39 ESSEX STREET

Environmental Injunctions

A paper for the Environment Agency

September 2006

By Christiaan Zwart

INTRODUCTION

1. This paper addresses the seeking of injunctions by the Environment Agency ("the EA").

2. The key messages are:

    - be practical
    - be proportionate
    - be prepared.

3. In practice, this means careful consideration be given to the use of powers to pre-empt the effects of pollution; to the cost/benefit exercise as against prosecution after the polluting event; to the proportionality of injunctive proceedings as against the lesser of the evil of prosecution in securing protection of the environment; to the evidence needed to support an injunction application; and to the benefits of securing the ring in the context of injunctive obligations, pending resolution at trial of identified regulatory breaches.

4. Importantly, once obtained, an injunction can be a significant device by which a series of obligations creates a framework within which a respondent may be encouraged to voluntarily comply with the relevant regime, to cease polluting the environment, to discontinue his environmental harm activities or to clean them up properly, thereby reducing the effects of his or her unlawful activities. Furthermore, breach of the injunction may engender contempt of court or lead to other civil liability.

WHAT IS AN INJUNCTION?

5. An injunction is a court order prohibiting a person from doing something or requiring a person to do something (see CPR Glossary)- it's a stick. It is most often obtained on a pre-emptive basis because of immediate prejudicial threat to interests in order to preserve the status quo pending later resolution of the issues. It may be sought before or after a previous prosecution.

ENFORCEMENT

6. Enforcement means both forcing a person to do something and, in the field of environmental law, encouraging their obedience by incentives and strategies. For example, to comply with a consent or permit, or to obtain the same. The traditional tool of obedience is a licence coupled with the possibility of criminal sanction for breach- that is, notice of specified obligations followed by criminality for non-compliance. Such a scheme caters for after the event effects of polluting but not pre-emptive strikes in respect of those effects. Instead,

7. The precautionary principle requires that: "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation".

8. Consequently, the precautionary principle contemplates taking pre-emptive action in the face of threatened action. In addition, making the polluter pay means that those responsible for pollution ought to bear the costs.

EA JURISDICTION TO SEEK AN INJUNCTION

9. The EA is a creature of statute[1]. It has a number of statutory obligations. It is dependant upon government for funding and must take care in the application and recovery of limited sums.

10. What is the aim of the EA? Its principal aim in exercising its various functions is as follows[2]:

> *It shall be the principal aim of the Agency (subject to and in accordance with the provisions of this Act or any other enactment and taking into account any likely costs) in discharging its functions so to **protect** or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development mentioned in subsection (3) below.*

11. It is apparent that the EA's aim reflects the precautionary principle. What does that aim contamplate? The EA will be familiar with the principles of public law statutory interpretation. In particular, the application of a word or phrase to the particular facts is a matter for the

[1] Section 1(1) Environment Act 1995.

decision maker, within the range of responses available to it as a reasonable decision maker. Importantly, for this paper, the word "protect" means "to defend or guard against injury, shield from attack" and "aim to preserve" (see Shorter Oxford Dictionary, Fifth Edition). It is apparent that the EA's statutory aim encompasses the discharge of its functions (the "how to") in a pre-emptive manner if it is necessary to "protect" the environment. In this way, a further contribution may be made to the objective of achieving sustainable development.

12. It is also apparent that the statutory "aim" assumes the exercise by the EA of its power for protection of the environment as a whole. The discharge of such functions contributes to the core objective of achieving sustainable development. Particular statutory duties may supercede the principal aim while there will inevitably be a cost benefit analysis affecting the EA's decisions.

13. The theme of pre-emptive action is also apparent from the terms of section 5. This requires the EA to exercise its "pollution control powers" "to prevent or minimise or remedy or mitigate the effects of pollution to the environment".

14. Importantly, there may be pollution, but the obligation is directed to its effects alone. However, it is apparent that the section 5 obligation to exercise these powers includes both preventative (as in anticipatory) and after the event purposes. "Preventing" means to "act before, in anticipation of, or in preparation for a future event, to meet beforehand…to anticipate in action" (see Shorter Oxford Dictionary, Fifth Edition).

15. Furthermore, the capacity of the environment to absorb the pollution or waste is a relevant consideration- its carrying capacity- in litigation decision making, on a precautionary basis, where the risk of potential damage to the environment is uncertain and significant.

16. Section 6 obliges the EA to "promote to the extent it considers desirable: a) the conservation and enhancement of natural beauty and amenity of inland and coastal waters…b) conservation of flora and fauna…and c) the use of such waters and land for recreational purposes".

17. Once again, "conserve" means to "keep from harm" (see Shorter Oxford Dictionary, Fifth Edition). Again, this obligation contemplates pre-emptive action.

[2] Section 4(1), Ibid.

18. It will be apparent that the EA's aims and objectives embrace the seeking of an injunction either pre-emptively to protect the environment from the threat of harm, or to protect it from the possibility of further harm. Applying these considerations to the facts of the case will assist in assessing the nature and magnitude of the environmental harm sought to be rectified, and the purpose of seeking an injunction.

19. Against these background aims, objectives, and purposes by which the EA can act, the EA has a range of powers, both specific and general- its "toolkit"- enabling it to act. It is helpful to firstly consider the general power - a fallback.

20. The genesis of section 37(1) of the Environment Act 1995 is as follows. Prior to its enactment, the Government understood section 37(1) would empower the Agency to issue and injunction to restrain environmental harm. Viscount Ullswater, then Minister of State in the Department of the Environment said that:

> [S]*o far as civil proceedings are concerned the agency will be able to take any civil proceedings which in its opinion are calculated to facilitate or are conducive or incidental to the carrying out of its functions by virtue of Clause 35* [now section 37(1)]. (see *Hansard*, HL, Vol 562, col. 1035).

21. As enacted, section 37(1)(a) and (9) provide the EA with a broad power expressed in the following terms:

(1) Each new Agency (that is to say, in this Part, the Agency or SEPA)—

*(a) **may do anything** which, **in its opinion**, is **calculated to facilitate**, or is **conducive** or incidental **to, the carrying out** of its functions; and*

(b) without prejudice to the generality of that power, may, for the purposes of, or in connection with, the carrying out of those functions, acquire and dispose of land and other property and carry out such engineering or building operations as it considers appropriate;...

(9) In this section "engineering or building operations" , without prejudice to the generality of that expression, includes—

(a) the construction, alteration, improvement, maintenance or demolition of any building or structure or of any reservoir, watercourse, dam, weir, well, borehole or other works; and

(b) the installation, modification or removal of any machinery or apparatus.

22. "Conducive" means "tending to promote or encourage" (see Shorter Oxford Dictionary, Fifth Edition). This is a broad power. Likewise "calculated to facilitate the carrying out of its functions" is also broad. It may, for example, be used to encourage compliance with an environmental regime in the particular circumstances of a case. The practical application of the power is self-evident enabling construction of "other works" and the removal of any machinery or apparatus. Examples of the application of this power might include injunctive protection to prevent harm to flood defence works by private parties, or removal of apparatus causing environmental harm to the environment.

23. In respect of specific powers, IPPC Regulation 33 empowers the EA to apply to the High Court to secure compliance with an enforcement or suspension notice, where the EA is of the opinion that proceedings for an offence under regulation 32(1)(d) would afford an ineffectual remedy. If an injunction is sought, that opinion must be formed prior to exercising the power to issue an application for an injunction.

24. The lack of availability of other specific powers in respect of other offences, indicates the type of circumstances in which the fallback power under section 37(1) EA 1995 may apply to enable an injunction to be sought. For example, to secure compliance with Regulation 32(1)(a), (b), (c) without prosecuting. In this respect, Regulation 9(1) may be breached where an operator operates an installation without a permit, and an injunction might be sought to encourage an application for the same, rather than simply to prosecute. Likewise a departure from the existing permit absent a Regulation 17 variation engendered by a proposed change under Regulation 16, or a breach of condition may require an injunction to ensure compliance.

25. A triable issue may arise in respect of whether on the facts there was a breach, or a question of law arising from the changes undertaken.

26. Part IIA of the EA 1990 renders the EA the enforcing authority in respect of special sites. Once a remediation notice has been served, failure to comply, without reasonable excuse, with its requirements is an offence. Once again, section 78M(5) empowers the EA to apply to the High Court where it is of the opinion that proceedings for an offence would be an ineffectual remedy.

27. As with IPPC, the same section 37(1) considerations would apply.

28. The EA also has power to issue an injunction under Part III, Chapter II of the 1991 Water Resources Act. Again, this may be sought where the EA is of the opinion that the holder of a relevant consent is in breach of one of its conditions or is likely to do so. Section 90B(4) enables the EA to apply the same "ineffectual remedy" test prior to issuing proceedings in the High Court. In respect of service of a works notice where it appears to the EA, under section 161A(1) (inserted by EA 1995, Schedule 22, paragraph 162), that any poisonous, noxious or polluting matter or any solid waste is likely to enter, or to have been present in, controlled waters, it may serve a notice on any person it considers responsible. If it considers proceedings for non-compliance would be ineffectual, it may secure compliance through the High Court.

29. Once again, section 37(1) may be regarded as a fallback power in respect of injunction in other circumstances.

30. EA funding is ring fenced into at least 70 streams for historic reason increasing the importance of cost benefit analysis in taking enforcement action. The lack of funding integration remains a barrier to enforcement. EA officers must be practical in their use of civil enforcement powers.

31. Consequently, the EA is subject to the equivalent of the best value obligation. Section 39 requires the EA to take into account the "likely costs and benefits" when "deciding whether to exercise its powers". The obligation does not apply where it would be unreasonable for it to do so, or when it must do something. However, whilst there is a duty to enforce, their remains a discretion in how to enforce. Thus, cost benefit analysis remains relevant despite the EA guidance which indicates enforcement is a duty and that there is, therefore, no obligation to conduct a cost benefit exercise in respect of enforcement decisions (EA, *Taking Account of Costs and Benefits* (1996) Sustainable Development Series SD3, at 11.1). A factor in the balance might be: who pays for the clean up or preventative measures to avoid a likely occurrence of a particularly harmful polluting event?

COURT JURISDICTION TO GRANT AN INJUNCTION

32. The Supreme Court Act 1981 Section 37 states that the High Court may by order, whether interlocutory or final, grant an injunction in all cases where it appears just and convenient to do

so (see section 37(1)). Any such order may be made either unconditionally or on such terms and conditions as the court thinks just (see section 37(2)).

33. The County Courts Act 1984, section 38 provides that, generally, in any proceedings in a county court the court may make any order (final or interlocutory, and absolute or conditional) which may be made by the High Court if the proceedings were brought in the High Court.

INJUNCTION PRINCIPLES

34. The basic principles enunciated in the case of *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396 HL remain the touchstone of justification for an injunction, today coupled with public law concept of proportionality. The purpose of the *Cyanamid* rules is to prevent the court becoming bogged down with complex contentious issues which are unsuitable for determination in interim applications, in circumstances where the trial date cannot be predicted and may be some time off.

35. In practical terms, the *Cyanamid* rules are case management rules designed to reduce delay and avoid hearing a case twice, whilst at the same time preserving the status quo in circumstances where the prospects of ultimate success cannot be reasonably assessed by either side.

36. Under the CPR, early identification of issues and their resolution if likely to dispose of the matter is encouraged. This means that not all injunctive proceedings end in trial. Indeed, the injunction can be an effective practical framework within which to resolve dispute under the shadow of more costly proceedings and potential criminal contempt. Delays between issue of proceedings and the trial are much reduced. Matters may therefore be resolved more quickly in an injunction context than if the parties must await a criminal prosecution for environmental sometime after the event. Consequently, the context for the application of the *Cyanamid* rules has altered.

37. The essential principles are as follows:

    a) There should be no full trial on the evidence;

    b) There must be a triable issue on the facts;

c) If there is a serious triable issue, the Court will weigh competing factors of:

i) protection of the environment against injury in respect of which compensation may be inadequate- is that injury or its risk more than trivial or irreversible?; and

ii) the need to protect the defendant from injury resulting in his or her inability to act due to the injunction in respect of which he or she cannot be adequately compensated by the claimant (see *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337);

d) if, having weighed up the competing factors, the Court is doubtful as to whether or not to grant the injunction, it will attempt to strike the balancing exercise on the broader principle "balance of convenience" ie "the balance of justice" (see *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 413). This exercise is on the basis of a balance of the risk of doing injustice to either party (see *NWL v Woods* [1979] 1 WLR 1294 per Lord Diplock at 1306). Relevant factors also include the public interest (see *Laws v Florinplace Ltd* [1981 1 All ER 659);

e) if the balance remains even, the Court will seek to preserve the status quo (see *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130);

f) thereafter, the Court may consider the relative strength of each party's case but only where the imbalance in that strength appears from the evidence to be disproportionate to the others (see *Fellowes & Son v Fisher* [1976] 1 QB 22, per Browne LJ at 137).

38. However, the foregoing principles do not apply where:

a) there is no real prospect of a trial (see *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 per May LJ at 238);

b) there is no issue of fact involved (see Bradford City Metropolitan Council v Brown (1986) 84 LGR 731);

c) there is clear breach of a legal right (see *Hampstead & Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248 at 259, eg a trespass);

d) The activity sought to be restrained by injunction must at least have the potential to cause harm which is a substantive violation of a right or environmental control. Trivial harm may not be enough (see *Hambleton v Bird* [1995] 3 PLR 8).

PRACTICE

39. How do these injunction principles apply in practice? Many of the principles applicable to section 187B Planning Act 1990 injunction apply by analogy to consideration of granting the EA an injunction, also a public authority seeking to protect the environment from environmental harm and also unwilling to give undertakings in damages.

40. In respect of a party ignoring a planning enforcement notice, the court would not sanction that state of affairs and granted an injunction (see *Tunbridge Wells BC v Redford & Another*, QBD (Charles Harris QC) 13/12/2004).

41. In respect of material factors, an injunction removing travelers from occupation of land in breach of planning control should not be suspended pending determination of their planning application (see *Coates v South Buckinghamshire DC* [2004] EWCA Civ 1378). Furthermore, where a gypsy caravan park had been established on agricultural land in a green belt area in breach of planning control and after the local authority had obtained an ex parte injunction to restrain the occupiers of the land from causing or permitting entry on to the land of any caravan or mobile home, it was appropriate to suspend operation of a final injunction only for so long as would allow practical compliance but not until determination of a planning application (see *Mid-Bedfordshire DC v Thomas Brown* [2004] EWCA Civ 1709).

42. In respect of the test of "need" in the consideration of whether the injunction was proportionate, a local planning authority was entitled to an injunction preventing breaches of planning controls by a group of travelling show people occupying an agricultural site as the relief sought was necessary to protect the environment and was not disproportionate (see *Tewkesbury BC v Appleton*, QBD (P M Hunter) 12/10/2004).

43. Furthermore, although there were factors in favour of refusing an injuction sought to require a gypsy family to remove caravans from green belt property owned and occupied by them, and there was a likelihood of continuing breach of planning control even if the injunction were granted, the court had to have at the forefront of its considerations the need to declare that the instant and defined breach had to be brought to an end and an injunction was proportionate and necessary (see *St Albans District Registry v Daniels and Others*, Ch D (Lewison J) 9/9/2003).

44. In respect of person unknown, the court had power to make an interim injunction to prevent a breach of planning control in the terms sought against persons unknown (see *South Cambridgeshire DC v Person Unknown*, CA (Civ Div) (Brooke LJ (V-P), Clarke LJ) 17/9/2004). In that case, the appellant local authority appealed against the dismissal of its application for an interim injunction against persons unknown. The local authority had sought to prevent the deposit of hardcore and the stationing of mobile residential accommodation on a site adjacent to a legitimate gypsy caravan site. The judge below refused the application on the basis that there was no power to make the injunction in the terms sought against persons unknown. However, the Court of Appeal held that there was power to make an interim injunction to prevent a breach of planning control in the terms sought against persons unknown. The court was wholly satisfied that the Town and Country Planning Act 1990 s.187B, the rules of court and authority gave the court power to make an order of the type sought, *Bloomsbury Publishing plc v Newsgroup Newspapers Ltd (2003) EWHC 1087 Ch* and *Hampshire Waste Services v Persons Unknown* (2004) ELR 9 approved. Moreover, the court was completely satisfied on the evidence that it was expedient and necessary to grant relief. By virtue of CPR r.6.8 service would be permitted by documents placed in plastic bags nailed to posts in prominent positions on the site.

45. In respect of use of different powers to achieve similar results, a local authority was entitled to apply for an injunction, under the Town and Country Planning Act 1990 s.178, despite already having pursued an action under s.187B of the Act (see *R(on the application of Lee and Others) v Nuneaton and Bedworth BC* [2004] EWHC 950 (Admin)).

46. In the *Porter* case, the court considered whether to grant an injunction under s.187B Town and Country Planning Act 1990 to restrain a breach of planning control had to reach a just and proportionate decision which took account of any personal hardship which would result.

47. There were appeals in three cases by local planning authorities challenging the guidance given by the Court of Appeal on 12 October 2001 on the grant of injunctions under s.187B Town and Country Planning Act 1990. The respondents in the three cases were gypsies who were living on land in breach of planning control. In each case the local authority applied for and obtained an injunction under s.187B to restrain the breach. On appeal the local authorities argued that the power to grant an injunction should be exercised in support of planning control and that they were entitled to injunctions unless their applications were irrational or perverse. The respondents argued that an injunction should only be granted where the court was prepared to enforce it by committal and where the consequences of granting an injunction and enforcing it were a proportionate response to the breach so that the respondents' rights under Art.8 European Convention on Human Rights were not infringed.

48. The Court of Appeal held that as a matter of principle, proportionality required not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought (protection of the environment) but also that it did not impose an excessive burden on the individual whose private life and home were at stake. The Court of Appeal allowed the appeals and remitted the cases to the High Court for re-determination in light of its guidance on the correct interpretation of s.187B. The local authorities appealed arguing that it was not for the court to balance competing interests in the planning sphere.

49. The House of Lords held that (1) the jurisdiction to grant an injunction under s.187B was an original and not a supervisory jurisdiction. A defendant seeking to resist the grant of an injunction was not restricted to reliance on grounds which would found an application for judicial review. (2) The court had a discretion under s.187B which had to be exercised judicially. Where it appeared that a breach or apprehended breach would continue or occur unless and until effectively restrained by law and that nothing short of an injunction would provide effective restraint that would point strongly towards the grant of an injunction. (3) Issues of planning policy and judgment were matters for the local planning authorities and the secretary of state, but the court was not precluded from entertaining issues not related to planning policy or judgment. Nor need the court refuse to consider the possibility that a pending or prospective application for planning permission might succeed. (4) The planning authorities were entitled to consider the personal circumstances of the gypsies. If it appeared that the local

planning authority had fully considered the issues of hardship and nonetheless resolved that it was necessary or expedient to seek an injunction, that would ordinarily weigh heavily in favour of granting relief, since the court must accord respect to the balance which the planning authority had struck between public and private interests. (5) It was for the court to decide whether the remedy sought was just and proportionate in all the circumstances. The court also had to consider whether the relief was proportionate in the Convention sense. The task was essentially the same under domestic law and under the Convention. The guidance given by the Court of Appeal was right. (*Mole Valley District Council v Smith* (1992) 90 LGR 557 and *Hambleton District Council v Bird* (1995) 3 PLR 8 disapproved.) (see *South Buckinghamshire DC v Porter* [2003] UKHL 26).

50. In respect of the application of proportionality by the Courts, the House of Lords decision in *Porter* [2003] 2 W.L.R. 1547 clearly indicated that decisions on planning merits were for the planning authorities and decisions on whether to enforce such decisions were for the courts, taking into account all relevant considerations including those of personal hardship to the party against whom injunctive relief was sought under Town and Country Planning Act 1990 (see *Tonbridge & Malling BC v Lyn Marie Davis & Others*, [2004] EWCA Civ 194).

51. In respect of Article 6 of the HRA, a decision by a local planning authority to take direct action under s.178 Town and Country Planning Act 1990 to remove the claimants' mobile homes from a site did not engage Art.6 European Convention on Human Rights because that decision was not "directly decisive" of the claimants' relevant civil rights (see *R (On the application of (1) Nayley Mitchell & Others) v Horsham DC* [2003] EWHC 234 Admin).

52. In respect of magnitude of harm, an application for an injunction pursuant to Town and Country Planning Act 1990 s.187B to restrain the defendants from using a property for residential purposes was refused where the remedy sought was disproportionate to the genuine hardship that would be caused to the defendants and no more than minimal harm was being done (see *Runnymede BC v Christian Papadopoulos and Another* [2004] EWHC 94 (QB)).

53. A claimant was not entitled to an injunction to restrain an alleged interference with its right of way nor to a declaration in the terms sought as to the physical boundaries of the right of way as

the topography of the land made it impracticable and the plans were unclear (see *Wesleyvale Ltd v Harding Homes (East Anglia) Ltd and Another, (2003)*).

54. In respect of land owned by a public body, an injunction was granted requiring the defendants to remove a number of caravans and mobile homes from their land and to restore the site to its former condition. The case involved the Council's application under s.187B Town and Country Planning Act 1990 for an injunction to prevent the defendants from keeping or living in caravans or mobile homes in a field owned by them and to require them to reinstate the land to its former condition. The breaches of planning control consisted of the stationing of ten caravans or mobile homes in an area of outstanding natural beauty, involving a change of use from agricultural land and resulting also in a loss of hedgerows and an increased risk to highway safety as a result of a new access that had been created.

55. Those breaches first came to the council's attention in March 2001. Enforcement and stop notices were issued in April 2001, but none was complied with. An interim injunction was obtained in June 2001, but the substantive hearing was held over until after judgment was given by the Court of Appeal in *Porter (2001)* EWCA Civ 1549. There were now ten caravans or mobile homes on the land. It was accepted that none of the defendants had alternative accommodation, and that some of them, as well as their children, suffered from health problems of varying degrees of severity. The Court held that the balance was strongly in favour of an injunction. The only real question was the length of any suspension. (2) In all the circumstances, the defendants would be required to vacate the site by 31 August 2002, and to reinstate it by 31 October 2002 (see *Cotswold DC v Ford & Others*, QBD (Mr P Mott QC) 18/2/2002).

56. In respect of the chain of authority, an action seeking injunctions under the Town and Country Planning Act 1990 s.187B and s.214A, for alleged breaches of planning control, had to be dismissed because the local authority's scheme of delegation did not authorise any officer to decide whether to bring proceedings under those sections (see *Kirklees BC v Eric Arthur Brook* [2004] EWHC 2841 (Ch)).

57. In respect of urgent injunctions, where a party applied without notice for an interim injunction in respect of intellectual property, there was a basic requirement that there had to be a real

urgency for the injunction particularly where an early effective hearing date was available. There had to be an element of threat and damage between the without notice application and the hearing of the effective application that required the immediate intervention of the court (see *Mayne Pharma (USA) Inc & Others v Teva UK Ltd & Another* [2004] EWHC 3248 (Ch)).

58. In respect of the strength of a party's case, while there was an issue to be tried as to whether there had been misuse of trade secrets, a claimant's case was weak. That weakness was a significant factor when assessing whether, on the balance of convenience, an interim injunction should be granted restraining misuse of confidential information (see *Townends Group plc v Cobb & Others*, Ch D (Michael Briggs QC) 26/11/2004).

59. In respect of an impecunious defendant, the court granted a mandatory injunction without confining the works required to be done to those that the defendant would be able to afford. The defendant had a history of persistent, flagrant and significant breaches of planning control. He could not avoid the injunction merely because he could not afford to take the steps necessary to remedy his earlier wrongs (see *Warrington BC v Hull & Another* [1999] Env LR 869).

INJUNCTION PROCEDURE

60. An application for an interim injunction is made on an application notice under CPR Part 23. The application must be supported by evidence unless the Court considers otherwise (see CPR Rule 25.3(2)). What evidence should be provided? Practice Direction- Interim Injunctions sets out the detailed procedural requirements for the application. In essence, it is as follows.

61. The EA will need:

    a) Authority to injunct under the relevant statutory provision and bring its claim;

    b) an application notice;

    c) a draft injunction order;

    d) affidavit evidence in support with exhibits;

e) a draft claim form and particulars of claim specifying the regulatory breach complained of, the environmental harm caused, and, for example any damages claimed for clean up and costs of the action.

62. The application notice must state:

a) the order sought;

b) the date, time and place of hearing.

63. The application notice and evidence in support must be served as soon as practicable after issue and in any event not less than 3 days before the court is to hear the application.

64. The draft order and notice should be filed on a disk where possible to enable speedy preparation and sealing of the order.

65. Applications for interim injunctions must be supported by evidence set out in either a witness statement or a statement of case verified by a statement of truth, but more often than not an affidavit is required.

Injunctions Without Notice

66. An application may be made without notice if there is "good reason" (see CPR Rule 25.3(1)). Where the application is made without notice, the evidence in support must state the reasons for doing so (see CPR Rule 25.3.(3)). Furthermore, in such circumstances, the applicant must disclose fully to the court all matters relevant to the application, including all matters, whether fact or law, which are, or may be, adverse to it (see Chancery Guide, para 5.16). This is a "high duty" and requires the applicant to make full, fair, and accurate disclosure of material information to the court and to draw the court's attention to "significant factual, legal and procedural aspects of the case" (see *Memory Corporation plc v Sidhu* [2000] 1 WLR 1443 at 1459).

67. The duty was explained further in *Brink's MAT Ltd v Elcombe* [1988] 1 WLR 1350 at 1356, CA:

a) the applicant must show the utmost good faith and disclose his case fully and fairly;

b) he must, for the protection and information of the defendant, in the evidence in support of the application summarise his case and the evidence on which it is based;

c) he must identify the crucial points for and against the application, and not rely upon general statements and the mere exhibiting of documents;

d) he must investigate the nature of the claim asserted and the facts relied upon before applying and must identify any likely defences;

e) he must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether or not to grant the application;

f) there is a particular duty on the advocate to ensure that the correct legal procedure and forms are used, a skeleton and proper order drafted by him or her personally and lodged with the Court before the oral hearing; and that he or she draw to the court's attention unusual features of the evidence adduced;

g) the court may discharge an interim injunction where the obligation of full and fair disclosure is mot observed.

Urgent Applications without Notice

68. These fall into two categories:

a) applications where the claim form has been issued;

b) applications where the claim form has not been issued.

69. Urgent applications are normally dealt with at court hearing but may be heard by telephone in cases of extreme urgency.

70. In cases where a claim form has been issued:

a) the application notice, evidence in support and draft order should be filed two hours before the hearing wherever possible;

b) if an application notice has not been issued, a draft order should be provided at the hearing, and the application notice and evidence filed on the same day or next working day or as required by the court;

c) the applicant should take informal steps to notify the respondent of the hearing.

71. In addition to the above, in cases where the claim form has not been issued:

a) the applicant must undertake to the court to issue a claim form immediately or the court will give directions for commencement of the claim;

b) where possible the claim form should be served with the order for the injunction;

c) an order made before the issue of the claim form should state in the title the names of the Claimant and Defendant in an "Intended Action".

Injunction Orders

72. The Court may grant an interim injunction under CPR Rule 25.1(a). In exercising that discretion to grant an order in terms sought, it must give effect to the overriding objective under CPR Rule 1.1. So far as is practicable it must:

a) deal with the case so as to save expense;

b) ensure the case is dealt with expeditiously and fairly;

c) deal with the case in a manner which is proportionate to what is at stake.

73. An interim injunction will not normally be granted unless the claimant undertakes to compensate the defendant for losses he may suffer between any grant of an injunction and the determination of the dispute at trial. Consequently, a private person seeking an interim injunction will normally have to give a cross-undertaking in damages- ie the respondent has security against the applicant disappearing having caused costs to be incurred or damages to arise. He or she will promise to pay damages to the person subject to the injunctive obligations if the injunction is not confirmed at trial. Consequently, there may appear to be a risk that the

EA may be required to give a cross-undertaking in damages for any loss caused to the defendant by its injunction. This can be expensive.

74. However, it is settled law that the Crown, when "enforcing the law", will not normally, as a matter of the court's discretion, be required to give a cross-undertaking. (see *Hoffman-La-Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295). Lord Reid said:

> *I agree…that the practice of exacting an undertaking from the Crown as a condition of the grant of an injunction in this type of law enforcement action ought not to be applied as a matter of course, as it should be in actions between subject and subject, in relator actions, and in actions by the Crown to enforce or protect its proprietory or contractual rights. On the contrary, the propriety of requiring such an undertaking from the Crown should be considered in the light of the particular circumstances of the case* (*Hoffman-La-Roche* at 364F).

75. Thereafter, where the public authority chose to apply for an interlocutory injunction to uphold a public law enforceable by other means (eg by prosecution for a criminal offence), the principle enunciated in *Hoffman* has been said to not apply and the authority was required to give an undertaking. However, in *Kirklees* this was rejected and the same principle applies to local authorities (see *Kirklees Borough Council v Wickes Building Supplies Ltd* [1992] 3 All ER 717, HL, per Lord Goff at 274D-F).

> *The considerations which persuaded this House to hold that there was a discretion whether or not to require an undertaking in damages from the Crown in a law enforcement action are equally applicable to cases in which some other public authority is charged with enforcement of the law.*

76. Consequently, the Court has a discretion to not require a cross-undertaking from a public authority. Furthermore, as a matter of *practice*, cross-undertakings have not been required in planning injunctions of local planning authorities. This is in part due to the law enforcement nature of planning injunctions and in part because there is little risk of a planning authority disappearing. However, the EA's justified refusal to give an undertaking may be considered a relevant consideration in striking the balance prior to the grant of the injunction.

77. A cross-undertaking has only been required on a law enforcement action under section 222 of the Local Government Act 1972 in "special circumstances" (see *Coventry City Council v Finnie*, (1996) 29 HLR 658). In an unreported decision, the first instance judge required a cross-undertaking in damages from the local authority where no breach of the criminal law had yet occurred. However, the local authority refused and in the Court of Appeal an order was granted for a planning injunction without giving a cross-undertaking.

78. What is "law enforcement"? Simply put, it is the pursuit of a regulatory function by a regulator.

79. The best example of such action appears in the *Securities* case. The Securities and Investments Board did not give an undertaking in damages on an injunction application to restrain misleading business forecasts and unsolicited business calls. The remedy of an injunction was provided by statute for the benefit of the public at large, who may have suffered from the infringement of the 1986 Financial Services Act. It was held that such an application, being made under section 61 of that Act, constituted law enforcement action even though the action was not predicated on criminal liability (see *Securities and Investment Board v Lloyd-Wright* [1994] 1 BCLC 147).

80. In that case, the injunction did not proceed on the basis of a pre-existing criminal prosecution. By analogy, it would be permissible for the EA, in pursuit of its regulatory functions as regulator, to seek an injunction to require someone to do something or to stop doing something but without first having attempted to prosecute them. An obvious example is where an activity is being undertaken in breach of the IPPC regime. The EA might seek an injunction requiring cessation of that activity, conditional upon an application being made to it for a permit.

81. Consequently, when justifiably "enforcing the law", the EA is unlikely in practice to be required to give an undertaking in damages prior to obtaining an injunction albeit there may be debate about the matter.

82. In addition, the risk of being required to give a cross-undertaking may be further reduced where the EA can show that it is seeking an injunction in lieu of prosecuting, ie it is using the injunction as the lesser of two litigation evils thereby seeking a more proportionate approach than by engendering criminal liability, albeit that this has been an historic approach.

Furthermore, an acceptable mediated result between the parties is more likely to be achieved in the context of injunctive obligations preserving the status quo subject to contempt of court than by a pending criminal prosecution.

83. In light of the above, an injunction order must contain, (ordinarily) unless the court orders otherwise:

    a) an undertaking by the applicant to the court for damages which the respondent (and any other party served or notified of the order) may sustain, but subject to the Court's discretion to not require the same of the public authority. In the case of the EA, justification of law enforcement will be required in its supporting evidence for not giving that undertaking;

    b) if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as practicable;

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

    d) if made before filing the application notice, an undertaking to file and pay the appropriate fee on the same or next working day; and

    e) if made before issue of the claim form, an undertaking to issue and pay the appropriate fee on the same or next working day, or directions for the commencement of the claim.

84. An injunction order made in the presence of all parties may state that it is effective until trial of further order. Any order must set out clearly what the respondent has to do.

85. Where a person required by an injunction to restrain from a particular act, or to do something, willfully refuses or neglects to do so, or disobeys the injunction, such a breach may be a contempt of court punishable by imprisonment or sequestration of assets (see CPR ETC ; and *Rose v Laskington Ltd* [1990] 1 QB 562).

Injunction Alternatives and Variations

86. The following alternatives to the court ordering or continuing an injunction may arise to vary the ring held:

    a) The claimant usually accepts from the defendant a voluntary undertaking in the terms sought by the claimant until trial or further order. If this happens, a consent order made on such an undertaking is effectively the same as an injunction (see *Wilson & Whitworth Ltd v Express & Independent Newspapers Ltd* [1969] RPC 165 at 173).

    b) If it is possible for the parties to come to an arrangement in respect of the activity complained of, the operation of the injunction may be suspended until a certain date (see *Smith v Smith* (1875) LR 20 Eq 500). Indeed, this may be required where the defendant requires time within which to comply with the injunction and where the difficulty in removing the harm is great (see *AG v Colney Hatch Lunatic Aslylum* (1868) 4 Ch App 146; and *Jones v Llanrwst* UDC [1911] ;

    c) A person served with the order may apply to the court to set it aside or vary its contents where he or she was not served with it (CPR Rule 2310(1) and (2));

    d) A material change in circumstances since the injunction was made may justify discharge of the injunction or likewise, where it was found on an erroneous interpretation of the law (see *Regent Oil Co Ltd v JT Leavesley (Lichfield Ltd)* [1966] 1 WLR 210);

    e) An erroneous interpretation of the law may justify variation to any undertaking (see *Chanel Ltd v FW Woolworth & Co. Ltd* [1981] 1 WLR 485).

EVIDENCE REQUIRED

87. Make it easy for the judge to make the injunction. Environmental regulation in the public interest is increasingly technical. An injunction seeking environmental protection may contain complex technical matters and expert evidence. Bridge that technical gap and simplify the technical evidence. The simpler the application and evidence in its support appears, the more likely the EA will obtain its injunction. The evidence in support of the injunction should be

prepared by the case officer dealing with the case. In addition a legal officer may need to make an affidavit.

88. The affidavit should detail:

a) the land or property, with a (legible) plan exhibited;

b) the current use of the property and activity engendering harm;

c) in what way the defendant is in breach of the relevant statute or regulations and what should he or she do to achieve compliance;

d) when (so far as is known) the breach occurred or first commenced;

e) the harm to the environment caused by the breach, and whether or not it is irreversible (to be stated by an EA officer with relevant expertise);

f) any current consents, licences or permits relating to the property or in respect of the activity;

g) whether the consent required to be obtained is likely to be granted if applied for;

h) the defendant's role in the property and/or business (if any);

i) whether other enforcement action has been undertaken and when;

j) any criminal prosecutions of the defendant or connected persons in respect of use of the property, unless they disclose spent convictions (see section 4(1) Rehabilitation of Offenders Act 1974);

k) whether and when the defendant was given notice by the EA of the need for the consent;

l) whether and when the defendant was given notice by the EA of any attempted mediation to resolve the issues;

m) any other communications between the EA and defendant showing:

   i) knowledge of the matters complained of by the EA;

   ii) the refusal of the defendant to remedy those matters voluntarily;

   iii) any written warnings and interviews together with evidence of compliance with PACE Code C if questions relate to a section 67(9) PACE 1984 relevant offence,

n) The power under which the EA brings the injunction and the chain of command including the decision issue;

o) Any EA officer or expert report on the matter;

p) the EA's view that the CPR tests are satisfied, in respect of:

   i) why each and every injunction obligation sought is necessary, proportionate, and expedient in the public interest;

   ii) why nothing less than an injunction will suffice;

   iii) why a cross-undertaking in damages is not being given;

iv) (if open to it) why it would be open to prosecute the defendant but why it has chosen not to;

v) why the injunction constitutes "law enforcement";

vi) the absence of special circumstances justifying the EA giving a cross-undertaking;

q) if the injunction is without notice, an explanation of:

i) why it is urgent;

ii) why it is made without notice to the defendant;

iii) what steps have been taken to notify the defendant;

iv) what steps the EA will take to serve the injunction;

r) the draft order sought. The judge will want to know early on what orders the EA seeks. A draft order should always be prepared in advance with evidence to justify each and every obligation. The judge may have his or her own practical drafting suggestions and a draft order is invaluable for this purpose.

89. The exhibits required in support of the injunction are likely to include:

a) A plan of the property;

b) Evidence of title of the property if relevant;

c) Evidence of the defendant's role in the property or business;

d) Colour photographic evidence of the matter complained of with clear notations;

e) Any enforcement notice or other notice breached & other notices or consents which disclose useful information;

f) Any relevant inspector's report;

g) Correspondence between the parties;

h) the draft order of the obligations sought;

i) (if possible) a schedule of summary costs for the application hearing;

CONCLUSION

Be practical, be proportionate, be prepared.