SUPREME COURT OF QUEENSLAND

CITATION:	*BB v Liebsanft & Ors* [2003] QSC 326
PARTIES:	**BB** (applicant) **v** **R H LIEBSANFT, Acting Magistrate** (first respondent) **S C JOHNSTONE, Magistrate** (second respondent) **D F WILKINSON, Magistrate** (third respondent) **AB** (fourth respondent)
FILE NO:	S4921 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2003
JUDGE:	Mackenzie J
ORDER:	**1. The application to review the decisions of the first respondent made on 1 April 2003 in application 2332 of 2003 in the Maroochydore Magistrates Court is dismissed** **2. The application to review the decisions of the second respondent made on 15 April 2003 in the same application is dismissed** **3. The application to review the decisions of the third respondent made on 6 May 2003 in the same application is dismissed** **4. In other respects the application for a statutory order of review is dismissed** 5. **The parties have liberty to make submissions in writing as to costs within 14 days**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – "DECISION" WITHIN THE ACTS APPLICATION – OF AN ADMINISTRATIVE CHARACTER – where the applicant seeks judicial review under *Judicial Review Act* 1991 (Qld) of decision made in

Magistrates Court pursuant *to Domestic and Family Violence Protection Act* 1989 (Qld) – where temporary protection order made against applicant and proceedings otherwise adjourned to 6 May 2003 for mention – where applicant sought variation of that order – where before court for mention – where adjourned to 14 July 2003 – where, on 6 May 2003, further orders made imposing more onerous conditions on applicant – whether decision of Magistrate Court reviewable under Part 3 *Judicial Review Act* – whether decisions of an administrative character

ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – CONDUCT RELATING TO MAKING OF DECISION – where applicant also sought review under Part 5 Judicial Review Act – where applicant alleged failure to comply with provisions of *Domestic and Family Violence Protection Act* 1989 (Qld) in making orders – where applicant alleged denial of procedural fairness in failure to hear oral evidence, read applicant's material and refusal to admit evidence before court – where applicant alleged Magistrates acted outside jurisdiction in including relative of aggrieved person in orders – whether failure to comply with provisions of *Domestic and Family Violence Protection Act* in making orders – whether Magistrates acted outside jurisdiction in making orders – where denial of procedural fairness – whether making of temporary protection order requires full hearing of evidence – whether temporary protection orders invalid – whether basis for order of certiorari made out

Domestic and Family Violence Protection Act 1989 (Qld), s 11, s 13, s 15, s 16, s 17A, s 24, s 25, s 25A, s 34B, s 38(2), s 39A, s 48, s 50(4), s 54, s 85
Judicial Review Act 1991 (Qld), Part 3, Part 5
Justices Act 1886 (Qld), s 102B

COUNSEL: The applicant appeared on his own behalf
No appearance for the first, second and third respondents, who abide by the order of the Court
R V Bowler for the fourth respondent

SOLICITORS: The applicant appeared on his own behalf
No appearance for the first, second and third respondents, who abide by the order of the Court
Shera Jones Paras for the fourth respondent

[1] **MACKENZIE J:** The applicant in these judicial review proceedings ("the applicant") had proceedings commenced against him in the Maroochydore Magistrates Court under the *Domestic and Family Violence Protection Act* 1989 (Qld) ("DFVPA"). He seeks relief under the *Judicial Review Act* 1991 (Qld), the nature of which will be referred to later, in respect of three separate proceedings.

[2] On 1 April 2003 the applicant appeared in person and made submissions to the Magistrate. The Magistrate had before him the protection order application completed by the applicant's wife and verified by statutory declaration. In the application there was a lengthy account of a very discordant marriage. It included an allegation that she had demanded that he leave the family home because she was in fear, on her own behalf and that of her children, of "physical and mental torment". The applicant moved out of the house in October 2002.

[3] The event that precipitated the application was an allegation that she returned home one evening to find that the applicant had moved back in. He refused to leave, saying he wanted to live with his children. The police were called but because there was no evidence of an actual assault on her or the children they simply advised her to seek legal advice the next day. She said that she was in fear and left that evening to seek accommodation with friends. It was also alleged in the application for the protection order that there had been a variety of abuse, threats and aggressive behaviour, mostly not actual violence, by the applicant over an extended period.

[4] It should also be mentioned, since it is relevant to the terms of the orders, that there is an allegation that during the period of separation, the applicant frequently visited his wife's mother who was in a nursing home and under her guardianship and administration. It was alleged that these visits caused the old lady emotional and physical distress. It was more particularly alleged, in the setting that the applicant was seeking financial gain, that on one occasion he went to the nursing home with a solicitor to persuade her to change her will. It was alleged that the police had to be called to remove him.

[5] According to the transcript of the proceedings of 1 April 2003, the applicant made submissions about events leading up to the breakdown of the marriage relationship and expressed his concern over the effect that events were having on the children, including fears about their wellbeing. In response to a submission that there was "…a bunch of absolutely spurious and false allegations…" that would be proved false, the Magistrate said they would "…certainly…be tested in due course". Today obviously the matter is to be adjourned." He adjourned the application to 6 May 2003 for mention. He said that in the interim a temporary protection order would be made.

[6] Particularly, he ordered the applicant not to go within 50 metres of his wife and to vacate the matrimonial home within 7 days. The wife's solicitor referred to the allegation of harassment of the mother-in-law and asked for her to be included in the order, which the Magistrate did. The order made on this occasion is the first order challenged in the present proceedings.

[7] It is convenient to mention at this point that there was nothing to suggest, in the transcript, that the applicant was at any disadvantage in presenting submissions on his own behalf. He is described in one of the documents as having completed a law degree and in one of the transcripts there is a reference to his having been absent at a particular time doing the bar practice course. In the proceedings before me he was not at all unfamiliar with court procedure and in no way overawed by the process.

[8] On 15 April 2003 an application by the applicant for variation of the order of 1 April 2003 was before the court for mention. The only account of what happened on that occasion, since apparently mentions are not electronically recorded, is

contained in the applicant's affidavit sworn and filed on 4 June 2003. It appears that he raised concerns about the welfare of his children and that his sons were homeless. He says the Magistrate told him that a hearing date in the ordinary course would be allocated and fixed 14 July 2003. He also expressed a disinclination to reopen an order recently made. This is the second decision challenged.

[9] On 6 May 2003 both the applicant and his wife were legally represented. The wife's solicitor said that, although it was a mention hearing, there had been difficulties since the first order and it was desired that variations be made. Two which were sought were that there be a 100 metre exclusion zone rather than a 50 metre zone and a prohibition against the applicant attending the school of one of his daughters.

[10] The applicant's solicitor addressed the Magistrate, urging that the 50 metre zone be maintained so that his client could be visible to his children, which would not be the case if the zone was increased to 100 yards because of the topography of the residence. There was no dispute that he went to the vicinity. It was not in dispute either that the applicant had gone to the school where his daughter was but it was said that his motivation was to see her. The only issue needing consideration was whether the Magistrate considered, in all the circumstances, a desire on the part of the applicant to be visible to his children and to speak to one outweighed the unsettling effects the conduct was alleged to have. Even if the Magistrate erred in that judgment, which I am by no means satisfied he did, that error would be an error made within jurisdiction, not one going to jurisdiction. In the absence of any critical disputes of fact, it is difficult to see any obligation for oral evidence to be called.

[11] The Magistrate appeared to be minded initially to vary and extend the original temporary protection order. However, in the course of pronouncing his reasons he seems to have changed his mind, perhaps in the interests of creating a document which contained all terms in it, rather than have two documents, the original temporary order and the document containing the variations. The order made on this occasion is the third order challenged.

[12] The applicant's application to vary the order made on 1 April 2003 had previously been adjourned to 14 July 2003. After discussion about what should happen to that application, it was decided to hear the application for the protection order on that day on the assumption that all issues including those upon which the application for variation was based would be ventilated in the substantive proceedings.

[13] "Domestic Violence" is defined by s 11 of *DFVPA* as any of wilful injury, wilful damage to the other person's property, intimidation or harassment of the other person, indecent behaviour to the other person without consent or a threat to commit any of the previously mentioned acts, if such acts occur when a domestic relationship exists between two persons. A domestic violence order, according to s 15, can protect the aggrieved person and a relative of the aggrieved person. Under s 16, an application for a protection order may be made to a Magistrates Court by members of the public, or by a police officer, who may apply for a temporary protection order under s 54. Section 17A allows a variation or revocation to be applied for by a person if the circumstances change after a domestic violence order is made.

[14] A domestic violence order may, according to s 13, be either a protection order or a temporary protection order. A temporary protection order is an order (made under Pt 3 Div 2 of the Act or s 54) for a short period until a court decides whether to make a protection order for the benefit of an aggrieved person. It is apparent from that definition that a "temporary protection order" is envisaged to operate for a "short period" and that it puts in place an interim arrangement which lasts until the court decides whether to make a protection order.

[15] Section 39A provides that a court may make a temporary protection order only if it appears to the court that an act of domestic violence has been committed against the aggrieved person by the respondent. It is provided that a temporary protection order need only be supported by evidence the court considers sufficient and appropriate having regard to the temporary nature of the order. Section 38(2) provides that for proceedings under the Act the provisions of the *Justices Act* 1886 (Qld) apply to the proceedings unless the application of that Act is inconsistent with this Act.

[16] One of the issues raised by the applicant is that there was no oral evidence called when the temporary order was made. He submitted that the requirements of s 38(2)(a) had not therefore be complied with. In my view, it is unnecessary to fully explore the proper scope of s 38(2)(a) since s 39A(2) allows the court to rely on evidence the court considers sufficient and appropriate. As previously observed, the court did have before it a document in the form of a statutory declaration in which the allegations allegedly supporting the making of a protection order were detailed. It would have been open to the Magistrate, having regard to the essentially interlocutory nature of the temporary protection order to act upon it. To interpret s 39A(2) as not permitting a temporary protection order to be made without hearing full evidence would frustrate the intention of the Act.

[17] Before moving on to discuss the individual decisions in respect of which complaint is made a submission by the applicant that the decisions are amenable to review under Part 3 of the *Judicial Review Act* must fail. "A decision to which this Act applies" for the purposes of the *Judicial Review Act* is a decision of an administrative character. The orders made must meet the description of a decision of an administrative character if Part 3 is to apply. In my view the making of an order, whether it be a protection order, a temporary protection order or some other order including an order that the proceedings be adjourned by a Magistrates Court is not a decision of an administrative character within the meaning of the *Judicial Review Act*. Therefore to the extent that the application relies upon grounds specified in Part 3 or any residual common law equivalent relied on by the applicant, the application must fail. The matter then falls to be decided under the jurisdiction preserved in Part 5 of the Act.

Decision of 1 April 2003 – matters argued

[18] **(a) The Magistrate proceeded when the service requirements of s 85 of the *Domestic and Family Violence Protection Act* or s 102B of the *Justices Act* were not complied with.**

Reliance on s 102B is misconceived because it is concerned with service of private complaints charging a person with an indictable offence. Section 85 of *DFVPA* provides for service of an application in the manner prescribed by the *Justices Act* in respect of service of a summons and provisions of the *Justices Act* with respect of

proof of service apply to the *DFVPA*. However s 48 of the *DFVPA* provides that if an application for a protection order is to be heard by a court the appearance of the respondent is evidence that the respondent has been served. The applicant appeared at this hearing and there is nothing to indicate that he clearly asked for an adjournment for any reason related to insufficiency of service. There is therefore nothing in this ground.

[19] **(b) The Magistrate did not hear evidence from the respondent.**

[20] **(c) The Magistrate made a temporary protection order.**

[21] **(d) The Magistrate made a temporary protection order in the terms made.**

With regard to this group of grounds, the Magistrate had jurisdiction to decide the application for a temporary protection order if the Magistrate considered the evidence supporting it sufficient and appropriate having regard to the temporary nature of the order. He heard oral submissions from the applicant and had before him the application which had the character of a statutory declaration. It is not apparent that the applicant asked for oral evidence to be called either in support of the application or on his own behalf. It is not established that the Magistrate was without jurisdiction to make a temporary protection order on the evidence before him.

[22] **(e) The Magistrate did not consider the welfare of the aggrieved person's children.**

Submissions were made by the applicant's legal representative and the respondent about the children's welfare. The subject was placed squarely before the Magistrate. It is unlikely that he did not have regard to the submissions that were made. He was clearly not in a position to finally determine the competing claims about how the children's welfare would best be served at that time. The welfare of a child of the aggrieved person is, in conjunction with the need to protect the aggrieved person and any named persons, of "paramount importance to the court" when it imposes conditions on the respondent (s 25(5)). The court may also consider, amongst other things, the order's effect on a child of the aggrieved person (s 25(6)). It is not established that the Magistrate did not consider the welfare of the aggrieved person's children before making the order.

[23] **(f) The Magistrate did not enquire as to the accommodation needs of the parties nor of the children of the aggrieved person.**

Section 25(6) permits the court to take into account the accommodation needs of all persons affected by the proceedings. In exercising jurisdiction under the *DFVPA* the fact that a person will be required by force of the order to live in other premises cannot be a dominant consideration. It is not mandatory in terms of the Act to take accommodation needs into account but if an ouster condition is to be imposed, s 25A explains what must be done. There appears to have been compliance with s 25A, from the terms of the order made. I am not persuaded that the ground has any cogency.

[24] **(g) The Magistrate did not advise the respondent of the matters required to be advised by s 50 of the Act.**

This ground is misconceived since s 50(4) expressly states that failure to comply with the requirement to ensure that the respondent understands the domestic violence order does not affect its validity.

[25] **(h) the Magistrate did not enquire as to the matters s 24 of the Act required the court to enquire into.**

Section 24 is concerned with whether a respondent to a domestic violence order application has a weapons licence or weapons; whether the person may access weapons in the course of employment; whether the person is in a category to whom the *Weapons Act* 1990 (Qld) does not apply (principally because of the nature of employment); and ascertaining information about the employer and the circumstances in which access to a weapon in the course of employment occurs. Since an amendment in 2002 to *DFVPA* regulation of weapons related aspects of a respondent's conduct seem to revert to the *Weapons Act*. Power in s 25(2) to impose a condition on the respondent is noted. There is nothing to suggest that a failure to make the enquiries referred to in s 24 had any practical impact on the respondent since such information as was before the court in the application suggested that he did not have a firearm. Nor did he suggest that the failure to make enquiries had any practical effect on him. No wider issues concerning the form of the order in this respect were argued. The absence of any discernable practical effect and the failure to raise any issues, if relevant, at an appropriate time are relevant to the granting an order of certiorari.

[26] **(i) The Magistrate included the name of a relative of the aggrieved person in the temporary protection order**.

The basis upon which it was open to the Magistrate to include the applicant's mother-in-law in the order is apparent in that part of the application for the protection order which relates to allegations against the applicant with respect to her.

[27] For the reasons given none of the grounds argued by the applicant have been made out to the standard required for granting an order of certiorari in respect of the hearing on 1 April 2003.

Decision of 15 April 2003 – matters argued

[28] A complaint with respect to this occasion was that the Magistrate did not read the application to vary the existing order or the affidavit in support to ascertain the urgency or cogency of the application and whether there were changed circumstances sufficient to invoke his discretion to order a variation. It is apparent that the date upon which these proceedings occurred was a mention or callover date only. In such a case one would ordinarily expect the matter to be set down for hearing at a future date when time was available. That was the order made.

[29] However, associated with this argument is a submission that giving the application "a hearing date well past the time when the orders sought to be varied would expire by the effluxion of time" was objectionable. The application was in fact adjourned to 14 July 2003 which, as far as the record goes, appears to be a date which was available after the magistrate consulted the diary. The account given in the applicant's affidavit is ambiguous at best as to whether the Magistrate was told specifically that the order sought to be varied had been set down for hearing on 6 May 2003. It may be that he was aware of it from the file. It is asserted that the

order was "due to expire" on 6 May. That, of course, was subject to the provision of s 34B which continues an order in force until the order is returnable before a court, unless the court extends the order. For that reason it is inaccurate to characterise the order as one due to expire on 6 May 2003. Had it been extended on that day its expiry date would have been later. I am not persuaded that there is any basis for certiorari made out in respect of this aspect of the matter.

[30] It is also complained that the Magistrate characterised the application to vary as if it were an appeal, which he lacked jurisdiction to hear. In context, the statement by the Magistrate as recalled by the applicant appears to have been a response to submissions by the applicant implying that the order previously made was erroneous and that his application be disposed of as a matter of urgency. Viewed in that way, I am satisfied that the remarks complained of do not bear the character complained of.

[31] The same comments relate to the complaint that the Magistrate did not allow any evidence to be brought before the court. Since the matter was not being treated as a hearing, it was not incumbent upon the Magistrate to give detailed consideration to matters which would necessarily be considered upon an application.

[32] Having regard to what has been said above, I am satisfied that no basis for certiorari has been established in relation to the proceedings on 15 April 2003.

Decision of 6 May 2003 – Matters argued

(a) The Magistrate made a temporary protection order de novo without any evidence appropriate to support the making of same.

[33] The circumstances in which a separate order was made have already been summarised. The Magistrate appears, at the last minute, to have decided to make a new temporary protection order reflecting changed conditions although his original intent seems simply to have been to make a variation. The applicant was legally represented at the time. No complaint was made at the time about this course being followed. No objection was taken about the fact that the application appears to have been made orally. Argument appears to have proceeded without any point being taken in that respect.

[34] Each of the alleged breaches of the original order and the problems raised by the wife's solicitor were addressed in detail by the applicant's legal representative. The nature of the issues then before the Magistrate in relation to variation has been explained previously. In the circumstances it is somewhat difficult to ascertain that any real prejudice has been suffered by the applicant since, had objection been taken to making a new order as opposed to making a variation the Magistrate would no doubt have simply varied the existing order having regard to his view of where the balance lay on the submissions made to him. There was also no request that oral evidence be given. What has been said leads to the conclusion that grounds (a) to (d) argued with regard to this order do not provide a compelling reason to grant certiorari at this point, when the temporary protection orders will expire on 29 September 2003 provided the hearing with regard to the application for a protection order is completed on that day and a decision given, and in any event the order operates only until the decision is given.

[35] Grounds (f) to (j) in the application are identical to grounds addressed in respect of the proceedings of 1 April 2003. For the same reasons given with regard to them there is no substance in these grounds. The remaining issues raised by the applicant with regard to the proceedings of 6 May 2003 are that the Magistrate did not give any weight or due weight to affidavit material filed by the applicant before making the orders. Nor did the Magistrate enquire of the applicant's legal representative as to why he stated he was "directly contravening his client's instructions".

[36] Those grounds relate to an occasion when the applicant's legal representative said his client had prepared a number of affidavits and instructed him that they should be read. However, the legal representative said he was not prepared to do that although the applicant may wish to rely on them in support of his application to show that the hearing should be expedited. They may have some relevance in that regard but were quite detailed. He concluded by saying that if the court had time on 14 July 2003 to hear the application as a final hearing it would not be necessary for the court to read the affidavits but if that date was not available his client had instructed him to read the affidavits for the magistrate to consider.

[37] In the event, the Magistrate took the view that all issues relevant to granting a protection order, including those relevant to the applicant's arguments concerning variation of the original order would be dealt with on that date. In the circumstances it was not incumbent upon the Magistrate to ask to read the affidavits or enquire why the legal representative was taking the course of not presenting the affidavits.

[38] One other matter raised generally by the applicant upon which comment should be made was that the making of a temporary protection order without a full hearing was restricted to cases under s 54. In my view that is unsustainable having regard to s 39A(2) and s 13(3).

[39] The outcome is that I am not persuaded that an order of certiorari ought to be made in respect of any of the proceedings about which the applicant has complained. Having said that, it is not difficult to understand that the applicant has a sense of frustration. The real concern in the case is not that the applicant has been denied procedural fairness on any occasion when the matter was before the court. It is that it is now 6 months since the temporary protection order was originally made without the issue of whether a protection order should be made being resolved at a full hearing. The substantive application was part heard on 14 July. It had been set down for 1 day and now stands adjourned until 29 September 2003.

[40] I am conscious that in busy courts, matters must be disposed of in an orderly way. Matters in the Magistrates Court can generally not be heard on demand. Hearing dates are often available only weeks or months into the future. Where a matter is unusually complex or vigorously contested, unless it is identified as being of that kind well in advance, insufficient time to complete it may be allocated when a hearing date is allocated. Except where, fortuitously, time allocated to some other matter becomes conveniently available because it does not proceed, weeks or months may elapse before the next available date for resumption of the hearing, because that is when matters are then being set down.

[41] In one sense, a "temporary" order is one that is put in place pending a decision whether a more permanent order is to be made. That is reflected in s 13(3).

However, in another sense, the notion that a "temporary" regime which imposes significant restraints upon what a person may do can be in place for 6 months without his having the opportunity to have the evidence upon which it was based tested is bound to be of concern to a person who is subject to it. It is understandable that a sense of frustration may be engendered.

[42] There is no evidence before me whether time taken to dispose of this case is typical or exceptional. For that reason it is not useful to make more expansive comments than those already made. However, the particular example clearly illustrates the desirability of bringing matters of this kind, which are frequently emotionally charged, to finality at the earliest possible opportunity.

[43] The orders are as follows:

1. The application to review the decisions of the first respondent made on 1 April 2003 in application 2332 of 2003 in the Maroochydore Magistrates Court is dismissed;
2. The application to review the decisions of the second respondent made on 15 April 2003 in the same application is dismissed;
3 The application to review the decisions of the third respondent made on 6 May 2003 in the same application is dismissed;
4. In other respects the application for a statutory order of review is dismissed;
5. The parties have liberty to make submissions in writing as to costs within 14 days.