SUPREME COURT OF QUEENSLAND

CITATION:	*Bell v Bay-Jespersen* [2004] QCA 68
PARTIES:	**IAN BRUCE BELL** (applicant/respondent) **v** **R H LIEBSANFT, Acting Magistrate** (first respondent) **S C JOHNSTONE, Magistrate** (second respondent) **D F WILKINSON, Magistrate** (third respondent) **ANGELA MONIQUE BAY-JESPERSEN** (fourth respondent/applicant)
FILE NO/S:	Appeal No 9591 of 2003 SC No 4921 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2004
JUDGES:	McMurdo P, McPherson JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application filed by respondent on 27 February 2004 dismissed with costs** **2. Affidavit in support of application filed by respondent on 27 February 2004 must be removed from the file and placed in a sealed envelope marked "not to be opened except by order of the Court or Judge"** **3. Until further order, the respondent's application dated 17 December 2003 for leave to appeal and to extend the time for doing so, from the orders of the Supreme Court made on 26 September 2003 and 13 November 2003 in no S4921 of 2003, and all proceedings in that application and the appeal filed on 27 October 2003 be stayed until the respondent gives security in the sum of $10,000 in such form as may be agreed by the parties or in default**

determined by the Registrar for the costs of that application.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – JURISDICTION – EXISTENCE OF OTHER RIGHTS OF REVIEW – whether application for judicial review of temporary protection order should have been dismissed because adequate provision made for review by appeal to District Court in s 63 of *Domestic and Family Violence Protection Act*

FAMILY LAW AND CHILD WELFARE – FAMILY LAW ACT 1975 AND RELATED LEGISLATION – TEMPORARY PROTECTION ORDERS – whether when making and subsequently extending such an order magistrate should have had regard to rules of evidence despite s 84(2) of *Domestic and Family Violence Protection Act*

PROCEDURE – COSTS – SECURITY FOR COSTS – OTHER MATTERS – where appeal incompetent as leave not obtained – whether Court of Appeal has power under UCPR r 670 to grant security for costs in application for leave to appeal – whether Court should exercise discretion to do so

Domestic and Family Violence Protection Act 1989 (Qld), s 13(3), s 34B(1)(g), s 39A, s 63, s 64, s 65
Judicial Review Act 1991 (Qld), s 12, s 14(b), s 20, s 43, s 48 (5)
Uniform Civil Procedure Rules 1999 (Qld) r 440, r 670, r 671, r 672, r 771

Capricorn Inks Pty Ltd v Lawter International (Australiasia) Pty Ltd [1989] 1 Qd R 8, referred to
Johns v Johns [1988] 1 Qd R 138, referred to
Jiminez v Jayform Contracting Pty Ltd [1993] 1 Qd R 610, referred to
Stone v Copperform Pty Ltd [2002] 1 Qd R 106, considered

COUNSEL: R V Bowler SC with J W Moore for the applicant
The respondent appeared on his own behalf

SOLICITORS: Shera Jones Paras for the applicant
The respondent appeared on his own behalf

[1] **McMURDO P:** I agree with the reasons of McPherson JA and with the orders proposed.

[2] **McPHERSON JA**: The protagonists in the matters before the Court are husband and wife, who were married in 1987 and now have four children aged five to 15 years or over. The marriage came under stress some time ago, and on 28 March 2003 the wife made application to the Magistrates Court at Maroochydore for a protection order under the *Domestic and Family Violence Protection Act 1989*.

Such an application is made in writing in a prescribed form, which contains provision for the incorporation of factual information forming the basis for making the order sought, and for a declaration by the applicant that the information is true and correct. An application in that form was duly completed and filed by the wife in the Magistrates Court.

[3] The application came to a hearing in the court at Maroochydore on 1 April 2003, when the husband appeared in person and made submissions in opposition to the order. On that occasion the magistrate made a temporary protection order under s 39A read in conjunction with s 13(3) of the Act restraining the husband in various respects until the specified date to which the hearing was adjourned. Since then there have been further adjournments to 14 July and 29 September 2003, and then to 20 January 2004. On some but not all of those dates hearings have taken place at which evidence was given. We were informed that the hearing of the application now stands adjourned to a date in mid-May 2004, when it is hoped that the application for a final order under the Act will be concluded. On the occasion of each of those successive adjournments an order was made under s 34B(1)(a) of the Act extending the temporary order to the date of the next hearing. So, pending resumption of the hearing in May 2004, the matter now stands.

[4] The husband became aggrieved at the fact that throughout this period he was bound by a temporary protection order without his having, as he saw it, an opportunity of challenging the factual basis on which the original order was made and in part has since been extended. By s 63 of the Act, a person aggrieved by an order of a Magistrates Court under the Act may appeal to the District Court. Such an appeal proceeds by way of rehearing on the record and also under the rules applying to the District Court: s 65(1), and the District Court may, on allowing an appeal, discharge or vary the order, or make such order or decision as it considers should have been made: s 66(1). From a decision given under those provisions, the only avenue of appeal is to the Court of Appeal against a decision of the District Court in its appellate jurisdiction, as provided for in s 118(3) of the *District Court Act*. Such an appeal requires leave of the Court of Appeal, which, it has been held, must be obtained before the appeal is instituted: see *Johns v Johns* [1988] 1 Qd R 138; *Jiminez v Jayform Contracting Pty Ltd* [1993] 1 Qd R 610.

[5] Instead of appealing under s 63 of the Act, the husband applied to the Supreme Court for judicial review under the *Judicial Review Act 1991* of the decisions in the Magistrates Court which had made or extended the temporary protection order on each subsequent occasion when the hearing was adjourned. In a reserved judgment given on 26 September 2003, Mackenzie J, before whom the application had come, held that the statutory procedure by way of judicial review under s 20 of the Act was not available in respect of the decisions of the Magistrates Court for which it was sought. That was because the expression “decision to which this Act applies” in s 20 conferring the right to apply for a statutory order to review is limited in s 4 of the Act to “a decision of an administrative character”. The magistrates’ decisions in this instance were clearly not decisions of that character, but were judicial decisions. His Honour was therefore correct in dismissing the application in so far as it was based on s 20 of the Act.

[6] What remained of the husband’s application to Mackenzie J comprised an application under s 43 of the Act for a prerogative order in the nature of certiorari under s 41 in respect of the Magistrates Court decisions. His Honour considered the

husband's submissions in support of this part of the application and, in the end, also dismissed the application for certiorari or its statutory equivalent under s 41 of the Act.

[7] Section 12 of the *Judicial Review Act* provides that the Supreme Court may dismiss an application made to the Court under s 20 or s 43 of that Act because:

> "adequate provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by the [Supreme] Court or another court".

Here the provision by s 63 of the *Domestic and Family Violence Protection Act 1989* of a full appeal to the District Court is a more than adequate provision that entitled the husband to seek a review in that court of the temporary orders made in the Magistrates Court at Maroochydore. By virtue of s 65(1) such an appeal on the record affords greater scope for examining the evidence given at the lower court hearing than a review by way of certiorari, in which the facility for reviewing evidence is much more limited. When asked why he had not proceeded by way of appeal to the District Court, the husband informed us at the hearing that, having made inquiries, his impression was that such an appeal would take longer to come to hearing than an application for judicial review to the Supreme Court. That, however, is not a sufficient reason for disregarding the tribunal and procedure appointed by the legislature for hearing and determining appeals against orders made under the *Protection Act*. His failure to appeal to the District Court pursuant to s 63 thus affords an additional reason for dismissing his application under the *Judicial Review Act*. See also s 14(b) of that Act, which provides that where such adequate provision is made the application must be dismissed if the "interests of justice" so require it.

[8] Despite the husband's submissions before this Court, I have not been persuaded that his Honour was wrong in any of the respects advanced before us in the course of the husband's submission to this Court. The Magistrates Court had jurisdiction to make temporary orders in favour of the wife, and did so on the material contained in her declaration embodied in the originating application, as well no doubt as other evidence received at the uncompleted hearings. In any proceedings with a view to making, revoking or varying a protection order, the magistrate may under s 84(2) of the Act inform himself or herself "in such manner as … the magistrate thinks fit and is not bound by the rules or practice as to evidence". The husband complained that the magistrates had, in extending the temporary orders instead of revoking or varying them as the husband sought, applied these provisions without proper reflection and in derogation of the husband's rights.

[9] However, short of a complete hearing of all of the evidence, which is still taking place, there is little else that could have been done. A temporary protection order functions rather like an interim or interlocutory injunction, or an interim order for custody, to maintain the status quo pending the determination of the proceedings for final relief, in which it is common practice to continue the relief until those proceedings are completed. Unless persuaded to discharge or vary the protection order at that stage, it is not easy to see what else the magistrates could on the evidence before them have done but to extend the temporary order until the hearing was concluded and the application finally determined. Contrary to the husband's assertion before us and to the magistrates, there is no reason to suppose that the

material on which the wife relied was completely fabricated. Indeed, the purpose of that hearing, which is not yet concluded, is to determine where the truth lies.

[10] Had the husband followed the procedure of appealing to the District Court under s 63 of the *Protection Act*, he would have had a better prospect of demonstrating what he claims to be factual errors in the record than is available to an applicant for certiorari or its statutory equivalent. However that may be, his Honour also dismissed the husband's application under s 43 of the *Judicial Review Act*, as well as his application under s 20 for a statutory order to review the decisions continuing the temporary orders on the occasion of each adjournment. Dismissing the husband's application is something that his Honour was expressly authorised to do by s 48(1) of that Act, and which by s 48(3)(a) the court is also empowered to do of its own motion.

[11] The husband then purported on 27 October 2003 to appeal to this Court against the order dismissing those applications. By s 48(5) of the Act, an appeal may be brought from an order under s 48 dismissing an application under s 20 or s 43 only with the leave of the Court of Appeal. It is possible that s 48 is concerned only with some form of summary dismissal under that section: if it is not so confined, the husband has never obtained leave of this Court to bring an appeal against the dismissal of his applications under s 20 and s 43 of the Act and his appeal would be incompetent. Moreover, the appeal was instituted after the time limited for appealing against the decision of Mackenzie J had expired on 24 October 2003. It is true that it was only a few days late, and that in such circumstances the Court not infrequently extends the time within which to institute an appeal; but no satisfactory reason for doing so has been proffered here. In any event, it is not simply a matter of excusing a few days delay in filing and serving the notice of appeal. The husband's application for leave to appeal was not filed until 17 December 2003, which was almost three months after the order dismissing the applications had been made. If the rule adopted in *Johns v Johns* [1988] 1 Qd R 138 and *Jiminez v Jayform Contracting Pty Ltd* [1993] 1 Qd R 610 is applied to applications for leave to appeal under s 48(5) of the *Judicial Review Act* as it has been to applications for leave to appeal under s 118(3) of the *District Court of Queensland Act 1967*, the husband has no prospect at all of obtaining leave to appeal against the order dismissing his applications under the *Judicial Review Act*.

[12] The reason why this question has become material at this stage is that the wife has now filed an application for an order for security for the costs of the appeal, which is the principal issue now before the Court. Rule 771 of the UCPR confers on the Court of Appeal power to order an appellant to give security for the prosecution of an appeal and for payment of any costs that the Court may award to a respondent. On what I have said, there is currently no appeal to this Court but only an application for leave to appeal. Consistently with the decision in *Stone v Copperform Pty Ltd* [2002] 1 Qd R 106, the Court of Appeal has no power under UCPR 772 to make an order for security for the costs of an application for leave to appeal, as distinct from the costs of an appeal as such. The decision in *Stone v Copperform* was concerned not with an application under UCPR 772 for an order for security for costs, but with an application under UCPR 761 for a stay of proceedings for enforcement of a decision under appeal. But the two rules are sufficiently similar in form and content, including use of the word "appeal", to attract a like interpretation. This may therefore present a difficulty for the wife in her application under UCPR 772 for security for costs of the husband's appeal, for

which he has not obtained leave and which, accordingly, is not yet, and may never become, an appeal within the meaning of UCPR 772.

[13] Rule 772 of the UCPR is, however, not the only source of power to make an order for security for costs of proceedings in the Supreme Court. Rule 670 of the Rules confers on the court authority to order a plaintiff to give security for the defendant's costs of and incidental to the proceeding. On any view of it, the husband's application for leave to appeal to this Court is a "proceeding" within the meaning of that Rule. The expression "the court" is defined in Schedule 4 to the Rules by reference to Rule 3(2), where the court is declared to include the Supreme Court. For reasons explained in *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8, 12-14, the Supreme Court includes the Full Court, whose jurisdiction was transferred to the Court of Appeal by s 29 of the *Supreme Court of Queensland Act 1991* at the time when the Court of Appeal was constituted under that Act in 1991.

[14] It follows that in referring to the "court", and in Rule 3(2) to the Supreme Court in this context, UCPR 670 vests in the Court of Appeal the power to order the plaintiff to give security for the defendant's costs of the proceeding to obtain leave to appeal from the Court of Appeal. Regrettably, when the *Supreme Court Act 1995* was enacted, the broader definitions in s 1 of the *Judicature Act 1876* of "plaintiff" and "defendant", which then applied generally to the earlier *Rules of the Supreme Court of 1900*, were confined to Part 13 of that Act, which may explain why they were not later carried over to the *Uniform Civil Procedure Rules* in 1999. Those definitions as they stood were plainly wide enough to comprehend the wife as "plaintiff" in her application for security, as well as the husband as "defendant" or respondent to it, in contrast to the somewhat limited ambit of those terms as defined in Schedule 4 to the Rules of 1999. The power to stay proceedings either generally or on such terms as may be just, which was originally contained in s 4(7) of the *Judicature Act*, was nevertheless perpetuated in s 244(7) of the *Supreme Court Act 1995*. In my opinion, that provision, when read in conjunction with UCPR 670, is sufficiently wide to enable the Court of Appeal to order a stay of the husband's application for leave to appeal pending the provision by him in favour of the wife of security for the costs of his application for leave to appeal.

[15] Rule 671 specifies a number of alternative requirements at least one of which must be satisfied before the Court may order a "plaintiff" like the husband to give security for costs of the proceeding under UCPR 670. It is enough to say that the "defendant" wife here fulfils the final requirement (h) in Rule 671, which is that the justice of the case requires the making of the order. That is so because the husband deliberately disregarded the avenue of appealing to the District Court prescribed by the *Protection Act* and instead, in order as he claimed to save himself waiting time, instituted an application in the Supreme Court under the *Judicial Review Act*. In doing so, he ignored the adequate provisions made by ss 63 to 66 of the *Protection Act* by means of which he was, within the meaning of ss 12(b) and 14(b) of the *Judicial Review Act*, entitled to seek a review by way of appeal to the District Court instead of by judicial order to review under the latter Act.

[16] An appeal to this Court by way of order nisi to review was at one time available under s 209 of the *Justices Act 1886*; but that provision and procedure were abolished by legislation in 1997 leaving only the appeal under s 222 to the District Court, which is equivalent in procedure and effect to that provided in s 63 to

s 66 of the *Protection Act*. The purpose of the legislative amendment was both to reduce the workload of the Court of Appeal and to provide a more convenient, less costly and more expeditious venue for appeals from magistrates than the procedure by way of order to review to three Judges of the Court sitting in Brisbane. If the husband had followed the path mapped out by the legislature, his appeal under s 63 of the *Protection Act* as it would have been, could and would have been heard by the District Court at Maroochydore instead of by a Supreme Court Judge and the Court of Appeal in Brisbane. The justice to the parties of having a matter like this heard and determined by that method clearly outweighs the procedure adopted by the husband here, and so fulfils the requirement specified in Rule 671(h).

[17] Rule 671 having been satisfied, UCPR 672 then prescribes a number of discretionary factors to be considered in deciding whether or not to make an order for security for costs of the proceeding. Without overlooking any of them, those of principal concern here are, as in any other application of this general kind, specified in sub-rules (a): the means of those standing behind the proceeding; (b) the prospects of success or merits of the proceeding; and (m) the costs of the proceeding. Some reference has already been made to the costs of these proceedings generally. The course taken by the husband will involve the further time and expense of the hearing of his application to this Court to determine whether an extension of time within which to appeal and leave to appeal are to be granted, to say nothing of the appeal itself if he were to succeed in obtaining leave to appeal under s 48(5) of the *Judicial Review Act*. The proceeding for leave is therefore pregnant with the prospect of engendering further costs, which would not have been incurred if the appeal had been instituted in the District Court as it should have been in the first place.

[18] As to Rule 672(a), the means of the parties, though perhaps not as meagre as those of many litigants in this area of human conflict, are not likely to have been improved by the costs and expense already incurred in the proceedings to date. The affidavit of the wife in support of her application for security lists a number of occasions on which the husband has in the past been ordered to pay her costs, which include two orders made by Mackenzie J on 13 November 2003 in respect of the judicial review application, and one by the President of the Court of Appeal on 19 December 2003 in respect of the costs of mentioning the appeal to compel the husband to comply with the Rules and Practice Directions of this Court. In addition, the husband has instituted proceedings in the Federal Magistrates Court in Brisbane seeking a property settlement with the wife. The costs of a report ordered in the proceedings in that court are $2,500, which is to be shared equally by the parties. The husband, when he condescended in an affidavit to describe his occupation, on one occasion called himself a “father” which is not widely reputed to be a lucrative calling. He appears to conduct a business of some sort involving the use of a computer and is also studying to qualify as a lawyer. Information provided by him in the Federal Magistrates Court proceedings showed his weekly disposable income to be $256.00, from which he must provide food, clothing and entertainment for himself and the two sons of his marriage who are now living with him. He persuaded the Appeals Registrar of this Court to waive the fee for filing the notice of appeal, which is a step taken only in the case of impecunious persons. Until recently, he was living in a caravan park, and he maintains himself and his sons on the supporting parents pension. There is therefore little doubt that his prospects of being able to pay the costs, if awarded against him, of these and those other proceedings are extremely slight. Apart from a small sum in his bank account, he

has no assets other than an interest in the matrimonial home that is subject to the protection order.

[19] Realistically assessed, there are no merits or prospects of his succeeding in these proceedings. Having regard to the legal obstacles I have mentioned, it is right to regard the husband's prospects of success in the appeal as practically non-existent. For all the reasons already given, it is most unlikely that he will succeed in obtaining belated leave to appeal from the decision of Mackenzie J and, for the same reasons, there is little chance of his being granted an extension of time within which to do so. The application for leave is almost certainly fatally compromised by ss 12 and 14(b) of the *Judicial Review Act*, as well as by the fact that the magistrates' decisions are not of an administrative character susceptible of review under s 20. Relief by way of certiorari under s 43 of the Act has always been discretionary, and it would therefore be a notoriously difficult task on appeal to challenge the decision of the primary judge in this case, which is persuasive and likely to withstand closer scrutiny on appeal.

[20] All things considered, I regard this as an appropriate case in which to make an order that the husband provide security for the costs of his application for leave to appeal and for an extension of time within which to do so. In a letter to him from the wife's solicitors, an estimate of the likely costs of appeal is given as $10,000 to $15,000; but the amount of security ordered seldom affords a complete indemnity for the prospective costs of appeal, and in any event I regard the lower of the two figures as consonant with an application for leave that is likely to occupy less than a day and to involve briefing junior counsel to appear for the wife.

[21] There is one final matter to which reference must be made. On the eve of this hearing in the Court of Appeal the husband on 27 February 2004 filed an application for an order that his wife, the fourth respondent, be "directed to abide the order of the court and not actively participate in these proceedings". Given full effect, such an order if it were to be made would have prevented the wife from giving instructions to her solicitors and counsel in relation to her application for security. It would, if successful, provide a novel forensic device for disabling one's opponent from pursuing an application in court - a resurrection in enlarged form of the old common injunction in equity that was abolished by the *Judicature Act* in 1876.

[22] When one turns to the husband's affidavit filed in support of the application, it is found to consist almost entirely of irrelevant material, comment, self-serving statements, and opinions about the mental condition of the wife which the husband in this case is not professionally qualified to give. He asserts that the application for security for costs is "an abuse of process", and he accuses the solicitors acting for her of engaging in professional misconduct, which he says includes trying to unduly influence witnesses not to testify in the Magistrates Court. About these and other matters, the husband has complained to the Law Society, which he says has "point blank" refused to investigate his complaint. This and other parts of the affidavit are scandalous within the meaning of UCPR 440, and the balance of it is inadmissible and irrelevant. Acting under that Rule, I would order that the affidavit be removed from the file and placed in a sealed envelope marked "not to be opened except by order of the Court or Judge". Section 11 of the *Defamation Act 1889* accords absolute privilege to defamatory matter published in the course of a proceeding before the courts; but the price of that privilege is that the material relied on in court

must conform to the requirements of the Rules and the rules of evidence, and not be turned into a vehicle for wanton attacks on the reputation of other parties and their solicitors. In the absence of any supporting material, the application filed on 27 February 2004, which was in any event doomed to fail, must be dismissed with costs.

[23] In the result, the order that will be made on the wife's application will be that, until further order, the respondent husband's application dated 17 December 2003 for leave to appeal, and to extend the time for doing so, from the orders of the Supreme Court made on 26 September 2003 and 13 November 2003 in no S4921 of 2003, and all proceedings in that application and the appeal filed on 27 October 2003 be stayed until the respondent gives security in the sum of $10,000 in such form as may be agreed by the parties or in default determined by the Registrar for the costs of that application.

[24] **WHITE J**: I have read the reasons for judgment of McPherson JA and agree with his Honour that this is an appropriate case in which to order security for the reasons which his Honour gives.

[25] I agree with the orders which his Honour proposes.