibitory injunction restraining a use of premises that is prohibited under planning law, so as to allow time for the defendant to find alternative premises where the use can be carried out legally;¹²⁵
- (b) suspending a prohibitory injunction restraining wrongful pollution, so as to allow time for the polluter to obtain licences or otherwise address the problem;¹²⁶ and

¹²² *Associated Minerals Consolidated Limited v Wyong Shire Council* [1975] AC 538 at 559–560; [1974] 2 NSWLR 681 at 692; and Meagher Heydon and Leeming, above n 7, 741 [21-180].

¹²³ *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 189-190; *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 254-258 and *F Hannan Pty Ltd v Electricity Commission of NSW (No 3)* (1985) 66 LGRA 306 at 313.

¹²⁴ *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 341; *ACR Trading Pty Ltd v Fat-Sel Pty Ltd* (1987) 11 NSWLR 67 at 82.

¹²⁵ *Blacktown Municipal Council v Friend* (1974) 29 LGRA 192 at 201; *Canterbury Municipal Council v Perri* (1982) 47 LGRA 111 at 117; *Woollahra Municipal Council v Carr* (1982) 47 LGRA 105 at 110; *North Sydney Municipal Council v Ekstein* (1985) 54 LGRA 440 at 453, 454; *Hawkesbury Shire Council v Taylor* (1986) 59 LGRA 36 at 38-39. In a different factual context, an injunction was granted restricting the number of cats permitted to be kept at residential premises but suspended for four months to allow the excessive cats to be rehomed: *Randwick City Council v Fuller* (1996) 90 LGRA 380 at 383.

¹²⁶ *Pride of Derby v British Celanese Ltd* [1953] 1 Ch 149 at 182, 192, 194.

- (c) suspending a mandatory injunction requiring demolition of illegally erected buildings or works, so as to allow time for the defendant to apply for some form of statutory approval, such as development consent or building certificate, which would authorise the continuation of the building or works.¹²⁷

After an injunction has been made, if the underlying law or circumstances change, the injunction may be stayed or suspended.¹²⁸

10. Clarity of the terms of an injunction

An injunction must inform the person against whom it is granted exactly in fact what acts the person is restrained from doing or what acts the person must do.¹²⁹ An injunction 'should be as definite, clear and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it; and when practical, it should plainly indicate to the defendant all of the acts which he is restrained from doing, without calling on him for inferences or conclusions about which persons may well differ.'¹³⁰

In the context of statutory injunctions, it has been said that:

Plainly injunctions should be granted in clear and unambiguous terms which leave no room for the persons to whom they are directed to wonder whether or not their future conduct falls within the scope or boundaries of the injunction. Contempt proceedings are not appropriate for the determination of questions of construction of the injunction or the aptness of the language in which they are framed.¹³¹

The requirement for certainty in the terms of an injunction applies both to prohibitory as well as mandatory injunctions, but it is more difficult to satisfy in the latter.¹³²

¹²⁷ *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19 at 36; *Tynan v Meharg* (1998) 101 LGERA 255 at 259; *Tynan v Meharg (No 2)* (1998) 102 LGERA 119 at 120, 121; *Barton v Orange City Council* [2008] NSWLEC 104 at [55].

¹²⁸ *Permewan Wright Consolidated Pty Ltd v Attorney-General (NSW); Ex rel Franklins Stores Pty Ltd* (1978) 35 NSWLR 365 at 367, 374; *Ireland v Cessnock City Council* (1999) 103 LGERA 285 at [34].

¹²⁹ *Morris v Redland Bricks Ltd* [1970] AC 652 at 666, 667; *Optus Network Pty Ltd v City of Boroondara* [1997] 2 VR 318 at 336-337.

¹³⁰ *Collins v Wayne Iron Works* 76 A 24 at 25 (1910) quoted in J D Heydon and M L Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2001) 1189-1190.

¹³¹ *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 259.

¹³² Meagher Heydon and Leeming, above n 7, 813 [21-505].

The court cannot order a defendant merely to do what is 'necessary'¹³³ but it is common in the case of mandatory injunctions to direct the taking of 'all steps necessary' to bring about a certain result.¹³⁴ A danger of couching the injunction in excessively wide language is that it will not only prohibit activities or require activities to be done where there is a right to prohibit or require such activities, but also prohibit other activities or require other activities to be done, where there is no right to prohibit or require such activities.¹³⁵

The principle of certainty in framing an injunction cannot be pressed too far. The principle that an injunction should be clear is 'a counsel of perfection rather than a mandatory standard, and there are limits to its application'.¹³⁶

It is common for a plaintiff to seek for the court's command to not only apply to the defendant personally but also to the defendant's subordinates. Care, however, needs to be taken in framing the injunction. The correct wording to achieve the desired result is for the injunction to apply to 'the defendant by himself, his servants and agents'.¹³⁷ It is improper for the injunction to enjoin 'the defendant, his servants and agents' from doing or not doing something. This would be to issue an injunction against persons other than the parties to the proceedings and against persons who have not committed or threatened any breach of the law.¹³⁸ Only persons who have breached the relevant statute may be the subjects of an order to remedy or restrain a breach of that statute.¹³⁹

¹³³ *Cothor v Midland Railway Co* (1848) 17 LJ Ch 235 at 236; 41 ER 1025, cited in Young, Croft and Smith, above n 1, 1035 [16.270].

¹³⁴ Eg. *Kennard v Cory Bros & Co Ltd* [1922] 1 Ch 265; on appeal [1922] 2 Ch 1 at 17, where the order addressed to the defendant was to 'execute such works as may be necessary' to put a certain drain in working order.

¹³⁵ Meagher Heydon and Leeming, above n 7, 814 [21-505].

¹³⁶ *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 349; *Bankstown City Council v Alamo Holdings Pty Ltd* (2004) 135 LGERA 312 at 332 [106] (reversed by the High Court in *Bankstown City Council v Alamo Holdings Pty Ltd* [2005] HCA 46; (2005) 223 CLR 660 but not on this point).

¹³⁷ Meagher Heydon and Leeming, above n 7, 814 [21-510]. The correct wording was used by Powell J in the demolition order in *Post Investments Pty Ltd v Wilson* (1990) 26 NSWLR 598 at 646.

¹³⁸ *Marengo v Daily Sketch and Sunday Graphic Ltd* (1948) 65 RPC 242; [1948] 1 All ER 406; *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 47-48.

¹³⁹ *Wilkie v Blacktown City Council* [2002] NSWCA 284; (2002) 121 LGERA 444; *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 at [47]-[48].

11. Ability to vary a final injunction

Once an injunction has been made and entered, the court has limited power to vary or set aside the perfected order.¹⁴⁰ The circumstances in which the court may set aside a final injunctive order include if it was made irregularly, illegally or against good faith,¹⁴¹ or if the parties to the proceedings consent,¹⁴² or if it was made in the absence of a party.¹⁴³

The finality of entered, final injunctive orders is of particular significance if the order is of a self-executing nature. Self-executing orders are orders that operate unless some condition or action specified in the order is satisfied. Self-executing orders can lead to injustice. Special exculpatory circumstances might arise making the self-executing order inappropriate, yet it still will take effect upon the non-satisfaction of the condition or action. They are usually made 'in terrorem' rather than in the interests of justice.

If the self-executing order does not fix a time by which the action or condition required by the order must be satisfied and the order is entered, there may be very limited power in the court to vary the perfected order.¹⁴⁴ If, however, the self-executing order does fix a time by which the action or condition specified is required to be satisfied, the court may be able to extend the time, even after the time expires.¹⁴⁵

In *Parramatta City Council v Zreik*¹⁴⁶ an injunction restraining use of premises was granted but suspended for 12 months to allow the completion of outstanding works in

¹⁴⁰ *Bailey v Marinoff* [1971] HCA 49; (1971) 125 CLR 529 at 530; *Gamser v Nominal Defendant* [1977] HCA 7; (1977) 136 CLR 145 at 147, 150, 154; *DJL v Central Authority* [2000] HCA 17; (2000) 201 CLR 226 at 245, 250.

¹⁴¹ *Uniform Civil Procedure Rules 2005* (NSW), Pt 36 r 36.15(1).

¹⁴² *Uniform Civil Procedure Rules 2005* (NSW), Pt 36 r 36.15(2).

¹⁴³ *Uniform Civil Procedure Rules 2005* (NSW), Pt 36 r 36.16(2)(b).

¹⁴⁴ *Bailey v Marinoff* [1971] HCA 49; (1971) 125 CLR 529; *Gamser v Nominal Defendant* [1977] HCA 7; (1977) 136 CLR 145; *DJL v Central Authority* (2000) 201 CLR 226 at 245; *Kelly v Mosman Municipal Council* [2012] NSWCA 291 at [12]-[14].

¹⁴⁵ See *Uniform Civil Procedure Rules 2005* (NSW), Pt 1 r 1.12 and *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* (1986) 7 NSWLR 319 at 327 affirmed by the High Court in *FAI General Insurance Company Ltd v Southern Cross Exploration NL* [1988] HCA 13; (1988) 165 CLR 268 at 283-284, 286, 290; *Paino v Hofbauer* (1988) 13 NSWLR 193 at 196-197, 200.

¹⁴⁶ [2012] NSWLEC 141 at [39].

a development consent. The injunction was to be vacated upon the completion of the works. The Land and Environment Court found that there was power to extend the suspension period because the orders created the potential for the exercise of a further judicial function of determining whether the precondition for vacating the injunction order had been met.

The court can, in making final injunctive orders, authorise applications to vary or supplement the substantive orders. Two expressions are often used, 'liberty to apply' and 'liberty to restore'.

The reservation of liberty to apply does not change the character of the final order; it is not rendered any less final thereby.¹⁴⁷ The effect of reservation of liberty to apply is to permit persons having an interest under the order to apply to the court to deal with matters involved in, or arising in the course of, working out of the final, substantive order, such as by making more specific provision for its implementation or modifying its operation to take account of some subsequent change of circumstance or by enforcing it.¹⁴⁸ It does not extend to the substantive amendment of the judgment or orders in respect of which the liberty was granted, such as by giving substantive relief not sought in the originating process or which is substantially different to that given in the final order.¹⁴⁹

Liberty to apply is implied in relation to ancillary matters, even in the case of final orders. It may also be implied from the nature of the order where the order is one which requires or may require further direction of the court in order to be carried into effect.¹⁵⁰

¹⁴⁷ *Re Scott* (1964) 82 WN (NSW) 313 at 314-315.

¹⁴⁸ *Dowdle v Hillier* (1949) 66 WN (NSW) 155 at 156; *Cristel v Cristel* [1951] 2 KB 725 at 728, 730; *Phillips v Walsh* (1990) 20 NSWLR 206 at 209; *Say-Dee Pty Ltd v Farah* [2006] NSWCA 329 at [33], [35]; *Australian Hardboards Ltd v Hudson Investment Group Ltd* [2007] NSWCA 104; (2007) 70 NSWLR 201 at [50].

¹⁴⁹ *Dowdle v Hillier* (1949) 66 WN (NSW) 155 at 156; *Phillips v Walsh* (1990) 20 NSWLR 206 at 209; *Woollahra Municipal Council v Baranov* [2006] NSWLEC 97; (2006) 144 LGERA 96 at [27]-[29]; *Australian Hardboards Ltd v Hudson Investment Group Ltd* [2007] NSWCA 104; (2007) 70 NSWLR 201 at [52]; *Pittwater Council v Brown Brothers Waste Contractors Pty Ltd* [2009] NSWLEC 50 at [20].

¹⁵⁰ *Cristel v Cristel* [1951] 2 KB 725 at 728, 731.

The procedure for exercising the liberty to apply is to make application by substantive notice of motion in the proceedings.¹⁵¹

Liberty to restore should not be granted in final injunctive orders, but rather only in interlocutory orders. Liberty to restore permits restoration of the matter to the list of the court to which the proceedings have been allocated. It is effected by a request to the list clerk that the matter be relisted, provided the necessary period of notice is given to the other parties to the proceedings.¹⁵²

C. CONCLUSION

I summarise some of the main points I have discussed in the paper.

An injunction is not a cause of action (like a tort or breach of statutory right) but a remedy (like damages). The person seeking an injunction, therefore, must have a cause of action in law entitling the person to substantive relief, including the remedy of an injunction.

A court will have power to grant an injunction if the court has jurisdiction to hear and determine that cause of action. A court may grant an injunction to enforce, prevent or remedy a breach of equitable rights or title if it can exercise the exclusive jurisdiction of a court of equity; a breach of legal rights or title if it can exercise the former auxiliary jurisdiction of a court of equity or the jurisdiction of a common law court bestowed by the Common Law Procedure Acts; or a breach of statute if the court is vested with power to remedy or restrain a breach of that statute.

The injunction may require a person either to do a specific act (a mandatory injunction) or refrain from doing a specific act (a prohibitory injunction). The injunction can remain in force temporarily or permanently. Ex parte, interim and interlocutory injunctions are granted as a provisional measure before or shortly after commencement of the proceedings before the court has had an opportunity to hear

¹⁵¹ *Kraft v Kupferwasser* (1991) 23 NSWLR 236 at 244; *Toben v Len Sadleir Productions Pty Ltd* (1993) 30 NSWLR 374 at 374-375; *Australian Hardboards Ltd v Hudson Investment Group Ltd* [2007] NSWCA 104; (2007) 70 NSWLR 201 at [50].

¹⁵² *Toben v Len Sadleir Productions Pty Ltd* (1993) 30 NSWLR 374 at 374-375.

and weigh fully the evidence and arguments of both sides. They preserve the status quo until the final hearing. A permanent injunction is a final judgment, usually only granted (except by consent of the defendant) after a hearing on the merits.

Interlocutory injunctions of the various kinds are granted according to settled principles, where there is a serious question to be tried and the balance of convenience favours the grant of the injunction.

Final injunctions are either prohibitory (restraining violation of equitable, legal or statutory rights) or mandatory (compelling a person to repair the consequences of a violation of rights (restorative), perform some obligation (enforcing) or prevent further damage from violation of rights (preventative)).

Mandatory injunctions involve special considerations and need care in crafting their terms. Injunctions must be clearly expressed. An injunction carries the sanction of contempt of court. A person enjoined must know plainly what is to be done or not to be done.

Once a final injunction has been entered, the court has limited power to vary or set aside the perfected order. The finality of entered, final injunctive orders is of particular significance if it is of a self-executing nature. Self-executing orders should be used sparingly, because of their often draconian and unjust operation. Liberty to apply can be granted, but it is limited to matters concerning the implementation of the final injunctive order and does not permit substantive amendments of the order.
