New Forays of Equitable Remedies into Commercial "Personal Service" Contracts

Rachael Mulheron *

The traditional view was that a contract of personal services[1] was not one of a kind in which equity would ordinarily intervene and order either specific performance or an injunction which would have the effect of compelling the plaintiff and defendant to sustain that contractual relationship.[2] This attitude was based upon several factors:

i) the courts cannot supervise the performance of a contract of personal services;
ii) to compel the continued relationship of hostile parties is not for the benefit of either party; and
iii) such relationships generally require the performance of obligations of mutual trust and confidence, the absence of which is generally exhibited by the very presence of the parties before the courts.[3]

The traditional view has since been amended in Australia in two respects in the context of a contract of employment:

i) first, in *Turner v Australasian Coal and Shale Employees' Federation*,[4] the

* Lecturer in law, College of Law, Notre Dame Australia University, Western Australia.

1 Commonly, in such contracts, one party to a contract is required to perform duties as an employee or an agent or a partner. The hallmarks of a contract of personal services include: the requirement to maintain a personal relationship; where the purpose is not merely the accomplishment of a particular result but also the manner in which the parties act during the period of the contract; where confidential or intimate information and dealings occur; or the presence of fiduciary duties.

2 *Francis v Kuala Lumpur Councillors* [1962] 1 WLR 1411 at 1417-18; *Corbett v Aboriginal Legal Service of Western Australia (Inc)* (unreported, Supreme Court of Western Australia, Mr Commissioner White, 13 July 1989) at 6.

3 *Powell v London Borough of Brent* [1988] ICR 176 at 193.

4 (1984) 55 ALR 635 at 648-9.

Full Court of the Federal Court held that there was no rule preventing the making of an order for the specific performance of a contract of employment, and that the decision whether to make such an order was one involving the exercise of the court's discretion. Similarly, in *Gregory v Philip Morris Ltd*,[5] a differently constituted Full Court, by a majority, held that the making of an order for specific performance of a contract of employment is a matter within the discretion of the court.

ii) second, in the appropriate case, it will be competent for a court to grant an injunction to restrain breach of a negative covenant in the contract, notwithstanding that the effect of the order would be to direct that the contract of employment be specifically enforced.[6]

The most common scenario in which the above principles have been espoused has been that of the employment contract. However, three recent and unreported decisions demonstrate an application of these principles in the context of *commercial contracts* which required some degree of mutual obligations and personal relationship between the contracting parties. These are: *075 883 626 Pty Ltd v CSR Ltd*[7] (*"CSR"*) which concerned contracts for the supply of cartage services, *Wilson Parking Australia 1992 Pty Ltd v Kao Holdings Pty Ltd*[8] (*"Wilson Parking"*), which involved an exclusive license and management agreement of a city carpark, and *Marine Pilots Pty Ltd v State of Queensland*[9] (*"Marine Pilots"*), in which the court had to consider another exclusive services contract to provide piloting services in the Port of Brisbane.

Exclusive service contracts inherently contain a negative stipulation[10] of the following effect:

> "... the whole essence of that contract is that which is not expressed in words ... but which by implication is really the only thing existing, a contract that he will not take from somebody else.[11]"

Thus, the negative stipulation, breach of which the plaintiff seeks to restrain in exclusive commercial agreements, may not be an express condition or term of the agreement.[12] Nevertheless, the traditional principle

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5 (1988) 80 ALR 455 at 482.

6 For example: *Buckenara v Hawthorn Football Club Ltd* [1988] VR 39 at 46 per Crockett J; *Hawthorn Football Club Ltd v Harding* [1988] VR 49 at 58 per Tadgell J. In England: *Lumley v Wagner* (1852) 1 De GM&G 604; 42 ER 687; *Warner Bros v Nelson* [1937] 1 KB 209.

7 Unreported, Federal Court of Australia, Queensland District Registry, Cooper J, 17 July 1998.

8 Unreported, Supreme Court of Western Australia, White J, 8 September 1995.

9 Unreported, Supreme Court of Queensland, Williams J, 1 April 1992.

10 *Beltech Corporation Ltd v Wyborn* (1988) 92 FLR 283 at 284.

11 *Metropolitan Electric Supply Coy Ltd v Ginder* [1901] 2 Ch 799 at 806 per Buckley J.

12 After some earlier authority to the contrary: *Ampol Petroleum Ltd v Mutton* (1952) 53 SR (NSW) 1 at 11 and 13, this proposition was confirmed by Kaye J in *State Transport Authority v Apex Quarries Ltd* [1988] VR 187 at 190.

confronting a plaintiff in such an application was that an injunction would not lie to restrain breach of a negative stipulation, express or implied, if the effect of the injunction was to compel performance of an agreement of which equity would not decree specific performance.[13] However, in more recent times, just as in the case of employment contracts, there has been a movement away from that strict position in the context of exclusive commercial agreements.[14] It is now a matter for the court's discretion, not a matter of hard and fast rules.[15]

In the cases which form the subject of this article, all applicants sought interlocutory injunctive relief, the purpose of which was to enforce part of the contracts between the parties. In *CSR*, the court was not prepared to grant the injunction, whilst interlocutory injunctive relief was awarded in *Marine Pilots* and *Wilson Parking*.

The decisions throw up a number of the factors to which the courts typically have regard when exercising their discretion as to whether to grant or decline equitable relief in contracts of personal services. The purpose of this article is to extract and analyse these various factors.[16] Although equitable relief depends to a great extent upon the particular facts and circumstances, there are some oft-repeated matters to which, according to these cases, the parties seeking such relief should give consideration when preparing an interlocutory application. These are discussed below, but first, brief mention must be made of two preliminary matters.

Prerequisites for equitable relief

Where a party to a contract of personal services repudiates the contract, the position is as with any other contract - it takes two to end it, by repudiation on the one side, and acceptance of the repudiation on the other. Upon repudiation, the applicant has an option: an election to accept it, or keep the contract alive by not accepting it.[17] An injunction restraining breach, or a decree of specific performance, of a personal services contract, will only be considered by the court where the contract remains on foot.

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[13] For example: *Atlas Steels (Australia) Pty Ltd v Atlas Steels Ltd* (1948) 49 SR (NSW) 157; *Page One Records Ltd v Britton* [1968] 1 WLR 157.

[14] For example: *State Transport Authority v Apex Quarries Ltd* [1988] VR 187 at 192; *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538 at 551; *Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd* [1983] 1 NSWLR 513 at 516; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 at 371-2.

[15] *Turner v Australasian Coal and Shale Employees' Federation* (1984) 55 ALR 635 at 649.

[16] For a consideration of further cases in the context of exclusive commercial agreements, see: G Davis, "The Remedy of Injunction in Exclusive Employment and Commercial Arrangements" in R Carroll (ed), *Civil Remedies: Issues and Developments*, Sydney: The Federation Press, 1996, ch 6.

[17] *Heyman v Darwins Ltd* [1942] AC 356 at 361 per Viscount Simon LC, cited in *CSR* at 7.

In *CSR*, Cooper J approved dictum of Sachs LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd*[18] to the effect that a party to a personal services contract may choose the latter option in the hope that either the other party will take a different course away from the repudiation, or that it may be one of those "special cases" where the court will grant equitable relief such as an injunction. However, if the contract is no longer on foot, equitable relief will be denied.[19]

In all three cases, the plaintiffs were careful to ensure that they did not accept the other party's alleged repudiation of the contract, and that they appeared to the court to remain willing and able to continue the performance of the contract. In *Marine Pilots*, for example, the plaintiff wrote a letter expressly stating that:

> "Your letters [of purported termination] amount to a repudiation of the contract. The company does not accept that. The company regards the contract as remaining on foot and the company remains ready, willing and able to perform its obligations under the contract.[20]"

Second, because all cases were interlocutory applications, then in accordance with the criteria in *American Cyanamid Co v Ethicon Ltd*,[21] the applicants had to demonstrate that:

i) there was a serious question to be tried;
ii) it would have been unjust to confine the plaintiff's relief to an award of damages; and
iii) the balance of convenience favoured the grant of the injunction, ("the interlocutory criteria").

The facts and results

The table below sets out the relevant facts and outcome of each application:

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[18] [1971] 1 WLR 361 at 375-6.
[19] *CSR* at 8.
[20] *Marine Pilots* at 1-2.
[21] [1975] AC 396. Also: *Murphy v Lush* (1985) 65 ALR 651; *Queensland Industrial Steel Pty Ltd v Jensen* [1987] 2 Qd R 572; *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd* [1991] 1 Qd R 301.

Table 1: Relevant cases

	075 883 626 Pty Ltd v CSR Ltd	Wilson Parking Australia 1992 Pty Ltd v Kao Holdings Pty Ltd	Marine Pilots Pty Ltd v State of Queensland
the applicant	075 883 626 P/L and other cartage companies	Wilson Parking, the sole manager and operator of a city carpark	Marine Pilots
what services were provided under the contract	the companies supplied concrete truck and driver to deliver readymix concrete to CSR Ltd (" CSR")	Wilson covenanted to manage, control and operate the carpark efficiently, and establish an appropriate marketing programme and fee structure for maximum return	Marine Pilots agreed to provide, exclusively, all piloting services to shipping in the Port of Brisbane for a 10 year period
how the dispute arose	the companies applied for an extension of the term of their initial 2 year contracts, but CSR refused - companies alleged that the refusal constituted a repudiation	defendant owner of the carpark, Kao, served notice of termination on Wilson, alleging breach of abovementioned covenants - Wilson alleged service of notice was a repudiation	after 3 years, dispute arose as to monies payable to Marine Pilots for pilotage services performed in 1992 - State informed plaintiff to cease pilotage services - Marine Pilots alleged State' s letter was a repudiation
what the applicants were seeking by injunction	to prevent CSR from taking any steps to prevent the companies from continuing to perform their cartage contracts until trial	to prevent Kao from interfering with the operation of the carpark, or restricting Wilson' s access to the carpark until trial	to restrain the State from breaching the negative stipulation contained in the exclusive services clause, and appointing other pilots, until trial
the effect of the application, if successful	to maintain the contracts so that CSR would allocate work to the cartage companies to enable them to earn remuneration	to compel the carpark license and management agreement to continue until trial	to keep the exclusive services contract on foot until trial
was equitable relief available?	no	yes	yes

The reasoning

Having regard to each of the interlocutory criteria:

i) Serious question to be tried?

This criterion was successfully made out in all three cases.

In *CSR*, the cartage companies claimed that each was entitled as of right to an extension of its contractual term, that on a proper construction of the contract, CSR did not have a discretion to not approve an application for an extension, and that the refusal to grant the extension (the period of which was dependent upon a formula in the contract) amounted to repudiatory conduct by CSR. There was also a dispute between the parties as to whether CSR had properly exercised the power to terminate the contracts according to the termination clause in the contracts. Both were serious questions to be determined at trial.[22]

Similarly, White J was satisfied in *Wilson Parking* that whether Wilson as carpark operator repudiated the agreement as alleged, or at all,[23] or committed fundamental breaches of the contract thus entitling the owner to terminate,[24] and whether Wilson's right to occupy the carpark arose by virtue of a revocable license, which license was effectively revoked by the notice of termination,[25] were serious questions to be tried.

In *Marine Pilots*, His Honour Williams J found that there was a serious issue to be tried as to whether or not the pilotage services agreement had been terminated for want of certainty as to the consideration where a nominated body failed to make a determination, or whether it remained in full force and effect.[26]

ii) Unjust to confine applicants to damages?

It was said by Kaye J in *State Transport Authority v Apex Quarries Ltd*[27] that the proper test is not whether damages would provide the plaintiff with an adequate remedy, but rather whether it is just, in all the circumstances, that the plaintiff should be confined to his remedy in damages. That was confirmed as the correct approach in *Marine Pilots*,[28] although the two expressions of the test still tend to be used interchangeably.[29]

Damages were an adequate remedy for the applicants who brought their suit against CSR (hence an injunction was denied), but were not considered to be adequate for either plaintiff in *Wilson Parking* or *Marine Pilots*.

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[22] *CSR* at 6.
[23] *Wilson Parking* at 6.
[24] above at 8.
[25] above at 10.
[26] *Marine Pilots* at 8.
[27] [1988] VR 187 at 193, citing with approval Sachs LJ in *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349 at 379.
[28] *Marine Pilots* at 8.
[29] *CSR* at 9, *Wilson Parking* at 11.

In *CSR*, Cooper J noted that:

> "It is true that in exceptional cases interlocutory injunctive relief will be granted to restrain an employer from unlawfully terminating the employment of an employee. However, those circumstances are regarded as exceptional and ordinarily require that there is something which shows that damages are an inadequate remedy.[30]"

The matters which the courts took into account to determine whether there were "exceptional circumstances" in the three cases the subject of this article are indicated in Table 2 below:

Table 2: Checklist of factors: damages

whether it would be futile to force the contract onwards at the request of the plaintiff	yes	no
whether plaintiff is likely to suffer detriment to reputation or goodwill, which damages cannot compensate	no	yes
whether damages the plaintiff will suffer if no injunction is granted are impossible to quantify	no	yes
Factor tends to indicate ...	**no injunction**	**an injunction**

Dealing with each factor in turn:

i) futility of forcing contract on

This negated any prospect of the plaintiffs' success in *CSR*. CSR was able to prove that damages were indeed an adequate remedy for the cartage contractors because CSR was committed to a decision to rationalise its fleet size. If CSR was ultimately held at trial to have repudiated the contracts, it thereafter proposed to terminate the contracts of each applicant according to the machinery provided in the contracts. If that did indeed occur, then CSR would be liable to pay the applicants damages for the period between breach and trial, in addition to whatever compensation was prescribed under the termination clause. At the very best, if the applicants were entirely vindicated at trial, they would only receive a monetary sum. However, under no circumstances were each of the applicants going to get the benefit of a longterm contract. Therefore, it was pointless to try to enforce performance of the cartage contracts until trial. The futility of forcing the contracts onwards meant that damages were adequate as a remedy.[31]

[30] *CSR* at 8.
[31] above at 9.

ii) damages cannot be awarded

A plaintiff's loss of goodwill and trade reputation cannot be taken into monetary account in a common law action for breach of contract. Indeed, as Sachs LJ noted in *Evans Marshall & Co Ltd v Bertola SA*,[32] the grant of injunctions in cases where a breach of contract is alleged often stems from this factor, for it would be unjust to confine a plaintiff to his damages for breach in these circumstances.

Thus, in *Wilson Parking*, it was held unjust to confine the plaintiff to damages, because of the likely loss of goodwill and reputation if it was known generally that Wilson Parking had had a management contract terminated. Evidence was put before the court to the effect that the plaintiff's competitor, KC Park Safe (WA) Pty Ltd, would get "a lot of mileage"out of the situation if the injunction were not granted, and the plaintiff's credibility in the marketplace would be affected irrevocably.[33] To have the carpark run by a different operator and under a different name would cause the plaintiff severe prejudice if, at the end of the day, the agreement was held not to have been validly terminated by the carpark owner.[34]

iii) difficulty in estimating damages

A further reason for the decision that damages were not an adequate remedy for Wilson Parking was that there were cogent arguments to support the contention that it was going to be impossible to quantify the damage that would be suffered by the plaintiff if it was not awarded the injunction, and then succeeded at trial in proving that the agreement remained in full force and effect. For example, if the carpark agreement was not kept on foot, it was argued that Wilson would lose an interest in land of a unique character, and that any calculation of damages (amounting to a sale price of the licence) would be "mere conjecture."[35] Additionally, the future economic return of the carpark was too difficult to predict, given shifting demographic and retail trends and Council policy upon future development.[36]

Although the carpark owner tried to counter this by pointing to the principles upon which courts may award damages for breach of contract resulting in the deprivation of a commercial opportunity,[37] White J was satisfied that damages would not be an adequate remedy for Wilson Parking if the purported termination of the agreement was held at trial to have been ineffective.[38]

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[32] [1973] 1 WLR 349 at 380.
[33] *Wilson Parking* at 15.
[34] above at 16.
[35] above at 11 and 15.
[36] above at 35.
[37] For example: *Sellars v Adelaide Petroleum NL* (1993) 179 CLR 332.
[38] *Wilson Parking* at 16.

Balance of convenience favoured an injunction?

The balance of convenience favoured the defendant CSR (so that the parties did not have to continue to work together), but favoured the continuation of the performances of the contracts as requested by plaintiffs Marine Pilots and Wilson Parking. Several factors emerge from these three cases as relevant to the assessment of the balance of convenience in commercial contracts which entail personal services:

Table 3: Checklist of factors: balance of convenience

whether the status quo should be preserved	no	yes
whether relationship of trust and confidence has broken down	yes	no
whether to grant the injunction at the plaintiff' s request would cause hardship to the defendant	yes	no
whether the constant supervision of the court would be required	yes	no
whether the plaintiff seeking to keep contract on foot invested large sums in contract performance	no	yes
whether the interlocutory injunction is likely to continue for a lengthy period	yes	no
whether the plaintiff can give a worthwhile undertaking as to damages	no	yes
whether third parties would be detrimentally affected if no injunction was granted	no	yes
Factor tends to indicate ...	**no injunction**	**an injunction**

Having regard to each in turn, and the cases in which they played a part:

i) preserving the status quo

If the effect of the grant of an interlocutory injunction would be to preserve the status quo until a decision can be reached after a full investigation of all the relevant circumstances, this is a strong, but not conclusive, factor in favour of the grant of an injunction.[39]

[39] above at 11.

As Lord Denning MR stated in *Hubbard v Vosper*:[40]

> "Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead ... The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.[41]"

If there is no demonstrable prejudice to the defendant in maintaining the status quo pending the final determination of the matter, then an injunction is more likely.[42] No sufficient prejudice on the part of either Kao Holdings Pty Ltd or the State could be proven to the courts' satisfaction if, respectively, the carpark agreement and pilotage contract were kept on foot until trial by interlocutory injunction.[43]

ii) the state of the relationship of trust and confidence

The court is extremely unlikely to grant an interlocutory injunction, the effect of which is to force the parties to work together, if their relationship has substantially deteriorated. If the agreement is not merely an exclusive services contract, but one that involves specific services and personal relationships between the parties of a "close and continuing kind,"[44] then the balance of convenience will favour restricting the parties to their remedies in damages. However, there are judicial indications that courts may be less ready than in the past to hold that mutual confidence has been destroyed.[45]

Significantly, this factor was relevant in each of the three cases the subject of this note, but with differing effect.

For example, to require CSR to perform its obligations under the cartage contracts (which did not require CSR to provide any particular amount of work to each applicant, but which did require certain "safety payments" if the applicants made themselves available for work) depended on there being mutual co-operation and mutual confidence as to the allocation of work. That was absent, according to Cooper J. There was a history of conflict evident on the face of the material, such that any relationship of trust and confidence had broken down.[46] This was conclusive to deny injunctive relief.

Wilson Parking represented the mid-spectrum, where trust and confidence were severely dented, but the relationship was still salvagable by

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[40] [1972] 2 QB 84.
[41] above at 96.
[42] *Wilson Parking* at 16.
[43] above; *Marine Pilots* at 9.
[44] To adopt a phrase used by Cooke J in *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538 at 549.
[45] *Powell v Brent London Borough Council* [1988] ICR 176 at 195-6 per Ralph Gibson LJ, 198-9 per Nicholls LJ; *Wheeler v Philip Morris Ltd* (1989) 32 IR 323 at 356.
[46] *CSR* at 9.

the grant of interlocutory relief. The carpark owner claimed that it had lost confidence in Wilson Parking's competence and ability to operate the carpark successfully because of the reduction in earnings from the carpark. However, this was simply considered as a factor to be borne in mind in assessing the balance of convenience, and ultimately, it was held that the potential loss to Wilson Parking if the injunction were granted - the loss of the opportunity to run the carpark and earn income from it - outweighed the potential loss to the owners if the injunction were granted, because Kao Holdings Pty Ltd would still receive income generated by the carpark.[47]

Marine Pilots represented the other end of the spectrum from *CSR*. There was every indication that the contracting parties retained mutual confidence in each other, apart from the pay dispute. Williams J noted that at no time did the State express any dissatisfaction with the pilotage services that Brisbane Marine Pilots had provided in the past, and there was no question about the ability of Marine Pilots to provide them in the future, if the agreement remained on foot.[48]

iii) hardship to defendant if injunction were granted

There has been some suggestion that this factor will carry little weight when determining whether an interlocutory injunction ought to be granted in the context of exclusive commercial arrangements. For example, in *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd*,[49] Cooke J stated:

> "As we see it, the main significance of an express [or implied] negative convenant ... is twofold. It enables the court readily to define what the defendant may be enjoined from doing; and it emphasises that the defendant has unequivocally accepted this obligation, thus tending to make it more difficult for him to set up hardship.[50]"

Nevertheless, the factor was given considerable importance in *CSR*. If an injunction were granted against CSR, it would have affected CSR's other rights under the cartage contracts, namely the right to validly terminate the contracts before trial in accordance with the machinery provided in the contracts. If, for example, CSR had wanted to put the dispute with the applicant cartage companies beyond doubt by effectively exercising the termination clause in the contracts, the form of injunctive order sought by the applicants would have prevented CSR from doing so, at least until trial. The court was not prepared to impose such hardship upon the defendant CSR.[51]

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[47] *Wilson Parking* at 14.
[48] *Marine Pilots* at 3.
[49] [1978] 1 NZLR 538.
[50] above at 547.
[51] *CSR* at 9.

In contrast, if there is no evidence of any hardship or prejudice that the defendant will suffer if the injunction is granted, the balance of convenience will favour the plaintiff, as occurred in *Marine Pilots* and *Wilson Parking*.[52]

iv) supervision of the court

In *Turner v Australasian Coal and Shale Employees' Federation*, the Full Federal Court described this factor to mean where the order would involve the parties having constant recourse to the court for determinations as to the rights and wrongs of a variety of obligations in the contract.[53]

In *Wilson Parking*, White J was satisfied that the parties would not, if the injunction was granted, be involved in constant disputes as to the operation of the carpark requiring the supervision of the court. The argument that there was a fundamental incompatability between the parties was not borne out by the facts. A resolution of the one outstanding dispute - about the temporary reduction of parking fees - would resolve the difficulties between the parties.[54] Hence, this was an appropriate case for the injunctive relief sought.

v) the plaintiff's capital investment

If the contract is for a long term and involved the plaintiff in extensive capital expenditure in order to meet its obligation under the contract, then that party is entitled to expect that the agreement would not, in normal circumstances, be terminated during the proposed term.[55] Therefore, where the plaintiff has expended time, effort and money in performing its part of the contract, in return for certain exclusivity rights, that has tipped the balance in the plaintiff's favour in some cases.[56]

In that regard, Brisbane Marine Pilots' capital investment associated with providing motor launches, crews, pilot stations, administrative headquarters and staff, amounted to the "millions of dollars."[57] Further, it was made on the basis of being recouped over the ten year term of the agreement.[58] This factor influenced the awarding of injunctive relief in that case.

vi) length of the interlocutory injunction

The balance of convenience will favour the granting of an interlocutory injunction if the matter is likely to get to trial within a reasonably short time, so that the injunction would not have to be in place for a lengthy

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[52] above at 8.
[53] (1984) 55 ALR 635 at 649.
[54] *Wilson Parking* at 13.
[55] *Marine Pilots* at 6.
[56] For example: *Beltech Corporation Ltd v Wyborn* (1988) 92 FLR 283 at 288; *Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd* [1983] 1 NSWLR 513 at 516; *State Transport Authority v Apex Quarries Ltd* [1988] VR 187 at 191.
[57] *Marine Pilots* at 2.
[58] above at 2 and 6.

period. Any reasonable indication that the matter could be readied speedily for trial will assist in the obtaining of an injunction maintaining the contract on foot, as Marine Pilots[59] and the carpark operators[60] were able to convince their respective courts.

vii)undertaking as to damages

It is relevant to the balance of convenience whether the plaintiff's undertaking as to damages is likely to be worthless because the plaintiff would probably not have the means with which to satisfy any award of damages obtained by the defendant, if the defendant should prove its cause of action at trial. However, this is only a material factor, not a decisive one.[61] Although raised in *Marine Pilots*, an injunction was nevertheless granted by Williams J in favour of the plaintiff.

One point in relation to the undertaking which may tip the balance in favour of the defendant is that the defendant's damages (if the injunction is granted in favour of the plaintiff, the agreement is kept on foot, but ultimately at trial the defendant proves that its proposed course of action would have been lawful) must be capable of being valued in monetary terms. In *Wilson Parking*, the owner alleged that the loss of market share that it would suffer in the carpark industry, and the depreciation which an uneconomical carpark would have upon its whole building asset, could not be assessed by way of damages.[62] However, that contention was rejected, and the undertaking by Wilson Parking was considered to be sufficient to deal with any damage likely to be suffered by the owner, if later at trial, the termination was held to have been valid.[63]

viii) effect of no injunction on third parties

If the refusal to grant the equitable relief which an applicant seeks would adversely affect third parties other than the applicant, then that is relevant to the court's assessment of the balance of convenience. In *Marine Pilots*, the pilotage company emphasised to the court the specialist workforce involved in the dispute, and the fact that the future of many jobs was at stake if the injunction was not granted.[64] Equitable relief was awarded.

However, a similar argument did not work in the plaintiffs' favour in *CSR*. The companies argued that the livelihood of the principals of the companies depended on their contracts continuing and their receiving work, and that if no injunction were granted, no income would be re-

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[59] above at 8.
[60] *Wilson Parking* at 16.
[61] *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd* [1991] 1 Qd R 301 at 311 per Cooper J.
[62] *Wilson Parking* at 14.
[63] above at 16.
[64] *Marine Pilots* at 6-7.

ceived until the conclusion of the trial (if, of course, the plaintiffs were able to prove that their contracts remained on foot). This reference to third parties was unsuccessful to sway the court.[65]

The reverse is also true. If the grant of an injunction would work hardship on parties other than the defendant, then that is also relevant when the balance of convenience is being assessed. For example, in *Wilson Parking*, the owner of the carpark claimed that it had already committed itself to another manager to manage the carpark, and that if an injunction were granted preventing it from terminating the agreement with Wilson Parking, then the owner would be in breach of the new management contract.[66] However, this was not sufficient to tip the balance in favour of the owner.

Conclusion

The replacement of the strict rules of non-equitable involvement in contracts of personal services with the exercise of a court's discretion has had a two-fold effect. On the positive side, a court is now able to have regard to the actual affidavit evidence in order to determine whether there is sufficient mutual trust to warrant the continuance of the relationship until trial, and make suitable orders to preserve the status quo until the matter is examined thoroughly. The potential for loss to the plaintiff if the injunction is not granted, but the defendant's purported termination of the agreement is held to be repudiatory at trial, can be averted by the intervention of equity at the interlocutory stage of the dispute. Both *Marine Pilots* and *Wilson Parking* represent recent and further erosion of equity's reluctance to intervene in personal service contracts.

On the other hand, matters of discretion rather than hard and fast rules are inevitably more difficult to predict for lawyers and clients alike. The three cases selected for analysis in this article demonstrate that it is possible to construct a checklist of factors which, whilst not complete, arise repeatedly for consideration. Yet in cases of this type, such a checklist is the coathanger upon which a set of "infinitely variable facts"[67] hang. The finest of factual variations may result in a differing exercise of discretion from one case to the next. Such is the flexible and discretionary nature of the equitable jurisdiction.

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[65] *CSR* at 9.
[66] *Wilson Parking* at 14.
[67] *Warren v Mendy* [1989] 1 WLR 853 at 860 per Nourse LJ.