

**REQUIREMENTS FOR CLASS 4 PROCEEDINGS
AND PROSECUTIONS
IN THE LAND AND ENVIRONMENT COURT**

BY

**GEOFF CASTELLAN
B.Ec. Dip Law, Public Notary and
Solicitor of the Supreme Court of New South Wales**

1. Class 4 Proceedings

The Land and Environment Court of New South Wales is vested with a wide jurisdiction in Class 4 proceedings pursuant to Section 20 of the Land and Environment Court Act, 1979. It is specifically given jurisdiction in 29 nominated sections of various Acts found in Section 20(1) of the Act. Section 20(2) of the Act confers an extended jurisdiction in the following terms:-

“The Court has the same civil jurisdiction as the Supreme Court would, but for Section 71, have to hear and dispose of proceedings –

- (a) to enforce any right, obligation or duty conferred or imposed by a planning or environmental law or a development contract;
- (b) to review, or command, the exercise of a function conferred or imposed by a planning or environmental law or a development contract;
- (c) to make declarations of right in relation to any such right, obligation or duty or the exercise of any such function; and
- (d) whether or not as provided by section 68 of the Supreme Court Act 1970 – to award damages for a breach of a development contract. (At page 2-752).”

Section 20(3) of the Act defines 24 statutes or parts of statutes as being “a Planning or Environmental Law”. Section 20(3)(c) also includes the following in “planning and environmental law”:-

“Any statutory instrument made or having effect there under or made for the purposes thereof, including any deemed environmental planning instrument within the meaning of the Environmental Planning and Assessment Act, 1979”.

Subsection 5 defines “development contract” to mean “an agreement implied by Section 15 of the Community Land Management Act, 1989, Section 281 of the Strata Schemes (Freehold Development) Act, 1973 or Section 49 of the Strata Schemes (Leasehold Development) Act, 1986.

The specific jurisdiction conferred by Section 20(1)(c) of the Act gives the Court jurisdiction to hear and dispose of proceedings under Section 123 of the Environmental Planning and Assessment Act, 1979. The same Act is also defined as a “Planning or Environmental Law” for the purpose of Section 20(2) of the Act.

In this paper I will focus on the most common type of Class 4 proceedings taken by Councils, mainly enforcement of planning laws.

2. Locus Standi

Prior to commencement of the Environmental Planning and Assessment Act, 1979, the standing of Councils to commence proceedings to enforce planning laws was not automatic. The fiat (authorisation) to commence the equivalent of Class 4 proceedings was regulated by Section 587 of the Local Government Act, 1919 which stated:-

“Interest of the Public

In any case in which the Attorney-General might take proceedings on the relation or on behalf or for the benefit of the Council for or with respect to enforcing or securing the observance of any provision made by or under this Act, the Council shall be

deemed to represent sufficiently the interest of the public and may take the proceedings in its own name.”

Section 123 of the Environmental Planning and Assessment Act, 1979 took away any doubt as to the right of a Council to bring proceedings, or indeed any person to bring proceedings, to remedy or restrain a breach of the Environmental Planning and Assessment Act. It states:-

- “(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
- (2) Proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.
- (3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings.”

3. The Type of Relief

The jurisdiction granted to the Court under the Land and Environment Court Act 1979 empowers the Court to provide declaratory and injunctory relief. The power to make declarations is found in Section 20(2)(c) of the Ac. Declarations evolved from the Court of Chancery in England and were originally limited as to declaration of equitable rights. The Court was loath to make declarations where there was no further relief sought in the nature of an injunction to enforce the subject of the declaration. The law has now moved away from these constraints and modern jurisprudence embraces declarations without remedy as a matter of course.

The specific power given to the Land and Environment Court gives it the same civil jurisdiction which was formerly reserved to the Supreme Court to make declarations and grant injunctions (Supreme Court Act 1970, Ss 65 & 75). The use of this power is now well established in the Land and Environment Court as an effective tool to enforce the planning laws and the obligations which arise from these laws.

4. Declarations

A declaration may be made as to a right, obligation or duty or the exercise of any function under a planning and environmental law. There is no requirement to also seek an order to enforce that which is the subject of the declaration. However, it is usual to link the declaration with an appropriate order.

5. Example of a Declaration without Relief

Section 123 allows any person to commence proceedings in the Court and seek a declaration such as the following:-

The Applicant claims:-

1. A declaration that Leichhardt Council has failed to consider or properly consider the development application lodged by the XYZ company Pty Limited on 30th July, 2007 for the proposed development at 38 Curban Street, Leichhardt.
2. A declaration that the development consent no. 106/07 issued on 7 August, 2007 to the XYZ Company Pty Ltd is invalid.
3. An order for costs.

In a hearing of this matter, the Court would give judgment as to whether the Council had complied with the requirements of the Environmental Planning and Assessment Act, 1979 with particular reference to Section 79C of the Act. On the assumption that the declarations were made, the Council would then be on notice that it had failed to

comply with its statutory obligations and, without the necessity of being ordered to do so, would necessarily have to reconsider the application without being ordered to do so by the Court. The XYZ Company Pty Limited would also be on notice that its consent was invalid and further action was required.

6. Declaration and Injunction

As you are aware, Councils often take proceedings to enforce planning laws. An example of an Application by a Council in Class 4 for enforcement of a planning law could be as follows:-

The Applicant claims:-

1. A declaration that the respondent, XYZ Company Pty Limited, has failed to comply with Conditions 1, 5 and 7 of the development consent granted by the Applicant on 30th July, 2007 in carrying out development at 38 Curban Street, Leichhardt.
2. An order that the respondent be restrained from continuing with the development at 38 Curban Street, Leichhardt until it complies with Conditions 3, 5 and 7 of the development consent granted by the Applicant on 30th July, 2007.
3. An order for costs.
4. Further or other orders.

7. Relief is Discretionary

It must be borne in mind that declarations and injunctions are both discretionary remedies and even if the Court has been persuaded that there has been a breach of the planning laws, the Court still retains discretion as to whether or not it will grant relief. For example in the form of Application stated above, if Conditions 3, 5 and 7 went to minor matters such as the failure to pay an additional fee to Council or

provide proper waste facilities or to provide an amended plan, the Court, even though it could make the declaration sought, may well be minded not to grant an injunction or grant an injunction in different terms so as the work could still proceed.

In *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR at 335, the then President of the Court of Appeal, Mr Justice Kirby, laid down the following guidelines for the exercise of discretion by the Land and Environment Court to remedy or restrain a breach of the Environmental Planning and Assessment Act which it has found to have occurred. These were:

1. The discretionary power conferred on the Court by s.124 of the Act is wide and is as wide as the discretion enjoyed by the Supreme Court in its equitable jurisdiction.
2. It is undesirable to endeavour, by drawing upon decisions in differing facts situations, to attempt to catalogue or classify all of the circumstances which will enliven the exercise of discretion which is not fettered by the Act. Relevant factors would include the fact that the breach complained of was a purely technical breach which was unnoticeable other than to a person well versed in the relevant law, or the fact that the local authority had delayed the bringing of action or the fact that, far from having an adverse effect on the environment or the amenity of the locality, the breach, in reality may have a beneficial effect.
3. 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.
4. There is indicated in s.123 of the Act 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 is the purpose of the orderly enforcement of environmental law to avoid.

5. There is nothing in the Act by which the discretion is fettered or limited to “special cases”. The obvious intention of the Act is that, normally, those concerned in development and use of the environment will comply with the terms of the legislation. Otherwise, if unlawful exceptions and exemptions become a frequent occurrence, condoned by the exercise of the discretion, the equal and orderly enforcement of the Act could be undermined. A sense of inequity could then be felt by those who complied with the requirements of the Act or who failed to secure the favourable exercise of the discretion under s.124.
6. Where the application for enforcement of the Act is made by a Council, a Court may be less likely to deny relief than it would in litigation between private persons because Councils are seen as the proper guardians of public rights. Their interest is deemed to be protective and beneficial, not private or pecuniary.
7. Where the relief is sought against a “static development” (ie. The erection of a building) which, once having occurred can only be remedied at great cost or inconvenience, the discretion may, in the normal case, be more readily exercised than where what is involved is a continuing breach by conduct which could quite easily be modified to bring it into compliance with the law.
8. The wide discretion permits the Court to soften, according to the justice of particular circumstances, the application of rules which, though right in the general, may produce an unjust result in the particular case. Sometimes this can be achieved by postponing the effect of injunctive relief.

9. The refusal of a Court to grant an injunction, in the exercise of its discretion, does not necessarily conclude the authority's remedies such as criminal prosecution.
10. The Court of Appeal will have due regard to the exercise by a judge of the Land and Environment Court of his or her discretion to decline or grant an injunction because the Court is a specialist Court, with a large measure of exclusive jurisdiction.

8. Injunction without declaratory relief

In the example quoted above, proceedings could be taken merely seeking the order stated in paragraph 2, without seeking declaratory relief. The effect would be the same and it could reduce the amount of argument and time spent in having the matter heard in the Court. It is not a prerequisite to the granting of an injunction that there be a declaration.

The Application would then read:-

The applicant claims:-

1. An order that the respondent be restrained from continuing with the development at 38 Curban Street, Leichhardt until it complies with Conditions 3, 5 and 7 of the development consent granted by the Applicant on 30th July, 2007.
2. An order for costs.
3. Further or other orders.

9. Interim or Interlocutory Injunctions

Interlocutory or interim injunctions are speedy and effective means of preventing unauthorised development. An application is prepared in the normal way, with the

paragraph seeking the declaration and orders and indicating, by addition to the application, that interlocutory relief will be sought. When the application is filed with the Court an application is then made, based on an affidavit prepared to support the application, that the matter is urgent and damage is likely to occur if the unauthorised work proceeds, so that it should be brought before the Court as soon as possible. This can take the form of either having the matter listed before the Duty Judge to seek the interim injunction or, alternatively, by being granted leave for “short service”.

If an interim injunction is sought on an *ex parte* basis, the Court will generally require an undertaking as to the payment of damages to indemnify the respondent against any losses arising from the granting of the interim injunction. In more recent times, the Court has been more lenient in this aspect and will not always require the undertaking. An application for “Short Service” is generally sufficient to bring the matter before the Court as a matter of urgency. No undertaking as to damages is required once leave is granted for short service, the application is then served on the respondent and generally the matter is brought back before the Court within one or two days.

10. The hearing of an interim injunction

Once the matter is brought before the Court, pursuant to short service or further listing, it is then a matter for the Council to persuade the Court that there is a serious question to be tried and that the balance of convenience favours the granting of an interlocutory injunction to restrain the respondent. In order to determine whether to grant the interim relief, the Court will have regard to such factors as the strength of the Council’s case, the adequacy of damages reflected in any undertaking given by the Council (if any), the possibilities of alternative remedies, whether there have been any laches and delay, the strength of the grounds of any defence suggested by the respondent, whether the respondent is prepared to give any undertakings, hardship which may be caused to the respondent and the public interest. In practice, the impact of having a matter brought before the Court often brings the respondent to heel inasmuch as the respondent is no longer dealing with the Council but a member of the independent judiciary who will not be influenced by political considerations which often permeate Council decisions. Once an interim injunction has been

granted or the Court has refused one, the matter proceeds in accordance with the Court's Practice Note dated 30th April, 2007 as outlined below.

11. The Evidence

Evidence in support of applications to the Land and Environment Court is to be by way of affidavit. It is our role as solicitors to draft these documents. Our usual procedure is to take the initial instructions from the officer or officers of the Council who are seeking the Application, and then to be given access to Council's files to prepare a chronological record of events leading up to the Application, and to annex to the affidavit or affidavits copies of documents such as development applications, approved plans and correspondence passing between Council and the respondent. As well as these factual matters, it is also necessary to prepare a formal affidavit establishing the planning controls which apply to the property by reference to the appropriate environmental planning instrument, DCPs (if relevant), and the zoning of the property. The use of photographs is also important to illustrate the factual evidence contained in the affidavits. The Court encourages the use of electronic information systems where possible (Part 19 LEC Rules).

12. Practice and Procedure in the Court

Once the Application has been filed and served on the respondent, the matter proceeds in accordance with the Practice Note for Class 4 proceedings made by the Chief Judge on 30th April, 2007. This will require the filing and service of Points of Claim and affidavits in chief (if not already done), Points of Defence, any cross-claim, affidavits by the respondent and any replies by the applicant. It may also be necessary for the parties to agree on a single expert, depending on the subject of the proceedings. Where proceedings involve judicial review challenging a decision of a Council, the Council is to make available the documents on which it relies which it considers relevant to the decision, within 14 days. It may also be directed to furnish a statement in writing setting out the reasons for the Council's decision, including findings on material questions of fact, referring to the evidence or other material on which those findings are based, its understanding of the applicable law, and the reasoning process leading to that decision.

13. Hearing

A hearing will then proceed before a Judge of the Court, based upon the filed evidence and any other documentary evidence which has been the subject of directions, or which may have been produced during discovery of documents. Witnesses required for cross-examination must be given at least 7 days notice before the hearing. Evidence-in-chief of all witnesses is to be given by affidavit, subject to any contrary direction by the Court and Section 29(4) and 31 of the Evidence Act, 1995. Section 29(4) of the Evidence Act states:-

“Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the Court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.”

Section 31 provides for witnesses who are deaf or mute, to enable them to give evidence. The Practice Note also refers to mediation, neutral evaluation and reference. In our experience, the present Chief Judge has favoured the use of mediation, particularly where a respondent is not legally represented, as a means of resolving a dispute. Where a matter is referred to mediation, it will be conducted by a specially trained Commissioner of the Court and any agreement reached between the parties is reduced to a mediation agreement, which is then noted by the Court. Invariably such an agreement will require one or both sides to do something and then bring the matter back to the Court to see whether the dispute has been settled. In the absence of settlement, a request will then be made to the Court to have the hearing proceed to determination.

Council must establish its case to the civil standard, i.e. on the balance of probabilities.

Class 5 – Summary proceedings in the Land and Environment Court

14. Jurisdiction

Under Section 21 of the Land and Environment Court Act, the Land and Environment Court has jurisdiction, referred to as Class 5, “to hear and dispose of in a summary matter, inter alia:-

- Proceedings under Parts 8.2 and 8.3 of the Protection of the Environment Operations Act, 1997.
- Proceedings under Section 127 of the Environmental Planning and Assessment Act, 1979.
- Proceedings under Section 691 of the Local Government Act, 1993.
- Any other proceedings for an offence which an Act provides may be taken before, or dealt with by, the Court.

The Court also has jurisdiction under Classes 6 and 7 to hear appeals as of right and, by leave, from decisions of Local Courts.

Under Section 170 of the Criminal Procedure Act, 1986, Part 5 of that Act applies to proceedings before the Land and Environment Court giving it summary jurisdiction in the same way as the Supreme Court. Part 6 Rule 2 of the Land and Environment Court Rules 1996 adopts Supreme Court Rules, Part 75, Division 2 (Criminal Proceedings – Summary jurisdiction). Part 16 Rule 5 of the Land and Environment Court Rules 1996 provides for assessment of costs payable under Section 253(1) or (1A) of the Criminal Procedure Act 1986 where there is no agreement between a prosecutor and a defendant.

15. The Procedure for Commencing Proceedings

Once instructions have been given to us to prosecute an offence in the Land and Environment Court, it is necessary to interview the Council Officers concerned and prepare affidavits establishing the facts on which the prosecution will be basing its charge. Once the Summons and affidavit (or affidavits) have been prepared, an Order is also prepared alleging that the person named in the Summons has committed an offence and requesting that person appear at a time and place specified to answer the offence charged in the Order. This is presented to a judge of the Court who will read the affidavit evidence and, if satisfied, will sign a Minute of Order, which is prepared by us, directing the Defendant to appear at a time and place specified in the Minute of Order. A copy of the Minute of Order, together with the Summons and affidavit or affidavits, is then served on the defendant personally. The defendant is then required to attend Court at the nominated date and time, and enter a plea. Often there is more than one mention of the matter before a plea is entered. An early plea of guilty attracts a discount on the penalty of up to 25%. (*R v. Thompson, R v. Houlton 2000 49 NSW LR 383*). A later plea may attract little or no discount. If the matter is fully defended, no discount is applicable.

16. The Standard of Proof

Unlike Class 4 proceedings, proceedings in Class 5 are criminal proceedings and the offence must be proved beyond reasonable doubt.

17. The Gathering of Evidence

I commend to you the paper prepared by my colleague, John Ritchie, which provides excellent guidance to the interviewing of suspects and the preparation of evidence in criminal proceedings. Although prepared with reference to the Local Court, the same rules apply to evidence which is admissible in the Land and Environment Court as to the interviewing of suspects, administering the caution and recording interviews.

18. The provision of Briefs of Evidence

Prior to 2003, Councils were not required to serve on an accused person who pleads not guilty, a brief of evidence. However, since that time, following the repeal of the Justices Act 1902 and the application of the provisions of the Criminal Procedure Act 1986, Councils are usually required to serve a brief of evidence in many matters where the prosecution is defended.

S.183(1) provides that if an accused person pleads not guilty to an offence, the prosecutor must, subject to s.187, serve or cause to be served on him or her a brief of evidence relating to the offence. “Prosecutor” is defined in that Act to mean DPP or “other person who institutes or is responsible for the conduct of a prosecution and includes (where the subject matter or context allows or requires) a barrister or solicitor representing the prosecutor.”

S.183(2) requires the brief of evidence to consist of documents regarding the evidence that the prosecutor intends to adduce in order to prove the commission of the offence, and is to include written statements taken from the persons the prosecutor intends to call to give evidence in the proceedings, and copies of any document or other thing identified in such written statement as a proposed exhibit.

19. Local Court v. Land and Environment Court

The use of Local Court prosecutions is quite an attractive alternative for Councils. Compared with Class 5 prosecutions in the Land and Environment Court, or Class 4 proceedings in the Land and Environment Court, Local Court prosecutions are relatively inexpensive and are not usually long and drawn out. Within a month, a matter can be listed for first mention before a Local Court and if, as in so many matters, a plea of guilty is entered, the matter can be over within 1 or 2 months of commencement with moderate costs with an expectation that an order for costs in favour of the Council will be made.

Notwithstanding the views expressed by Mr Justice Bignold in the recent case of *Bayley v. Leichhardt Municipal Council* [2005] NSW LEC 34, Councils have often commenced Local Court prosecutions for breaches of the EP&A Act to achieve compliance with the law. This is particularly the case where the matter does not justify the expenses associated with Class 4 proceedings. Moreover, in many matters where I have prosecuted on behalf of a Council, the defendant's solicitor or barrister has asked for an adjournment to enable a development application to be lodged, or a building certificate application to be made, or to enable work required by an Order to be carried out, in the expectation that the Magistrate is likely to impose a lesser penalty where development consent has been belatedly obtained, or where a building certificate has been given by the Council, or where the work directed to be done has finally been completed, than where the Defendant does nothing to comply. It is often in the public interest that opportunities are given for compliance, even at the eleventh hour, rather than simply having a fine imposed.

We also find that in many instances the level of fines imposed in the Local Court is greater than the Land and Environment Court.

In the case of development without consent or development not in accordance with consent granted, my firm, when acting for Councils, regularly obtains penalties between \$10,000 and \$30,000 plus costs and has obtained penalties in severe cases of \$50,000 and \$60,000 plus costs. We have also obtained on a regular basis fines between \$10,000 and \$30,000 for breaches of orders served by councils, particularly orders dealing with fire safety relating to boarding houses and private hotels. No doubt most Magistrates are aware of the appalling consequences if fire protection standards are not maintained.

The Land and Environment Court has consistently held that an offence against s.125 of the EP&A Act is a serious one (*Warringah Council v. McNamee* [2003] NSWLEC 2). Mr Justice Bignold in *South Sydney Council v. Hexiva Pty Limited* (2001) 120 LGRA 146, referred to Council's role in enforcement of a public duty imposed by an Act of Parliament in the interest of public safety – "The interest of the Council is deemed to be protective and beneficial, not private or pecuniary, based upon an expectation that persons will comply with the terms of the legislation." Likewise, the

general principles set out by the Court of Criminal Appeal in *Camilleri's Stock Feeds v. EPA* (1993) 82 LGERA 21, often form the basis of submissions to the Court on behalf of the Council.