Land and Environment Court
of New South Wales

PRACTICE NOTE

URGENT APPLICATIONS

Name and commencement of Practice Note

1. This Practice Note commences on 11 May 2015 and is to be known as Practice Note - Urgent Applications.

Application of Practice Note

2. The Practice Note applies to all urgent applications in civil proceedings in Class 1, 2, 3, 4 and 8 and the Land and Environment Court's jurisdiction.

Purpose of Practice Note

3. This Practice Note is for the guidance of practitioners in preparing urgent applications for hearing with the aim of achieving the just, quick and cheap resolution of the real issues in dispute on the urgent application.

When is an application urgent

4. An application is urgent if the circumstances are such that it cannot await the normal return date.

Who hears urgent applications

5. A Duty Judge is available at all times to hear urgent applications. If the rostered Duty Judge is unavailable another judge will substitute as the Duty Judge. Urgent applications are normally made between 9.30am and 4.30pm. Extremely urgent applications may be made outside those hours. Apart from urgent applications, the Duty Judge's functions include hearing ex parte applications for an order under s 246 of the *Criminal Procedure Act 1986* for the appearance of a person charged with an offence (see r 5.3 of the Land and Environment Court Rules 2007 ('LECR')); and assisting the List Judge with short matters in the list that are too numerous for the List Judge to deal with on the day, if requested by the List judge to do so and if the Duty Judge is available.

6. Urgent applications are normally made at a court hearing but in cases of extreme urgency may be made through counsel or solicitor by telephone.

Steps prior to bringing an urgent application

7. Prior to making an application for urgent injunctive relief, unless special circumstances exist the Court expects the applicant to have sought agreement as to undertakings from the respondent and to have notified the respondent of the application.

Procedure for bringing an urgent application

8. The procedure for bringing an urgent application before the Duty Judge is for the applicant's legal representatives (or the applicant if legally unrepresented) to telephone the Registrar or the Assistant Registrar or (if they are unavailable) the Duty Judge's Associate to inform them of:

    (a) the name of the applicant;

    (b) the name of the counsel or solicitor who is to make the application;

    (c) the nature of the application;

    (d) the degree of urgency, and

    (e) contact telephone numbers for the persons involved in the application.

9. The Duty Judge (rather than the Registrar or Assistant Registrar) normally determines whether the matter is urgent and, if so, the degree of urgency and the priority that should be given to an urgent hearing.

10. An application for urgent relief should be by way of notice of motion, if that relief is not sought in the originating process, setting out the orders sought and accompanied by:

(a) supporting affidavit evidence setting out the facts in support of the application including why it is urgent and, where the application is made without notice to the respondent, why notice was not given;

(b) a draft order; and

(c) a skeleton outline of submissions.

However, in circumstances of sufficient urgency justice may permit non-compliance with these requirements.

11. If time permits, the originating process should be filed in the registry before the motion is heard by the Court. However, in urgent cases the Court, on the application of a person who intends to commence proceedings, may grant any injunctive relief or make an order for the detention, preservation or custody of property: r 25.2(1)(b) and (c) of the Uniform Civil Procedure Rules 2005 ('UCPR').

Undertaking as to damages

12. The usual undertaking as to damages to the Court (set out in UCPR r 25.8) is generally required as a term of the grant of an interlocutory injunction or of a respondent's equivalent undertaking to the Court. The applicant should proffer the usual undertaking as to damages (without waiting to be asked) or explain why it should not be required. The object of the undertaking is to attempt to ensure, at the interlocutory stage before the rights of the parties have been finally determined, that the respondent will be compensated for any loss the respondent might suffer by reason of the grant of the interlocutory injunction if it eventually appears that the applicant was not entitled to obtain it. However, the Court has power not to require the applicant to give an undertaking as to damages if it is satisfied that the proceedings have been brought in the public interest: LECR r 4.2(3).

Timely notice of urgent applications

13. The right to timely notice to the respondent is a fundamental principle of procedural fairness. There are exceptions:

(a) the main exception is an urgent case where, through pressure of time, there is no practical opportunity of giving the respondent

sufficient advance notice of the hearing. In such a situation the respondent must be given as much notice as is practicable in the circumstances, such as by informal notice;

(b) secondly, there is an exception where secrecy is essential because there is a real risk that notice would cause the affected party to take precipitate action designed to defeat the applicant's rights; and

(c) thirdly, there is an exception where a process is by its very nature unilateral such that notice is not required (although an application may later be made to set aside service); for example, an application for substituted service of, or for an extension of time for serving, the original process.

Applications without timely notice

14. In the case of an application without timely notice:

(a) the Court will entertain the application only where it is satisfied that it is just to do so;

(b) the applicant must make full and frank disclosure to the Court of all relevant matters, including those favourable to the absent respondent's case, known to the applicant, or would have been known if the applicant had made proper enquiries having regard to the circumstances of the case including the degree of urgency. Breach of the duty prima facie entitles the respondent to an immediate discharge of the order.

(c) the duration of an ex parte interlocutory injunction should be as short as practicable (usually not more than a day or two). The motion for continuation of the injunction should be listed for hearing before its expiry, when the respondent will have an opportunity to be heard. The applicant will then bear the onus of satisfying the Court that the injunction should continue.

(d) the Court may set aside or vary an order made in the absence of a party even after it has been entered: UCPR r 36.16(2)(b). To

enable a respondent to challenge any without notice decision, the applicant is to make a full note of the hearing or obtain a transcript and provide a copy with all expedition to any party affected by the decision.

(e) if the Court considers that the respondent should be served or given notice before proceeding with the hearing of the interlocutory application, the Court may abridge the time for service of the originating proceeding and the notice of motion (UCPR r 1.12) and fix an early return date (perhaps in a day or two) when the motion may be heard with the respondent having the opportunity to be present.

Terms of interlocutory injunctive orders

15. If the applicant is successful at a with notice hearing of an application for an interlocutory injunction, the inter partes order may be expressed to be "until further order". Leave to apply is usually granted in addition, although it is implicit in any event, signifying that the respondent is at liberty to apply to the Court to exercise its discretion afresh as to whether the injunction should be continued.

16. If the parties agree that the case warrants an urgent final hearing and agree on an interim injunctive regime until the matter is determined, they should inform the Court of: an accurate estimate of the timeframe within which the matter will be ready for hearing; an accurate estimate of the duration of the hearing; and the available hearing dates (obtained from the registry).

17. Any order for an injunction or for the detention, preservation or custody of property should normally contain:

(a) the applicant's usual undertaking as to damages;

(b) if made without notice to the other party, an undertaking by the applicant to the Court to serve on the respondent as soon as practicable the motion, the evidence in support, any order made, (if the originating process has not been served) the originating process, and a full note or transcript of the without notice hearing;

(c) if made without notice to the other party, a return date for a further hearing at which the other party can be present;

(d) if made before filing the notice of motion, an undertaking by the applicant to file the notice of motion and pay the appropriate filing fee by the next working day; and

(e) if made before the filing of an originating process, an undertaking by the applicant to file the originating process and pay the appropriate filing fee by the next working day.

The Honourable Justice Brian J Preston
Chief Judge
Date: 7 May 2015