SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney–General for the State of Qld v Fardon (No 2)* [2013] QSC 276
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) v **ROBERT JOHN FARDON** (respondent)
FILE NO/S:	BS5346/03
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	4 October 2013 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2013
JUDGE:	Peter Lyons J
ORDER:	**The application is dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAYING PROCEEDINGS – where reasons were published indicating it was intended to make an order for the release from custody of the respondent, with his being subject to a supervision order – where an application was made for a stay of the operation of the order, pending the determination of a proposed appeal – where the applicant submitted the proposed appeal is arguable on 3 substantial grounds – where the applicant submitted the first ground was that the reasons for judgment applied the wrong test – where the applicant submitted the second ground was that the conclusion that the respondent was "of the order of risk that the average sexual offender would re-offend" was an erroneous conclusion – where the applicant submitted that the third ground was that adequate protection of the community could not reasonably and practicably be managed if the respondent was released subject to a supervision order – where the applicant made no submission in relation to whether the applicant would lose the benefit of a successful appeal if the order for the release of the respondent subject to a supervision order is not stayed – whether the order should be stayed

Alexander v Cambridge Credit Corporation (1985) 2 NSWLR 685
Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd (2008) 2 Qd R 453
The Attorney-General for the State of Queensland v Fardon [2011] QCA 111

COUNSEL: J Horton for the applicant.

D O'Gorman SC for the respondent.

SOLICITORS: Crown Law for the applicant.

Patrick Murphy Solicitor for the respondent.

[1] **Peter Lyons J:** On the 27th of September 2013 I published reasons indicating that I intended to make an order for the release from custody of Mr Fardon, with his being subject to a supervision order. The matter has come before me today for the making of the order and I am prepared to make that order. However, an application has been made for a stay of its operation, pending the determination of a proposed appeal to the Court of Appeal.

[2] Despite my invitation to do so, the applicant generally declined to take me to evidence in support of the submissions made on the application.

[3] The principles relevant to this application may be found in the judgment of Chesterman JA in an earlier case involving the present respondent, *The Attorney-General for the State of Queensland v Fardon* [2011] QCA 111. It is convenient that I attempt to summarise them. The first, adopted by Chesterman JA from the judgment of Keane JA, as his Honour then was, in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* (2008) 2 Qd R 453 at 455, is that judgments of the trial division of this Court should not be treated as merely provisional. The second, if it be different, taken from the same source, is that a successful party in litigation is entitled to the fruits of the judgment.

[4] Reference was then made by his Honour to a passage from *Alexander v Cambridge Credit Corporation* (1985) 2 NSWLR 685 at 689, which refers to circumstances in which a stay may be ordered, that is, where there is a risk that the appeal will prove abortive if the appellant succeeds on appeal but a stay were not granted. From that, Chesterman JA derived the following criteria for determining whether a stay should be granted: his Honour said that the stay would not be granted unless the applicant shows that his appeal is arguable on substantial grounds, and secondly that the appellant would lose the benefit of a successful appeal if the order were not stayed.

[5] Beyond those statements, his Honour helpfully referred to matters relevant to some of them. Thus on the question whether the applicant demonstrates that his appeal is arguable on substantial grounds, Chesterman JA referred to the nature of the assessment required when determining whether or not to release a person subject to a supervision order. His Honour referred to the language of the statutory provisions, which use expressions which are relevant for the review determined by me. Of those provisions, his Honour said that the terms "adequate protection" and "unacceptable risk" are necessarily imprecise. His Honour said that the determination of what is unacceptable by way of risk and what is adequate

protection calls for a value judgment formed upon inexact data and by reference to imprecise terms. His Honour then noted that these are the sorts of judgments which appellate Courts have traditionally been reluctant to overturn.

[6] With respect to a consideration of the magnitude of the risk, his Honour observed that the applicant must demonstrate a degree of likelihood that the order appealed against will not adequately protect the public and that a greater degree of protection than that provided by a supervision order, being the order appealed from, is necessary pending the determination of the appeal.

[7] His Honour identified the relevant risk as being that the respondent would commit a serious sexual offence and observed that for the purposes of the Dangerous Prisoners (Sexual Offences) Act and the application for the stay, the risk of breaking the terms of the supervision order is irrelevant save to the extent that that risk indicates an increased risk of sexual offending.

[8] It is apparent, therefore, that the applicant must demonstrate two things. One is that his appeal is arguable on substantial grounds. The second is that he may well lose the benefit of a successful appeal if the order for the release of the respondent subject to a supervision order is not stayed.

[9] On the first question, that is, whether the appeal is arguable on substantial grounds, three matters were referred to, which I shall now consider. Before I do so, I should observe that the question is not whether the decision to release Mr Fardon subject to a supervision order will ultimately be found to be correct. Rather, the issue is whether an appeal against the order is arguable on substantial grounds.

[10] The first of the three matters raised by the applicant is based upon the earlier reasons for judgment in these proceedings, and in particular on paragraph 93. It is convenient to note what is said there. The paragraph reads, "I also note that the risk which the psychiatrists assess that Mr Fardon might commit any form of sexual offence if released subject to a supervision order appears to be of the order of risk that the average sexual offender would re-offend." That appears to be the part of paragraph 93 on which the submission focuses. The paragraph continues with an observation that the applicant did not attempt to suggest that, with this level of risk, adequate protection of the community was not ensured. The submission made in respect of this particular part of the reasons for judgment was that it did not reflect the test which appears in the *Dangerous Prisoners (Sexual Offenders) Act*.

[11] The second submission was that the conclusion reached was erroneous. I shall deal with each of those propositions in turn.

[12] It is correct to say that the Act does not specify, as a test for determining whether an offender should be released subject to a supervision order, that the matter is to be determined by considering whether the risk of the offender committing any form of sexual offence while released is the same as, greater, or lesser, than the risk that the average sexual offender would re-offend. However, in my view, a reference in reasons for judgment to something not stated in the Act is not itself error or even arguably error.

[13] It would only be error if the test stated in the Act were not applied in determining whether the person should remain subject to a detention order or should be released

subject to a supervision order. The submission that there is an error because reference was made to the risk of re-offending and a comparison of that risk with the risk of the average sexual offender re-offending reflects a failure to understand, and, indeed, a fundamental misconception of, the reasons for judgment. The passage appears in a long section of those reasons under the heading Consideration. It was one of a number of matters taken into account in considering whether the detention order should continue in force or whether Mr Fardon should be released subject to a supervision order.

[14] The reasons for judgment at an early stage set out section 30, which contains a statutory formulation of the test to be considered in determining that question. There was no suggestion that the reference to section 30 was inappropriate. It states that in deciding whether to make an order, including an order that the prisoner be released from custody subject to a supervision order, the Court must consider whether adequate protection of the community can be reasonably and practicably managed by a supervision order. Section 30 also requires, in deciding the question as to which order should be made, that the paramount consideration is to be the need to ensure adequate protection of the community.

[15] The section of the reasons in which paragraph 93 is found commences with a discussion of some of the evidence relating to the risk that Mr Fardon would commit a sexual offence if released from custody. That is followed, in paragraph 68 of the reasons, by a statement that the paramount consideration is the need to ensure adequate protection of the community and the recognition that it was also necessary to consider whether adequate protection of the community could reasonably and practicably be managed by a supervision order. Again, in paragraph 70, reference is made to those matters; and again, in paragraph 71. There is then further consideration of the evidence relevant to the risk that, if released from custody, Mr Fardon would commit further sexual offences. Then paragraph 90 of the reasons states that the real focus of the proceedings is not whether or not Mr Fardon might commit some breach of the requirements of the supervision order. It is whether adequate protection of the community can be reasonably and practicably managed by a supervision order with the paramount consideration being the need to ensure such protection.

[16] Paragraph 93 obviously follows shortly after that; and is in turn followed by paragraph 94 where the ultimate conclusion is reached by applying the statutory test. Paragraph 94 reads, "On balance, it seems to me that if Mr Fardon were released into the community subject to a supervision order, including appropriate conditions, adequate protection of the community can be reasonably and practicably managed by the order." The paragraph continues with the statement that there appear to be good prospects that he would comply substantially with the requirements of such an order and that some risk remains that he would breach some requirements of the order but there is little real risk he would progress to the commission of an offence.

[17] It might be observed that even in paragraph 93 itself, the statement about the level of risk of Mr Fardon's committing any form of sexual offence and how it might be compared to the risk of the average sexual offender committing such an offence, was immediately related to the statutory test. That is, whether adequate protection of the community might be ensured. That appeared in the following sentence where I observed, "The applicant did not attempt to suggest that the level of risk would

mean that adequate protection of the community was not ensured." It seems to me therefore, that it is not reasonably arguable that the observation about level of risk which appears in paragraph 93 indicates a failure to apply the statutory test or that the application was decided by reference to, as a deciding matter, a test not authorised by the statute.

[18] I therefore do not consider that it is reasonably arguable that the decision is wrong because the wrong test was applied or the statutory test was not applied.

[19] The second matter relied upon by the applicant in this context was that the conclusion was erroneous: that is, the conclusion that the risk that Mr Fardon might commit any form of sexual offence if released subject to a supervision order appeared to be of the order of risk that the average sexual offender would reoffend. In support of that submission, I was solemnly told there was no evidence which would provide a basis for it. And in particular, there was no such evidence in the transcript. I regret to say that the submission reveals a failure to read and comprehend the reasons for judgment; and a lack of attention to the evidence presented at the hearing on the part of those responsible for the submission.

[20] The reasons for judgment at paragraph 62 record that Dr Beech in his report on the 1st of August 2012 explained his assessment of a moderately high risk of further sexual offending as meaning that the risk was greater than for the average sexual offender, but not in the range of those at highest risk. That statement is based upon Dr Beech's report, relied upon by the applicant, of the 1st of August 2012; and is found in the concluding part of the report which is headed Summary and Opinion at page 31. It might be noted that that was an assessment as at August 2012.

[21] Dr Beech now assesses a lower risk of the commission of a sexual offence by Mr Fardon if he were to be released subject to a supervision order. That risk is moderate. Dr Beech did not explain the term "moderate" in his assessment of risk; although as I have pointed out, he had explained the expression "moderately high risk" in the way I have indicated.

[22] Paragraph 63 of the reasons for judgment record that Dr Grant in his report of the 22nd of July 2013 explained the moderate risk of sexual reoffending by Mr Fardon which Dr Grant assessed on the basis Mr Fardon was not subject to a supervision order, as being a risk of reoffending which was greater than for the average sex offender; with the difference being relatively moderate in extent. That assessment appears in Dr Grant's report of the 22nd of July 2013 under the heading Overall Risk Assessment at page 13.

[23] If Mr Fardon is released subject to a supervision report, Dr Grant said in his report at page 13 that the risk would be contained and reduced and assessed that risk as being low to moderate. He did not explain specifically what low to moderate meant; although, as I have said he did explain what a moderate risk was by reference to the risk that the average sex offender would reoffend.

[24] In order to determine whether adequate protection of the community could be reasonably and practicably managed by a supervision order, it was necessary for me to have some understanding of the effect of the assessments of the psychiatrists engaged by the applicant of the level of risk that Mr Fardon would reoffend if he were released from custody subject to a supervision order.

[25] The statement at paragraph 93 of the reasons is a conclusion reached from the evidence of the level of risk stated by the psychiatrists that Mr Fardon would commit a sexual offence if released subject to a supervision order, compared with their explanation of higher levels of risk assessed by them in other circumstances.

[26] It seems to me therefore, that the applicant fails to demonstrate a substantial ground on which he might successfully appeal on the basis that there was no evidence to support the conclusion recorded in paragraph 93 of the earlier reasons for judgment.

[27] The next matter relied upon is identified by reference to paragraph 92 of those reasons.

[28] In that paragraph, I considered the nature of any sexual offence which Mr Fardon might commit if released from custody. The submission focused on my reference to a concern that Mr Fardon might form a relationship with a woman in the course of which he would either coerce her into sexual behaviours as Dr Beech described the potential event, or he would become exploitative and sexually demanding and would exceed recognised boundaries as a consequence of his sense of entitlement as appeared in the evidence of Dr Grant. It was submitted on behalf of the applicant that the risk of an offence of that nature meant that adequate protection of the community could not reasonably and practicably be managed if Mr Fardon was released subject to a supervision order or at least that that provided a reasonably arguable ground for appealing against the order.

[29] I again note the submission was not supported by references to evidence. The submission did not seek to identify the level of risk that such an offence might occur so that it could be related to the question whether adequate protection of the community could or could not be reasonably and practicably managed by a supervision order. It might be said that the baldness of the submission makes it difficult to identify a reasonably arguable ground of appeal. The paragraph identifies a type of offence of which there is some risk if Mr Fardon were released. The question which had to be considered and in respect of which, if the present application is to succeed, the applicant must demonstrate a reasonably arguable ground that the conclusion is erroneous, is whether or not with a supervision order, adequate protection of the community in respect of such an offence would be reasonably and practicably managed under a supervision order.

[30] The evidence was in fact in support of the proposition that adequate protection of the community would be reasonably and practicably managed by the imposition of a supervision order. Dr Grant in his oral evidence at pages 48 and 49 discussed the risk that such offending might occur. He was asked whether that type of situation might happen overnight or whether it would be a progressive thing. And he accepted that it would be a progressive thing, not happening overnight generally unless he was intoxicated; which, I might add, Dr Grant did not think to be a real risk. He was then asked whether, if the supervision order was doing its job, such a relationship would be picked up before it got to the point of concern; to which he answered, "yes".

[31] The concern arises from a previous occasion when Mr Fardon had been released from custody and became involved in a relationship with a woman who lived at the Gold Coast. Of that occasion, Dr Grant said in his oral evidence, "In the past he would go down to the Gold Coast and spend a day or two or three down there. He

was able to do things without telling the supervisor what he was up to. He continued, "Whereas now, it's a lot harder because people – they do know where you are and the tabs are a bit tighter." He was then asked whether the regime for supervision had tightened and improved. He replied, "Yes, it's tightened in the sense of being able to monitor better what's happening. And it's improved, I think, in the sense of being able to help people with the practical aspects of rehabilitation." That evidence does not support a concern about the risk of such offending being at a level where adequate protection of the community would not be reasonably and practicably managed under a supervision order.

[32] Moreover, in his report of the 22nd of July 2013, Dr Grant expressed the view that it is now possible for the process of Mr Fardon's rehabilitation in the community to begin. That evidence is not consistent with the risk of sexual offending, including in the context of a relationship as is described in paragraph 92 of the earlier reasons, being such that adequate protection of the community could not be managed by a supervision order.

[33] Dr Beech considered the proposed order to be appropriate. His report of the 14th of July 2013, having referred to the risk that Mr Fardon might commit a sexual offence if released from custody, stated that a supervision order would reduce the risk to moderate. He then said, "The difficulty really is in determining whether Mr Fardon would abide by an order." He observed that it was his opinion that he would be more willing to abide by a supervision order now. A little later, he said that it was his opinion that Mr Fardon is more likely than not to abide generally with a supervision order.

[34] The earlier reasons at paragraph 52 record Dr Beech's evidence that there was some risk Mr Fardon would engage in minor breaches of conditions; for example, using the internet at 10.30 at night, contrary to a direction to cease doing so at 10 pm. But he does not suggest that these types of breaches of a supervision order are indicative of the commission of a serious sexual offence.

[35] The evidence to which I have referred is supportive of the view that the risk of the type of offending described by the psychiatrists within a relationship is not at a level where a supervision order would not be sufficient for ensuring adequate protection of the community. The applicant has not sought to demonstrate, by reference to evidence, that it is reasonably arguable that there is an error in that conclusion. I therefore do not consider that the applicant has demonstrated a reasonably arguable ground of appeal by reference to the risk of such offending.

[36] Reference was then made to paragraph 94 of the earlier reasons. That paragraph records, as mentioned earlier, the overall conclusion that if Mr Fardon were released into the community subject to a supervision order, including appropriate conditions, adequate protection of the community could be reasonably and practicable managed. It was submitted that the conclusion was substantially against the weight of the evidence. The submission was made without an attempt to identify the evidence, the weight of which would be substantially against the conclusion expressed in the paragraph.

[37] In support of the submission, emphasis was placed on the risk that Mr Fardon might breach the supervision order. That in itself is not a matter of much significance on an application such as this. As Chesterman JA pointed out in the decision

previously referred to, the risk of breaking the terms of a supervision order is irrelevant, save to the extent that the risk indicates an increased risk of sexually reoffending. Little attempt was made to demonstrate that a breach of any requirement could possibly progress to the commission of a sexual offence, or was otherwise associated with the risk of the commission of a sexual offence. In support of this particular part of the argument, the primary focus was Dr Grant's evidence of the risk that Mr Fardon might abscond.

[38] That evidence was discussed in the earlier reasons at paragraph 88. It is there recorded that Dr Grant thought that some breach of the requirements of the supervision order by Mr Fardon was likely, and that generally these would be in areas which are not of real concern in that they would not immediately raise a real risk of some form of sexual offence. The one potential exception raised by Dr Grant was the risk that Mr Fardon would abscond. And it is also recorded that he thought that if that happened, it was likely that Mr Fardon would be caught fairly quickly, and that with GPS monitoring absconding is less of an issue.

[39] Dr Grant had given evidence about the use of GPS monitoring, and in particular the use of a device attached to Mr Fardon so that his presence might always be identified. In relation to that, he said that officers of Queensland Corrective Services could tell whether he was at the Goodna Pub rather than being back at the precinct, the place where it is expected that Mr Fardon will reside on release. He continued, "They could tell if he's taking his bracelet or whatever it is off as well, tamper alerts and so on." A little later, he continued by stating that he knows that these bracelets or devices can be taken off. But he said, "That's always then noted immediately, that there's been a tamper alert and they", being a reference to the officers of Queensland Corrective Services, "know what's happening."

[40] With reference to the risk that Mr Fardon might abscond, he also responded to a question whether, with GPS monitoring, there is a real likelihood that Mr Fardon would attempt to abscond. He said, "I think it's less likely, because it's – but it certainly happens with people who are on GPS. And if they wanted, they cut off their monitor and run." He then continued, "They don't usually get too far or stay away for too long because they're caught up with one way or the other. But absconding is less of an issue with that kind of monitoring." Now, all of that provides an evidentiary basis for a conclusion first that the risk that Mr Fardon might try to abscond is relatively low; and secondly that if he did, that he would not be at large for any lengthy period.

[41] That is concerned with the risk of a breach of a requirement of a supervision order. It is a further step to consider the risk that he would progress to the commission of a sexual offence. No attempt was made to demonstrate there was a reasonable argument for saying the order is wrongly made because the risk that he would progress to a sexual offence is at such a level that adequate protection of the community is not ensured if he is released subject to a supervision order.

[42] The ground is formulated as a ground that the conclusion is substantially against the weight of the evidence. As was pointed out in the judgment of Chesterman JA, the legislation requires a value judgment by reference to terms which are necessarily imprecise and made upon inexact data. The mere fact that a careful weighing of the evidence might demonstrate that it weighs against the conclusion may not necessarily be sufficient for success on appeal. It is, however, not necessary for me

to consider that because the applicant has failed to demonstrate by reference to evidence that the conclusion is substantially against the weight of the evidence.

[43] On that basis alone, I would refuse the application.

[44] As I observed at the beginning of these reasons, however, the applicant had to establish two things. One related to whether the appeal was arguable on substantial grounds. The other was that the risk that in the period up to the determination of the appeal, Mr Fardon might commit a serious sexual offence was such that the stay should be granted. No separate attempt was made to deal with this aspect of the criteria for the grant of a stay. The findings made in the reasons are against it. No additional evidence was pointed to to demonstrate a level of risk as warranting a stay; and it seems to me that that aspect of the test has not been satisfied.

[45] The application is dismissed.