Interlocutory Injunction at the Land and Environment Court

Date : August 1, 2019

Interlocutory injunction is a type of an interim relief that the Court can order, usually to preserve the status quo until a formal hearing can be conducted. In this article, we will take a look at the elements of the interlocutory injunctions in the planning and environmental law context, and discuss some of the common issues councils may face when applying for interlocutory injunctions.

The Elements

There are, in essence, two elements that must be positively addressed before the Court will grant an interlocutory injunction.

Firstly, the applicant for the interlocutory injunction must prove there is a serious question to be tried. It is not necessary, for the purpose of addressing this element, to show that the applicant has a strong case. It would be sufficient to show that the applicant has a *prima facie* case by identifying the statutory or other legal rights on which the final relief are based.

Secondly, the applicant must show that the balance of convenience favours the applicant. In the planning and environmental law context, the Court would often consider the following non-exhaustive factors:

1. will irreparable environmental harm be caused if the injunction is not granted?
2. has the applicant provide the 'usual undertaking as to damages'?
3. where does the status quo lie?
4. is there any delay in bringing the application?
5. is the interlocutory injunction in public interest?
6. what is the time period before the final hearing?

Some Common Problems

Urgent/Ex Parte Application

As public authority enforcing planning and environmental laws, councils are likely to encounter situations where a person is about to carry out unlawful activities that may cause irreparable harms. In such circumstance, the Land and Environment Court may hear an application for an interlocutory injunction either on short notice, or on an ex parte basis (that is, without the defendant) (see, for instance, *Tamworth Regional Council v Johnson* [2019] NSWLEC 32(**Johnson**)).

Where the urgency of the situation or other factors meant that a formal notice cannot be served onto the defendant, councils should consider giving informal notice to the defendant, such as a calling the defendant. As the Privy Council in *National Commercial Bank Jamaica Ltd v Olint*

Corpn Ltd [2009] 1 WLR 1405 commented, '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.'

In extreme circumstances, an interlocutory injunction may be sought via telephone. This is achieved by calling the registrar on the urgent listing line of the Land and Environment Court. If the registrar is satisfied that the matter is extremely urgent, he or she may arrange the duty judge to call the applicant back so that an application for an urgent interlocutory injunction may be made over the phone.

If councils do make an ex parte application for interlocutory injunction, a higher duty of candour would be imposed. Failure to disclose all material facts can lead to the interlocutory injunction being revoked (see *Gerard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662), or an order of costs against the applicant (see, *Johnson* where the possibility of an adverse costs order against council was raised).

An interlocutory injunction granted on ex parte basis will usually be for a very short period of time. This enables the defendant to contest against any extension following the short period expires.

Delay

Delay in applying for the interlocutory injunction is often fatal to the success of the application. Chief Judge Preston of the Land and Environment Court wrote extra-judicially '[e]ven simple delay, as opposed to delay constituting laches or acquiescence, may result in an ex parte application being refused' (BJ Preston, 'Injunctions in Planning and Environmental Cases' (2002) 36 *Australian Bar Review*). Therefore, it is critical for councils seeking to halt unlawful activities to commence the application for interlocutory injunction as soon as practicable.

Undertaking as to Damages

Where an interlocutory injunction is sought to protect private rights between commercial parties, the Court would expect the plaintiff to provide the usual undertaking to pay damages to the defendant, if the plaintiff is ultimately unsuccessful in the proceedings.

Although such undertaking can be proffered by councils enforcing planning and environmental law, it is regarded as less decisive. Rule 4.3 of the *Land and Environmental Court Rules 2007* (NSW) expressly permits the Court to grant an interlocutory injunction without undertaking as to damages, provided that the proceedings is brought 'in public interest'. It is also worth noting that, as the undertaking is given to the Court rather than to the defendant, the undertaking can be provided even if the interlocutory injunction is sought on ex parte basis.

Conclusion

Interlocutory injunction is important and effective way to stop breaches of planning and environmental laws, especially when the harm is imminent and irreparable. However, care must

be exercised in order to avoid unsuccessful applications.

The Local Government and Dispute Resolution team at Matthews Folbigg Lawyers is ready to assist councils in bringing civil and criminal enforcement proceedings at the Land Environment Court, including making applications for interim and interlocutory reliefs.