SUPREME COURT OF QUEENSLAND

CITATION:	*Kosteska v Webber & Ors* [2010] QCA 138
PARTIES:	**LILLE KOSTESKA** (applicant) **v** **MAGISTRATE WEBBER** (first respondent) **REGISTRAR K J BROWN** (second respondent) **R S DILLON** (third respondent)
FILE NO:	Appeal No 5671 of 2010 SC No 4624 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for stay of execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	10 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 June 2010
JUDGE:	White JA
ORDERS:	**1. Application for stay dismissed.** **2. The applicant to pay the respondents costs in the sum of $1,500.00.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where applicant applied for stay of execution on all judgments which derived from default judgment and order made in Magistrates Court pending her application for leave to appeal to the Court of Appeal – where such judgments included a sequestration order of the Federal Magistrates Court – whether a stay of execution can be granted pending an application for leave to appeal – whether there is jurisdiction in the Supreme Court of Queensland to stay orders of the Federal Magistrates Court – whether it is appropriate to grant a stay *Judicial Review Act* 1991 (Qld), s 48(5) *Uniform Civil Procedure Rules* 1999 (Qld), r 761(2) *Bell v Bay-Jespersen* [2004] 2 Qd R 235; [2004] QCA 68, followed

	Perovich v ASIC [2005] QCA 456, followed *Stone v Copperform Pty Ltd* [2002] 1 Qd R 106; [2001] QCA 7, applied
COUNSEL:	The applicant appeared in person AD Scott (solicitor) for the first and second respondents YP Paltridge (solicitor) for the third respondent
SOLICITORS:	The applicant appeared in person Crown Solicitor for the first and second respondents Universal Legal Recovery for the third respondent

HER HONOUR: On the 2nd of June 2010 the applicant, pursuant to s 48(5) of the *Judicial Review Act* 1991 filed an application for leave to appeal the decision of Philip McMurdo J made on the 17th of May 2010 dismissing her application for a statutory order of review in respect of decisions made by the first and second respondents respectively in the Magistrates Court at Beenleigh.

On the 4th of June 2010 the applicant filed an application for "a stay of execution to be imposed on all judgments and orders made by whatever court which derived from the default judgment and order at first instance made in the Beenleigh Magistrates Court". I ascertained from the applicant, who has appeared on her own behalf today, that she intends by that application to include relevant decisions of the Federal Magistrates Court.

A brief synopsis will set out the background to the applicant's application. The third defendant, Mr Dillon, commenced proceedings in February 2004 in the Magistrates Court at Beenleigh to recover damages in the sum of approximately $1,100 arising out of a motor vehicle accident between his vehicle and Ms Kosteska's. A year later, the claim was renewed.

On the 28th of April 2005, the respondent Magistrate made an order for substituted service on the applicant. Judgment in default of filing a defence to those proceedings was given by the Registrar of the Magistrates Court at Beenleigh on the 11th of July 2005.

The applicant applied unsuccessfully to set aside default judgment on the 14th of September 2006. She thereafter had a judgment debt which she could satisfy by paying, but she did not. On the 30th of May 2006, a bankruptcy notice was served on her.

On the 31st of March 2007, an order was made for the substituted service of a creditor's petition on the applicant and on that day, the 31st of March 2007, a sequestration order was made against her in the Federal Court. I understand that the applicant appeared and contested that order being made.

There have been subsequent proceedings in the Federal Magistrates Court in Brisbane during this year in which the applicant has sought unsuccessfully to set aside the 2005 default judgment. The applicant's trustees in bankruptcy, Mr van der Velde, and Mr Sweeney, by letter dated the 21st of May 2010, directed the applicant to vacate her property at Tamborine by the 4th of June 2010. The applicant says that in fact that has not occurred pending the outcome of this application for a stay.

The direction of the trustees was as a consequence of the order of a Federal Magistrate made on the 13th of May 2010 that the applicant deliver up possession of her property at Tamborine and in default, an enforcement warrant issue in favour of the trustees and the co-owner who is the applicant's former husband.

The applicant filed her application for judicial review on the 5th of May 2010 in the Supreme Court, seeking review of the Registrar's decision to enter judgment in default and the Magistrate's refusal to set aside the judgment. Justice McMurdo dismissed the application under s 48 of the *Judicial Review Act* on a number of bases.

Firstly, he said that by s 18 of the *Judicial Review Act* the Act does not apply to decisions mentioned in s 43 of the *Magistrates Court Act* 1921. That section provides that all judgments and orders of that court are final and conclusive except as provided for by the *Magistrates Court Act* itself or by some other Act.

Secondly, he said the impugned decisions, being judicial in nature, were not decisions of an administrative character and thus susceptible to review under the *Judicial Review Act*.

Thirdly, s 13 of the *Judicial Review Act* provides that where there is provision under another Act for review of a challenged decision, the court must dismiss the application if satisfied that it is in the interests of justice to do so. Justice McMurdo found that if the decisions were of an administrative character such as to bring them within the purview of the *Judicial Review Act*, there was provision made in the *Magistrates Court Act* to review or appeal those decisions.

Fourthly, his Honour noted that the appeals were well outside the time provided in the *Judicial Review Act* for bringing an application for review; that it was about five years since each decision and there was no basis upon which a court would exercise its discretion to extend time.

Rule 761(2) of the *Uniform Civil Procedure Rules* provides "the Court of Appeal, a Judge of Appeal or the Court that made the order appealed from may order a stay of the enforcement of all or part of the decision subject to an appeal." The first thing to note is that this is an application for leave to appeal. Pursuant to s 48(5) of the *Judicial Review Act*, there is no appeal as of right where an application for review has been dismissed.

In *Stone v Copperform Proprietary Limited* [2002] 1 Qd R 106, McPherson JA construed r 761(2) as requiring an appeal to be on foot. His Honour held that "for a person to qualify for a stay under this rule...there must be an appeal".

In that case, his Honour was considering an appeal pursuant to s 118(3) of the *District Court Act* 1967 where leave was required in order to appeal an interlocutory decision. He concluded that there was nothing that could be described as a decision "subject to an appeal" in terms of the rule.

His Honour followed that decision in *Perovich v ASIC* [2005] QCA 456, noting in passing that the Court of Appeal in *Bell v Bay-Jespersen* [2004] 2 Qd R 235 confirmed that approach at pages 239 to 234.

That then would actually dispose of this application for a stay because the rule does not provide for a stay when there is an application for leave to appeal. However, I will make some observations had there been an appeal on foot.

On an application for a stay it is for the applicant to show that hers is an appropriate case for a stay. This the applicant accepts. Perhaps appreciating that a stay of the decision of Justice McMurdo would be of little immediate use to her, she has sought a stay of the Magistrates Court orders and the orders of the Federal Magistrates Court, which made the sequestration order.

There is no jurisdiction in the Supreme Court of Queensland to make orders against orders of a Federal Court. Any application for stay of that court's orders must be made to a Federal Court and it seems that that has occurred, unsuccessfully.

The strength of an appeal will usually dictate the grant of leave to appeal and may be considered on an application for a stay. Sometimes litigants who apply for a stay are merely seeking to put off the inevitable. The applicant here resists that conclusion but, it must be said, that the outcome is that she will likely lose her home and that is something understandably she does wish to put off.

All that a stay of the order below would do would be to stop the dismissal of the application for judicial review. It would not in my view interfere with the Magistrates Court orders. The applicant's main contention seems to be that his Honour erred in as much as he relied on s 18 of the *Judicial Review Act* which provides that the *Judicial Review Act* does not effect the operation of an enactment mentioned in schedule 1, part 1, or to decisions made under an enactment mentioned in schedule 1, part 2.

Schedule 1, part 1, refers to ss 43 and 50 of the *Magistrates Court Act* 1921. Section 43 provides that judgments and orders made in a Magistrates Court shall be final and conclusive except as provided by the *Magistrates Court Act*. The applicant contends that by virtue of the decision of the High Court in *Kirk v Industrial Relations Court of New South Wales* [2010] HCA 1, relating to the ousting of the jurisdiction of the Supreme Court of New South Wales in relation to privative clauses contained in New South Wales industrial relations legislation, a provision such as s 43 of the *Magistrates Court Act* is invalid.

The objection, if it is otherwise soundly based, is, however, without foundation because s 45 of the *Magistrates Court Act* permits any party who is dissatisfied with a judgment or order of that court to appeal to the District Court as provided by the rules if, for example, the amount involved is more than $5,000. Where the amount is not more than $5,000, an appeal lies only by leave of the District Court. Nonetheless, there is an avenue of appeal.

The concerns discussed by the High Court in *Kirk* do not apply to decisions made in Queensland under the *Magistrates Court Act*. There is no attempt to oust the jurisdiction of the superior courts.

Secondly, the applicant contends that the primary judge ought to have exercised his discretion not to characterise the decisions in the Magistrates Court as judicial. Those decisions plainly were judicial and there was no basis for characterising them in any other way.

The third point concerns s 13 of the *Judicial Review Act*, which precludes review under that Act if there is a provision made by another law under which an applicant is entitled to seek review of the matter by another court or tribunal. His Honour was clearly correct in concluding that there was another appeal or review system provided for in the *Magistrates Court Act*.

Finally, his Honour was clearly correct not to extend time because there would have been no utility in doing so for the reasons mentioned above.

Now, the applicant has mentioned a number of other matters going to the validity of the legal process in this state and I think some issues about legal tender, but I need not address those because they are not related to the application for a stay.

So for the primary reason that there is no appeal to which an application for a stay could attach, the application is dismissed. But in any event, even had an appeal been on foot, for the reasons that I have mentioned there is no basis for contending that it would be appropriate to grant a stay, and so I dismiss the application for stay.

...

HER HONOUR: The third respondent has sought costs of and incidental to this application. Ms Paltridge has provided a schedule of the costs incurred in preparing the submissions and her appearance today. I will fix the costs in the sum of $1,500.