

SUPREME COURT OF QUEENSLAND

CITATION: *Bell v Liebsanft & Ors* [2004] QCA 267

PARTIES: **IAN BRUCE BELL**
(applicant/appellant/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 Dismissal for Want of Prosecution

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 29 July 2004

DELIVERED AT: Brisbane

HEARING DATE: 29 July 2004

JUDGES: Davies and Jerrard JJA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal and application for leave to appeal are struck out**

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - TIME FOR APPEAL - EXTENSION OF TIME - GENERAL PRINCIPLES AS TO GRANT OR REFUSAL - where there was an application to strike out an application for an extension of time within which to seek leave to appeal to this Court - where the applicant was the wife of the respondent - where the applicant was granted temporary protection orders by a magistrate pursuant to the *Domestic and Family Violence Protection Act 1991 (Qld)* - where the respondent unsuccessfully applied to the Supreme Court for judicial review of the orders - where the respondent now seeks leave to appeal to this Court - whether the appeal and the application for leave to appeal

should be struck out

Domestic and Family Violence Protection Act 1989 (Qld),
s 3(3), s 39A

Judicial Review Act 1991 (Qld), s 48(5)

Bell v Bay-Jespersen [2004] QCA 68; Appeal No 9591 of
2003, 19 March 2004, followed

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

SOLICITORS: James White Lawyers for the applicant
The respondent appeared on his own behalf

DAVIES JA: This is an application to strike out an application for an extension of time within which to seek leave to appeal to this Court from a judgment of the Supreme Court given on 26 September 2003.

A notice of appeal against that judgment was filed on 27 October 2003 only a few days out of time. However, appearing that leave was necessary in order to appeal, an application for leave to appeal was filed on 17 December 2003. The application sought leave to appeal out of time.

I have no doubt that leave is necessary: see s 48(5) of the *Judicial Review Act 1991*. Moreover as Justice McPherson pointed out in the course of giving judgment in an application for securities for costs in the application for leave to appeal out of time (which is reported at [2004] QCA 68) his Honour said and I quote:

"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*."

This Court has declined to state principles upon which leave will be granted and the circumstances in which leave will be granted are not, in my opinion, limited to those stated in *Johns*. On the other hand the absence of any of those circumstances renders it unlikely that leave will be granted in the absence of some other compelling circumstances. In his reasons in the matter to which I have just referred, with whom the other members of this Court agree, Justice McPherson made it clear that there are no other such circumstances here. A brief survey of the relevant facts is as follows. On 28 March 2003 the present applicant, who is the wife of the respondent, applied to the Magistrates Court at Maroochydore for a protection order under the *Domestic and Family Violence Protection Act 1989*. The matter was heard on 1 April 2003 when the respondent appeared in person and made submissions in opposition to the order.

The court being unable to hear the matter fully, the magistrate made a temporary protection order under s 39A, read in conjunction with s 13(3) of the Act, restraining the respondent in various respects until a specified date to which the hearing was adjourned. Since then there have been adjournments to 14 July and 29 September 2003 and then to

20 January 2004. On each of those occasions a temporary protection order was extended.

Being aggrieved by that temporary protection order and its extension the respondent, instead of appealing to the District Court as he could have under s 63 of the Act, applied to the Supreme Court for judicial review under the *Judicial Review Act 1991* of the decisions of the Magistrates Court which made or extended the temporary protection order. The Supreme Court dismissed that application and it is from that dismissal that the respondent seeks leave to appeal to this Court.

In his reasons for judgment in the security for costs application, to which I have already referred, Mr Justice McPherson said and I quote:

"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."

I agree with his Honour's remarks and I find it unnecessary to add to the reasons which his Honour gave for that conclusion. Moreover the questions sought to be litigated here involve only questions of fact and discretion of no general importance. I agree with this Court's view in the application for security for costs that the appeal in those circumstances has no real prospects of success.

Moreover an order was for security of costs in the judgment to which I have referred and that has not been complied with. Consequently the application for leave and the appeal are stayed. There is no indication today of any prospect of that order being complied with. Indeed, the respondent has handed up to us a former writ of summons which seeks orders for certiorari and mandamus against this Court in respect of its decision to which I have referred.

That writ has, apparently, not been filed, but it has been lodged with the High Court Registry in Brisbane on 28 July with a view to its being filed.

For the reasons I have already mentioned however it seems to me appropriate that this appeal and application for leave should be struck out and I would strike it out.

JERRARD JA: I agree.

MULLINS J: I agree

DAVIES JA: The appeal and the application for leave to appeal are struck out.