SUPREME COURT OF QUEENSLAND

CITATION:	*KAA & Anor v Schemioneck & Anor (No 2)* [2007] QCA 449
PARTIES:	**KAA** (first appellant/first applicant) **KAB** (second appellant/second applicant) **v** **MAGISTRATE SCHEMIONECK** (first respondent) **DEPARTMENT OF CHILD SAFETY** (second respondent)
FILE NO/S:	Appeal No 3908 of 2007 Appeal No 3909 of 2007 Appeal No 4087 of 2007 DC No 2293 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2007
JUDGES:	McMurdo P, Muir JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. That each of application Appeal No 3908/07, Appeal No 3909/07 and Appeal No 4087/07 be dismissed** **2. The applicants pay the respondents' costs of and incidental to each application to be assessed**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE LEGISLATION – CHILDREN IN NEED OF PROTECTION – PROCEEDINGS RELATED TO CARE AND PROTECTION – JURISDICTION OF COURTS – where Childrens Court constituted by a magistrate made orders and issued warrants in relation to applicants' child – where applicants appealed to Childrens Court constituted by a judge – where applicant seeks right of appeal under s 118(3) *District Court of Queensland Act 1967* (Qld) - whether applicant may appeal from that decision to this Court

Child Protection Act 1999 (Qld) Ch 2, Pt 2, Pt 3, Pt 4, s 117, s 121
District Court of Queensland Act 1967 (Qld), s118

SBD v Chief Executive, Department of Child Safety [2007] QCA 318; Appeal No 5726 of 2007, 2 October 2007, considered

COUNSEL: First and second applicant on their own behalf
H A Scott-Mackenzie for the second respondent

SOLICITORS: First applicant in person for both applicants
Crown Law for the second respondent

[1] **McMURDO P**: It is by no means clear that there is an avenue to apply for leave to appeal from a decision of the Childrens Court to this Court under s 118(3) *District Court of Queensland Act 1967* (Qld): *SBD v Chief Executive, Department of Child Safety*.[1] Accepting for present purposes that there is such an avenue, the applicants have not demonstrated in any of these three applications any reason warranting the grant of leave to appeal to this Court. I would refuse each application for the reasons given by Daubney J.

[2] **MUIR JA**: I agree with the reasons of Daubney J and with his proposed orders.

[3] **DAUBNEY J**: Mr and Mrs KAA have applied for orders extending the time for appealing and for leave to appeal against the following decisions and orders of District Court Judges sitting as Childrens Court Judges:

(a) The decision and order of Shanahan DCJ on 21 March 2007;
(b) The decision and order of Tutt DCJ on 13 April 2007, and
(c) The decision and order of Trafford-Walker SJDC made on 17 April 2007.

Background

[4] Mr and Mrs KAA are the natural parents of a son, R, who was born on 11 August 2005. On the day of R's birth, the second respondent The Department of Child Safety ('the Department') applied to a Childrens Court magistrate for a temporary assessment order pursuant to Chapter 2 Part 2 of the *Child Protection Act 1999* (Qld) ('the Act'). That order was made on 11 August 2005.

[5] On 12 August 2005, the Department made application to the Childrens Court for a court assessment order in relation to R pursuant to Chapter 2 Part 3 of the Act. The court assessment order, and interim orders, were made by the Childrens Court magistrate on 19 August 2005. Mr and Mrs KAA appealed against that decision to the relevant 'appellate court' (pursuant to s 117 of the Act), being the Childrens Court constituted by a Judge[2] ('the first appeal').

[6] On 9 September 2005, the Department made application to a Childrens Court magistrate for a child protection order pursuant to Chapter 2 Part 4 of the Act. That application came on for hearing on 16 September 2005, but was adjourned to 23 September 2005. Interim child protection orders were, however, made in

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1 [2007] QCA 318; Appeal No 5726 of 2007, 2 October 2007, [17].
2 See definition of 'appellate court' in Sch 3 Dictionary, and the *Childrens Court Act 1992* (Qld).

relation to R on that day, including granting temporary custody of him to the Chief Executive of the Department. On 23 September 2005 the application was further adjourned for hearing to 20-22 December 2005. Apart from continuing the interim orders which had been made, the Childrens Court magistrate further ordered on that occasion that a written social assessment report about R and his family be prepared and filed in the Childrens Court by 2 December 2005, that a conference be held between the parties with a report to be filed in the court by 15 December 2005, and that R be separately represented by a lawyer. Mr and Mrs KAA appealed against this decision to the Childrens Court constituted by a Judge ('the second appeal').

[7] On 17 October 2005, the first appeal was adjourned to the Registry on the grounds that the orders appealed against had been spent. On 5 December 2005, the second appeal was listed for mention before a Judge, who offered to hear the appeal. Mr and Mrs KAA declined that offer, however, on the grounds that they were not prepared for a hearing, and the second appeal was adjourned to 7 February 2006.

[8] The Department's application for a child protection order, which had been listed for hearing on 20-22 December 2005, was mentioned before the Childrens Court magistrate on 15 December 2005. Mr and Mrs KAA at that time applied for the hearing dates to be vacated, relying on medical grounds. The Childrens Court magistrate acceded to that request, and the application was adjourned to 23 February 2006 for mention. The Childrens Court magistrate made further interim orders in relation to R in terms identical to those which had previously been made.

[9] On 20 December 2005, Mr and Mrs KAA appealed to the Childrens Court constituted by a Judge against the decision and interim orders of the Childrens Court magistrate on 15 December 2005 ('the third appeal').

[10] On 7 February 2006, the second appeal came on for hearing before Dick DCJ. Her Honour adjourned the hearing of that appeal to the Registry on the basis that the orders appealed against were spent. The third appeal came on, in due course, before O'Brien DCJ on 17 February 2006. Mr and Mrs KAA appeared in person on that occasion. The third appeal was heard and was dismissed.

[11] The Department's application for a child protection order was again mentioned before the Childrens Court magistrate on 23 February 2006. Mr and Mrs KAA did not appear at that mention. The Childrens Court magistrate adjourned the application for hearing on 17-19 July 2006, and made further interim orders in relation to the child. The magistrate also made orders and directions setting out a timetable for the filing and service of affidavit material on which the parties proposed to rely at the final hearing of the application for a child protection order. On 13 March 2006, Mr and Mrs KAA appealed to the Childrens Court constituted by a Judge against these orders and directions ('the fourth appeal').

[12] On 17 July 2006, the Department's application for a child protection order came on for hearing before the Childrens Court magistrate. There was no appearance by or on behalf of Mr and Mrs KAA. On that occasion, the Childrens Court magistrate made a child protection order under s 61 of the Act granting long term guardianship of the child to the Chief Executive of the Department.

[13] By a notice of appeal dated 26 July 2006, but not filed until 7 August 2006, Mr and Mrs KAA appealed to the Childrens Court constituted by a Judge against the child protection order made on 17 July 2006 ('the CPO appeal').

[14] On 7 August 2006, the fourth appeal came on for hearing before Nase DCJ. Mr and Mrs KAA appeared in person, but left the court before the appeal was determined, and that appeal was dismissed.

[15] On 19 March 2007, Mr and Mrs KAA filed an application in the Childrens Court seeking the following orders:

> "1. Appeal to be heard afresh.
> 2. Evidence to be heard from witnesses.
> 3. Evidentory [sic] material to be used by the applicant/s to argue, and prove, appellant's case.
> 4. Applicant KAA to give evidence at the bar, and in the witness box.
> 5. Applicant/s to have support people present in the courtroom throughout the proceedings.
> 6. The orders sought by the court:
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> *Order that the applicant/s file and serve any application to hear the application before the court below afresh, on the appeal, in whole or in part supported by affidavit material by 4.00 pm on 14/3/2007;*
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> be waivered or granted an extension of time which the reason for this order be explained in the supporting affidavit for this application.
> 7. The matter to be relisted if necessary.
> 8. If Judgement to delist the matter is made the applicant/s would like to submit an affidavit form, and argue in person before the court, why these documents have not been served on time.
> 9. Firstly the court show cause why the applicant/s must file, and serve, the application in Brisbane court when on previous occasions due to residing in a rural location the appellants have been able to file, and serve, the application in the local court to be forwarded to the Brisbane court.
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> Secondly the court show cause why the applicant/s must file, and serve, the application in Brisbane court when on previous occasions due to residing in a rural location the appellants have been able to file, and serve, the application via facsimile.
> 10. If Judgement is against the applicant/s due to the filing, and serving, of these documents the applicant/s wish to be notified of such Judgement, and be granted an extension of time so the applicant/s can reapply/appeal to the Supreme Court. * The Department of Child Safety pay the costs of KAA and KAB of the application and transport costs."

This application[3] was filed in the District Court Registry on 19 March 2007, was an application by Mr and Mrs KAA, and was signed by Mr and Mrs KAA over the description 'father and mother of the child'. Moreover, this application was filed

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[3] Appeal Record 39-41.

because, on 12 February 2007, Shanahan DCJ had ordered, inter alia, that "the Appellants file and serve any application to hear the application before the court below afresh, on the appeal, in whole or in part supported by affidavit material by 4.00 pm on 14/3/2007". I labour this point because of the repeated and increasingly vituperative assertions made in the course of the hearing before this Court by Mr KAA to the effect that counsel for the Department had misled the courts by stating that the application before the Childrens Court to have the appeal against the making of the child protection order 'heard afresh' had been made by Mr and Mrs KAA. It is clear beyond peradventure that this, in fact, was the case, and Mr KAA's attacks on counsel in that regard were completely without foundation.

[16] The application filed on 19 March 2007 was heard by Shanahan DCJ on 21 March 2007. His Honour dismissed the application.

[17] On 11 April 2007, Mr and Mrs KAA filed an application in the District Court Registry seeking orders that the hearing dates for the CPO appeal, which had been set for 17-20 April 2007, be vacated. This application was heard, and dismissed, by Tutt DCJ on 13 April 2007.

[18] On 17 April 2007, the CPO appeal was heard and dismissed by Trafford-Walker SJDC.

[19] Mr and Mrs KAA now seek to challenge each of the decisions referred to in paragraphs [14], [15] and [16].

Is there a right of appeal to this court?

[20] Counsel for the Department submitted that an appeal as of right does not lie to this Court against the decision and orders of the three Childrens Court. It was submitted on behalf of the Department that:

(a) Section 117 of the Act does not confer a further right of appeal to this court;

(b) Whilst, pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld), an appeal against a judgment of the District Court may lie to this Court with the leave of this Court, the reference to 'District Court' in s 118(3) does not extend to encompass a reference to District Court Judges who are sitting as Childrens Court Judges. Childrens Court Judges are appointed under Part 3 Division 2 of the Act and, it is submitted, whilst District Court Judges are appointed as Childrens Court Judges, an appointment as a Childrens Court Judge is a separate and distinct appointment to that as a District Court Judge. The submission is that the right of appeal, with leave, granted by s 118(3) of the *District Court of Queensland Act* does not extend to a decision of a Childrens Court constituted by a Judge on an appeal from a decision and orders of a Childrens Court magistrate.

[21] Some significant support for the argument advanced on behalf of the respondent is found in the judgment of Keane JA, with whom Muir JA and Lyons J agreed, in *SBD v Chief Executive, Department of Child Safety*.[4] However, his Honour in that case declined to go so far as to hold expressly that there is no right of appeal, even with leave, to this Court from an appellate decision of a District Court Judge sitting as the Childrens Court. Given the manner in which these matters have been argued

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4 [2007] QCA 318.

before this Court, I consider that this is an inappropriate vehicle for the determination of this point, and would prefer to approach the matter on the basis adopted by Keane JA:

> "[21] Accordingly, at best for the applicant, an appeal to this court lies only by a grant of leave. I should say here that if it is the intention of the legislature that there should be no further appeal, even by way of leave under s 118(3) … from the appellate court being the Childrens Court constituted by a Judge, then it would be desirable for the position to be put beyond doubt by the legislature."

[22] Proceeding on the basis that Mr and Mrs KAA may have a right of appeal to this Court, and giving them the benefit of an assumption that they would obtain all such necessary extensions of time as would be required to pursue those appeals, it is necessary for them to satisfy this Court that leave to appeal should be granted. As Keane JA observed in *SBD* at [22], such leave will usually be granted only 'where there is a reasonable argument that the decision sought to be challenged is wrong and that the correction of that error will correct a substantial injustice to the applicant for leave to appeal'.

The course of the hearing before this Court

[23] Before turning to examine the merits of the applications for leave to appeal, it is necessary to say something about the course of the applications before this Court.

[24] When these applications were called, Mr KAA sought to have the hearing of each of the applications adjourned *sine die*. Mrs KAB was not present, her absence being explained by Mr KAA on the basis that she was sick and also that they could only afford one bus fare for the purposes of appearing before the Court. He confirmed, however, that he had instructions to appear on his own behalf and on behalf of his wife, at least for the purposes of making submissions in support of the adjournment application.[5] The adjournment application was argued at length, and the application was refused, with members of the Court delivering reasons *ex tempore* for refusing the adjournment.

[25] After the Court dismissed the adjournment application and stated that it would proceed then to hear the three applications listed for hearing, Mr KAA indicated that he was not appearing for his wife on those applications. Obviously, Mrs KAB did not appear in person, and the applications proceeded in her absence.

[26] Mr KAA then told the Court, initially at least, that he wanted to withdraw (or seek leave to withdraw) the applications to enable him to appeal against the refusal of the adjournment to the High Court of Australia. After a short break to enable Mr KAA to consider his position and take advice on the matter, he again sought to withdraw all of the applications, but then retreated to the position of wanting to withdraw the applications concerning the decisions of Shanahan DCJ and Trafford-Walker SJDC, and to proceed only with the application concerning the decision of Tutt DCJ.

[27] In the end, mindful of Mr KAA's stated desire to seek special leave to appeal to the High Court against this Court's refusal of his adjournment application, the Court declined to grant him leave to withdraw any of the applications, but noted that he was seeking to proceed only in relation to the application concerning the decision of

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5 Transcript 3.18-21.

Tutt DCJ. It was, however, made clear to Mr KAA that the Court would be hearing all of the applications on the material before it.

Decision of Shanahan DCJ

[28] The first of the decisions against which Mr and Mrs KAA sought leave to appeal was the decision of Shanahan DCJ on 21 March 2007. That was the decision on the KAAs' application filed on 19 March 2007 for, an order that the appeal against the making of the child protection order be heard afresh.

[29] In his reasons for judgment, Shanahan DCJ, after citing the relevant provisions of s 120 of the Act, said:

> "The clear intention of the legislation is that an appeal is to be heard on the record unless there is good reason shown for the Judge to order that it may be heard afresh. There has been no reason established, either in material filed by the appellants or in oral argument today before me. In that regard, I note that the appellants had ample opportunity in the Childrens Court to file material and to request the cross-examination of witnesses. No such filing occurred, no such request was made although the appellants were given much time to consider the issue. There were numerous adjournments in the Childrens Court in relation to this matter and no material was filed.
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> It's clear from the submissions made by Mr K today that he seeks to re-litigate the matter on material that was clearly available to him at the time of the hearing in the Childrens Court.
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> As I say, I am of the view that no basis has been shown in the written material or in oral argument to found any legitimate reason for allowing the appeal to be heard afresh, either in whole or in part. As per s 120(2) of the *Child Protection Act*, the appeal will be decided on the evidence and proceedings in the Childrens Court."

Decision by Tutt DCJ

[30] On 13 April 2007, the KAAs' application to vacate the hearing dates of the CPO appeal came on before Tutt DCJ. The application was argued at length before his Honour, and the grounds relied on by the KAAs' in seeking the vacation of the hearing dates included many of the matters argued before this Court, including budgetary constraints, time needed to prepare, time to overcome claimed physical and psychological impediments, and a desire 'to receive procedural fairness'.

[31] I will quote in full the reasons given by Tutt DCJ[6] for refusing the application:

> "In this matter, there is an application by the appellants to have the hearing date of the appeal vacated. The hearing date of the appeal is scheduled to commence on 17 April, and proceed until 20 April 2007
> …
> I note from the file record that the hearing dates for this appeal were set down as far back as 5 February 2007, and those dates were communicated to the parties concerned.

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6 Appeal Record 201.

> Since that time, there have been at least two interlocutory applications before this court in respect of procedural matters concerning the hearing of the appeal. I note also from the file that contrary to the submissions made on behalf of the appellants, a certificate of readiness was filed and signed by them as far back as 16 October 2006.
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> The nature of the hearing of the appeal was considered before his Honour Judge Shanahan on 21 March 2007, and consequently the appeal guidelines have been clearly set down.
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> In the circumstances, I find that there are no grounds whatsoever for the hearing of this matter to be adjourned, and so far as I am concerned, the matter will proceed as scheduled on 17 April 2007."

Decision of Trafford-Walker SJDC

[32] The hearing of the CPO appeal came on before Trafford-Walker SJDC on 17 April 2007. His Honour's reasons for judgment record:[7]

> "The hearing commenced before me this morning at 10.00 am. The appellant was not present. His name was called and the hearing commenced in his absence. After some time the male appellant did enter court stating that he had been referred to another courtroom. We commenced the proceedings again. After some time it became most difficult to proceed. After efforts to control the hearing in the matter I had to exclude Mr KAA from the court.
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> After a time he returned but again disrupted the proceedings so that an ordinary hearing was impossible. I then excluded him for the balance of the hearing. The matter then proceeded with Mr Scott-Mackenzie on behalf of the second respondent outlining in detail the material which had been placed before the stipendiary magistrate and outlining the material upon which that decision was based."

[33] His Honour then undertook a review of the material before him, including, in particular, a review of the psychological and psychiatric assessments of Mr KAA.

[34] After referring to the relevant sections of the Act, his Honour found:

> "On the evidence before the stipendiary magistrate the evidence was overwhelming that [R] was a child at an unacceptable risk of harm if he stayed in the custody of the appellants, and that he did not have a parent able to protect him from such harm. On the evidence the magistrate was bound to make the order which he did."

[35] His Honour further referred to the manner in which the proceedings had been conducted before the Childrens Court magistrate, and said:

> "Transcript of what occurred is there for my examination and I have examined it. I am satisfied that every effort was made to have the applicants to court to participate in the proceeding. That did not occur. The magistrate acted as he could under s 58 and proceeded to hear and deal with the application by the Chief Executive.

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7 Appeal Record 341-342.

> In all the circumstances then there is absolutely no basis upon which I can interfere on the material before me with the order of the magistrate. I confirm the order of the stipendiary magistrate and I dismiss the appeal."

The applicants' contentions

[36] The principle contention advanced by Mr KAA on numerous occasions was to the effect that the Childrens Court Judges had erred by failing to admit and have regard to what he described as 'new and fresh evidence'. Despite being asked by this Court on several occasions to particularise this 'new and fresh evidence', Mr KAA did not, or was unable to, give details of the evidence which he contended should have been received by the courts below or which should be received by this Court in any appeal.

[37] It has been noted that the purpose of the hearing before Shanahan DCJ was to determine whether further evidence should be allowed to be adduced on the hearing of the CPO appeal. That application had been made by Mr and Mrs KAA. This is relevant because one of the principal items of 'fresh evidence' on which Mr KAA sought to rely in this Court was the notion that statements to the courts below to the effect that the application to have the appeal heard 'afresh' had been made by the KAA's was a misrepresentation. Clearly, it was not.

[38] Otherwise, as I have said, Mr KAA in his oral submissions to the Court failed to identify the 'new and fresh evidence' which he sought to lead.

[39] In each of the written applications to this Court, under the heading 'Summary of Arguments and Legal Issues Relating to the Department of Child Safety and the Police not Divulging Evidence to be Advanced by Appellants in Support of Application for Special Leave', the applicants said:

> "Appellants submit that the Department of Child Safety, Legal Aid lawyers, Crown and courts in Western Australia, South Australia, Queensland have material common knowledge and excupatory [sic] evidence, that vindicate and exonerate the appeallants [sic] by having a Wardship Order placed against them and their biological children.
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> The disclosure from the departmental files and Appellants documentation and transcript of material etc. … etc … shows that [sic] the department and police were in possession of exculpatory evidence, i.e. evidence which if led by the appellant would have tendered [sic] to support their case which was unavailable to the accused/Appellant. It is a well established principle of law that such evidence must be made available to the defence."

Despite those assertions, none of the "new and fresh evidence" was identified, or able to be identified, by the applicants.

[40] It has not been demonstrated that the supposed existence of the "new and fresh evidence" referred to by the KAAs gives rise to any demonstrable error in the exercise of discretion or judgment by any of the Judges below such as to call for intervention by this Court.

[41] Another ground advanced by Mr KAA was that his wife was ill at the time of the hearings below. Mr KAA appeared at each of the hearings before the Childrens

Court Judges. In the applications before Shanahan DCJ and Tutt DCJ he announced that he was appearing on his own behalf and on behalf of his wife.[8] When Mr KAA appeared before Trafford-Walker SJDC, he commenced by seeking an adjournment on behalf of his wife, who was absent. The transcript of the hearing before Trafford-Walker SJDC demonstrates that Mr KAA became increasingly belligerent in his tone and attitude to the learned primary Judge, leading to his Honour having to exclude Mr KAA from the courtroom. His Honour said:[9]

> "Look, I just want to note the record that it just became totally impossible to proceed with any rational argument, discussion of the evidence, discussion of the procedures with the presence of the … appellant who was continually shouting in court, shouting over me, not listening, refusing to discuss matters rationally. One can't conduct a proceeding in those circumstances. I have in my judgment decided that it is necessary to exclude him so this matter can proceed in a calm and proper way."

[42] The record reveals that Mrs KAB's name was called three times, and that there was no appearance by her.[10] Some short time after being excluded from the courtroom, Mr KAA reappeared before his Honour and took further part in the hearing of the appeal until his disruptive behaviour once against compelled the learned primary Judge to have him removed from the courtroom for the duration of the hearing.[11]

[43] Given the fact that Mr KAA appeared on behalf of Mrs KAB before Shanahan DCJ and Tutt DCJ and in view of the course of the appearances before Trafford-Walker SJDC, which I have summarised above, I do not see that any error was committed by any of their Honours below in relation to the absence of Mrs KAB such as to attract the intervention of this court.

[44] Mr KAA also sought to make some point about the dates of hearings which he said had been given to him by the courts, saying that the court had made errors and sent him material with the wrong dates on them. Even if these allegations amounted to matters which would attract the intervention of this court (which is unlikely), it is clear on a review of the material not only that Mr KAA was simply wrong about the assertions that he made about the dates, but he knew at all times when hearing dates had been allocated and what those hearing dates were. As noted, he attended on each of the allocated days.

[45] Mr KAA advanced a miscellany of other reasons, including his lack of financial resources, that he is involved in other court cases, that his phone is being tapped, that his mail is being interfered with, and that persons involved in this litigation are engaged in a corrupt conspiracy.[12] A review of the transcript of each of the hearings before the learned Childrens Court Judges below indicate that similar assertions had been made by Mr KAA to them in the course of each of the hearings. None of these matters give rise to any error on the part of any of the Judges below such as to warrant the intervention of this Court.

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8 AR 43.26; AR 172.11.

9 AR 308.42-52.

10 AR 303.11.

11 AR 315.10-316.19.

12 He made several references to this being a "Freemasons' conspiracy".

[46] Accordingly, to the extent that the applicants sought to proceed in relation to the application concerning the decision of Tutt DCJ refusing an adjournment of the hearing of the CPO appeal, I find that there is no reasonable argument advanced by the applicants that this decision was wrong, and accordingly would refuse that application.

[47] Further, on the whole of the material before me, I would refuse leave to the applicants to withdraw the applications concerning the decisions of Shanahan DCJ and Trafford-Walker SJDC, and further find that there are no reasonable arguments that either of those decisions was wrong.

Orders

[48] Accordingly, I would order:

(a) That each of application Appeal No 3908/07, Appeal No 3909/07 and Appeal No 4087/07 be dismissed; and

(b) That the applicants pay the respondents' costs of and incidental to each application to be assessed.