SUPREME COURT OF QUEENSLAND

CITATION:	*CAO v HAT & Ors* [2014] QCA 61
PARTIES:	**CAO** (applicant) **v** **HAT** (first respondent) **COMMISSIONER OF POLICE** (second respondent) **LEIGH THOMAS MADDEN** (third respondent) **PAUL PETER PATTY** (fourth respondent)
FILE NO/S:	Appeal No 3292 of 2013 DC No 3309 of 2008 DC No 3046 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	1 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2013
JUDGES:	Margaret McMurdo P, Morrison JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to adduce new evidence refused.** **2. Application for leave to appeal refused.** **3. The applicant must pay the costs of the third and fourth respondents of the application for leave to appeal to be assessed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – IN GENERAL – where a domestic violence order was made against the applicant in 2008 – where the applicant in 2009 was unsuccessful in appealing the domestic violence order – where the applicant's application to reopen the 2009 appeal was dismissed by the primary judge – where the applicant applied in 2012 for the revocation of the domestic violence order – where the magistrate refused to revoke the domestic violence order – where the applicant's appeal against that refusal was dismissed by the primary judge – where the applicant applied to adduce new evidence on the application for leave to appeal the decision of the primary judge – where

the evidence was ascertainable by the applicant for the hearing before the primary judge – where the futility of the appeals makes the new evidence irrelevant

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where a domestic violence order was made against the applicant in 2008 – where the applicant applied for the revocation of the order – where the magistrate dismissed the application – where the applicant's appeal against the refusal of the magistrate to revoke the order was dismissed by the primary judge – where s 169(2) *Domestic and Family Violence Protection Act* 2012 (Qld) provides that the decision of the appellate court is final and conclusive – whether there is jurisdiction for an appeal from the primary judge's dismissal of the magistrate's refusal to revoke the domestic violence order

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where the applicant was unsuccessful in an appeal to the District Court in 2009 against a domestic violence order – where the applicant sought leave to reopen the 2009 appeal – where s 66(5) *Domestic and Family Violence Protection Act* 1989 (Qld) provided the decision of the District Court was final and conclusive – whether there is jurisdiction for an appeal from the primary judge's refusal to grant leave to reopen the 2009 appeal

PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – CONTEMPT – POWER OF THE COURT TO PUNISH FOR CONTEMPT – IN GENERAL – where the applicant filed applications for contempt against the second, third and fourth respondents – where directions required the personal service of each application and any supporting affidavit on the relevant respondent – where the applicant failed to personally serve the respective applications and supporting affidavit on the relevant respondents – where the primary judge dismissed the applications on a summary basis – whether the primary judge erred

Domestic and Family Violence Protection Act 1989 (Qld), s 36, s 63, s 65, s 66
Domestic and Family Violence Protection Act 2012 (Qld), s 165, s 169, s 196
Uniform Civil Procedure Rules 1999 (Qld), r 106, r 667, r 668, r 926

CAO v Hedges [2013] QCA 1, related
Costello v Courtney [2001] 1 Qd R 481; [2000] QSC 67, considered
Stinson v The Pharmacy Board of Queensland [1995] 1 Qd R 567; [1993] QCA 520, followed

COUNSEL:	The applicant appeared on her own behalf No appearance by the first respondent J B Rolls for the second respondent A D Scott for the third and fourth respondents
SOLICITORS:	The applicant appeared on her own behalf No appearance by the first respondent C A Bradley**,** Queensland Police Service Solicitor for the second respondent G R Cooper, Crown Solicitor for the third and fourth respondents

[1] **MARGARET McMURDO P:** The applicant has not demonstrated any reason warranting the granting of leave to appeal. I agree with the reasons of and orders proposed by Mullins J.

[2] **MORRISON JA:** I have had the advantage of reading the reasons for judgment of Mullins J and agree with the reasons and the orders proposed by her Honour.

[3] **MULLINS J:** The applicant seeks leave to appeal pursuant to s 118(3) of *District Court of Queensland Act* 1967 from the decision given by the learned District Court judge on 15 March 2013: *CAO v HAT* [2013] QDC 42 (the reasons).

[4] That decision disposed of the applicant's application to reopen the applicant's 2009 appeal from the making of a domestic violence order against her on 17 November 2008 (the 2008 order) where the aggrieved person was her adult daughter (the first respondent), the applicant's appeal against the decision of a Magistrate given on 10 July 2012 dismissing the applicant's application to revoke the 2008 order, and the applicant's applications to prosecute the second, third and fourth respondents for contempt.

[5] The applicant's application for leave to appeal named the first and second respondents as the parties to be served with the application. As one of the orders sought by the applicant was that contempt of court charges be heard against the third and fourth respondents, the third and fourth respondents applied successfully on 31 July 2013 to be joined as parties to the application for leave to appeal.

[6] The applicant appears on her own behalf and participated in the hearing of the application for leave to appeal by telephone.

Background

[7] The first respondent initiated a protection order application under the *Domestic and Family Violence Protection Act* 1989 (Qld) (the Act) in the Cleveland Magistrates Court by an application dated 6 February 2008. An order was made ex parte on 12 February 2008, but that order was revoked on 26 February 2008, when further proceedings were adjourned to the Brisbane Magistrates Court.

[8] After a hearing in the Brisbane Magistrates Court on 22 May, 24-25 June, and 20-22 October 2008, the Magistrate on 17 November 2008 made a domestic violence order against the applicant in favour of the first respondent which was ordered to be for a period of five years from 17 November 2008. (The reasons of the Magistrate expressly referred to the domestic violence order being in place for a period of five

years and identified the order would continue in force to and including 16 November 2013, unless sooner varied or revoked, but the appeal record does not include a sealed copy of the order made by the Magistrate. There are references in submissions made at various times by the second respondent to the order being in place for six years. That submission does not reflect the reasons for the Magistrate's decision.)

[9] An appeal (3309 of 2008) against that order was dismissed by his Honour Judge Robertson in the District Court at Maroochydore on 21 October 2009.

[10] On 15 February 2012 the applicant applied to the Magistrates Court to have the 2008 order revoked. That application was dismissed on 10 July 2012.

[11] The applicant's appeal against the Magistrate's dismissal of the application to revoke the 2008 order was filed on 7 August 2012 (3046 of 2012).

[12] For the purpose of another proceeding in the Court of Appeal (that resulted in the judgment *CAO v Hedges* [2013] QCA 1), the fourth respondent who was then a legal support officer employed by the Office of the Director of Public Prosecutions sought a copy of the protection order application from the Magistrates Court file. The third respondent who was employed in the Registry of the Brisbane Magistrates Court provided the fourth respondent with a certified copy of the application form, certifying on 29 October 2012 that the photocopy "is a true and correct copy of the document of which it purports to be a copy."

[13] The Act was repealed by the *Domestic and Family Violence Protection Act* 2012 (Qld) (the 2012 Act) which commenced on 17 September 2012. The 2008 order is taken to have been made under the 2012 Act: s 196(2) of the 2012 Act. Any appeal against an order or a decision under s 63 of the Act which had not been finally dealt with on the commencement of the 2012 Act is taken to be an appeal under s 165 of the 2012 Act: s 209 of the 2012 Act.

The reasons

[14] The primary judge referred (at [36] of the reasons) to the Magistrate's conclusion that all three grounds for revocation relied on by the applicant in the application for revocation related to issues that were litigated at the original hearing for the 2008 order. These grounds were that the applicant was not served with the application for a protection order that was the same as the application on the file; the first respondent's evidence in the hearing that resulted in the 2008 order was false; and the first respondent made a death threat voicemail to the Federal/Family Court Registrar purporting to be the applicant.

[15] In dealing with the first ground, the primary judge observed (at [42] of the reasons):

> "I have examined the Magistrates Court file, as the appellant invited me to, and am quite satisfied that the document served on her is in substance the same as an application form on the file. It may be that she was served with an incomplete document. Even if it were relevant on this appeal to show that the appellant was not served with a complete copy of the application, given the length of the trial nothing can be made of the argument that the hearing thereby miscarried. I am quite satisfied the issue presents no basis for overturning the learned magistrate's decision not to revoke the order."

[16] In relation to the second ground, the primary judge found (at [44] of the reasons) that it was not open on an application to revoke or vary a protection order to attack the original decision, as that was for the appeal process, but, in any case, the applicant had not established a basis for revoking the 2008 order. The primary judge found (at [48] of the reasons) that the Magistrate was required to consider the matters set out in s 36 of the Act, the Magistrate had taken into account such information as there was relevant to the s 36 considerations, and was correct to conclude the materials did not call for revocation of the order. The primary judge found (at [49] of the reasons) that there was nothing before the Magistrate "to permit the conclusion that the safety of the aggrieved would not be compromised by revocation of the order." The primary judge (at [49] of the reasons), upon reviewing the record, including the further materials filed by the applicant for the purpose of the appeal, reached the same conclusion as the Magistrate.

[17] The primary judge set out (at [51] of the reasons) the grounds on which the applicant sought to reopen the 2009 appeal and which were listed in the application for reopening. They were that the application for the protection order served on the applicant on 6 February 2008 was not identical with the application certified by the third respondent and that the 2008 order and the order of Judge Robertson dismissing the 2009 appeal should be set aside as the application held by the court was never served on the applicant.

[18] The primary judge rejected (at [53] of the reasons) the applicant's reliance on s 147A of the *Justices Act* 1886 as the source of power to reopen the 2009 appeal. The primary judge doubted that there was power to reopen an appeal, but concluded (at [54] of the reasons) that, if there were power to reopen an appeal, there was no reason shown to do so. If r 667 and r 668 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*) applied to the proceeding under the Act, the primary judge (at [54] of the reasons) was also satisfied that none of the bases set out in those rules for staying, setting aside or varying the order of Judge Robertson was made out.

[19] The applicant had not personally served her applications against the second, third and fourth respondents seeking that each be dealt with for charges of contempt of court. Her Honour Judge Kingham had made orders on 28 November 2012 about the filing and the personal service of the contempt applications on the relevant respondents. Judge Kingham ordered that if the applicant did not comply fully with the requirements set out in the orders for personal service and proof of service then, unless there was a prior order to the contrary, the contempt applications would be dismissed on the date specified in the order, without further hearing. The timetable in those orders was amended by an order made by his Honour Judge McGill on 12 December 2012, extending the time for personal service to 14 January 2013 and the date for dismissal of the applications for non-compliance to 15 January 2013.

[20] The applicant sent the contempt application and her supporting affidavit to each of the second, third and fourth respondents by post on 10 January 2013. The primary judge held (at [23] of the reasons) that the applicant's failure to serve the contempt applications on the three respondents personally and with all relevant material was sufficient to prompt dismissal of those applications, and (at [24] of the reasons) the failure to comply with the *UCPR* as to personal service and service of any affidavit in support also constituted failure to comply with the orders made by Judge Kingham, as amended by Judge McGill. The primary judge (at [24] of the reasons) dismissed the applications on the basis that the applicant did not serve them

according to r 106 and r 926(3) of the *UCPR* and the orders made by Judge Kingham, as amended by Judge McGill. The primary judge noted (at [25] of the reasons) that it was not necessary to examine the allegations made or other issues raised, including whether there was jurisdiction for the District Court to deal with the alleged contempt committed during the course of the revocation application in the Magistrates Court.

Grounds of appeal

[21] The applicant's notice of appeal to this Court sets out 18 separate grounds for appeal which raised broadly the following issues:

(a) discrepancies between the protection order application dated 6 February 2008 served on the applicant and the copy of that application from the file held in the Brisbane Magistrates Court certified on 29 October 2012 as a true copy by the third respondent;

(b) allegations that Queensland Police altered official documentation concerning events on the evening of 5 March 2008 which were not adequately addressed by the primary judge;

(c) there was no record of the Magistrates Court hearing before Judge Robertson for the purpose of the 2009 appeal;

(d) complaints about Judge Kingham and Judge McGill;

(e) allegations that the primary judge showed "perceived Judicial Bias" by dismissing the applicant's contempt of court charges and other aspects of the conduct of the hearing.

Application for leave to adduce new evidence

[22] The applicant made a late application for leave to adduce new evidence on this application for leave to appeal. The "new" evidence included documents from 1993 concerning the first respondent, a letter dated 5 March 2008 from the Registrar of the Magistrates Court at Cleveland about the outcome of the proceedings on 26 February 2008, the transcripts of the proceedings before the Magistrate at Cleveland on 12 and 26 February 2008, and documents from the New South Wales police concerning events relating to the first respondent's son in October 2002.

[23] It appears the transcripts of the proceedings on 12 and 26 February 2008 (and the letter from the Registrar about the outcome on 26 February 2008) were to be used as a precedent to show that the Magistrate had power to set aside a domestic violence order. That evidence was unnecessary. Other foreshadowed evidence was directed primarily at attacking the credit of the first respondent and to impugn the making of the 2008 order. All the evidence was, however, ascertainable by the applicant for the hearing before the primary judge. In any case, the futility of the appeals concerning the application to revoke the 2008 order and the application to reopen the 2009 order, as discussed below, makes any so-called new evidence irrelevant.

[24] The application for leave to adduce the new evidence should therefore be refused.

Revocation of the 2008 order

[25] The second respondent submits the decision of the primary judge on the appeal from the Magistrate's decision dismissing the applicant's revocation application was final and conclusive, as provided for in s 169(2) of the 2012 Act:

> "The decision of the appellate court upon an appeal shall be final and conclusive."

[26] The second respondent relies on *Stinson v The Pharmacy Board of Queensland* [1995] 1 Qd R 567 where the Court of Appeal considered the provision in the *Pharmacy Act* 1976 (Qld) which gave a person aggrieved by the Pharmacy Board's refusal of an application for registration as a pharmacist the right to appeal to a judge of the District Court whose decision on the appeal was expressed to be "final." It was held by Williams J (with whom the other members of the court agreed) at 573-574, based on a review of authorities that considered the meaning of similar provisions, that the word "final" must in the relevant statutory context mean "without any appeal."

[27] The approach in *Stinson* is appropriate to the interpretation of s 169(2) of the 2012 Act. That disposes of the applicant's application for leave to appeal against that part of the primary judge's decision that dismissed her appeal against the refusal of the Magistrate to revoke the 2008 order.

[28] The applicant did draw the court's attention to the differences between two copies of the application for a protection order that were included in the appeal record. The discrepancies between the document, as served on the applicant, and the document on the court file, though not substantial, have been a matter of great concern to the applicant. On the basis that also reflects the discrepancies between the form of the application as served on the applicant and the form of the application on the file, the primary judge's suggestion (at [42] of the reasons) that may be due to the fact that the applicant was served with an incomplete document is the likely explanation. If it were appropriate to consider the merits of any appeal, the primary judge's conclusions that the application for a protection order that was originally served on the applicant was in substance the same as the application that was on the file and, as the hearing of that application before the Magistrate was lengthy, the process did not miscarry, were not unreasonable conclusions in the circumstances.

Reopening of the 2009 appeal

[29] The 2009 appeal was instituted under s 63(1) of the Act. Section 65(1) of the Act provided:

> "An appeal under section 63(1) is by way of rehearing on the record and under the rules of court applying to the District Court or, in so far as those rules can not be applied to such appeals, in accordance with directions given by a District Court judge."

[30] The powers of the District Court judge on the appeal were covered by s 66 of the Act and s 66(5) provided:

> "The decision of the District Court upon an appeal shall be final and conclusive."

[31] The second respondent did not refer to s 66(5) of the Act before the primary judge. The second respondent now submits in reliance on *Stinson* that the decision of Judge Robertson was final and is not able to be impeached by reopening and that is another basis on which the primary judge's decision to refuse to reopen that decision can be supported. That must be the case in respect of an application to reopen an appeal under the Act decided by one District Court judge made to another District Court judge.

[32] In view of the limited grounds specified in her application on which the applicant sought to reopen the 2009 appeal, it is not necessary to consider any effect of the

express statutory provision making the appeal to the District Court final and conclusive on the availability of other remedies, such as a prerogative order where circumstances giving rise to the possibility of prerogative relief apply.

[33] In any case, the applicant's grounds for reopening the 2009 appeal depended on the significance of the discrepancies between the application for a protection order on the file and the copy that was served on her. For the same reason that the discrepancies could not be successfully relied on by the applicant to revoke the 2008 order, they could not sustain a reopening of the 2009 appeal, even if there were power to do so before another District Court judge.

[34] The applicant did assert in her affidavit filed on 15 February 2013 in support of her application to reopen the 2009 appeal that:

> "There were no transcripts of the Brisbane Magistrate's Court proceedings at the hearing before Robertson DCJ at Maroochydore on 21st October 2009."

[35] As that assertion did not relate to any ground for the application, it does not appear that the assertion was tested before the primary judge and the appeal record in this Court does not deal with the proceeding before Judge Robertson. Despite the fact that it is one of the grounds on which the applicant seeks to appeal the decision of the primary judge, that is not appropriate when it was not pursued, or able to be, pursued before the primary judge.

Contempt applications

[36] To the extent that the applicant's application for contempt against the second respondent arose out of the failure by the second respondent to comply fully with the summons filed in the Magistrates Court for production of specified documents in connection with the application for revocation of the 2008 order, there is a threshold issue whether that part of the application could ever have been brought properly in the District Court. It appears that the documents were required for the hearing before the Magistrate of the application for revocation that took place and was decided on 10 July 2012. That hearing proceeded without the applicant inspecting the documents that were produced by the Queensland Police Service in response to the summons. The applicant inspected them subsequent to the decision on 24 October 2012. The acts of the third and fourth respondents relating to the viewing and certification of the protection order application that were the subject of the applicant's allegations of contempt appear to be unrelated to the application to reopen the 2009 appeal or the appeal against the refusal to revoke the 2008 order. The applicant pursued her applications for contempt against the second, third and fourth respondents in the District Court. As those applications were never served personally, jurisdiction issues were not considered by the primary judge.

[37] The bringing of an application for punishment for contempt is a serious step. It is consistent with the nature of the proceeding that r 926(3) of the *UCPR* requires the application for punishment of a contempt and any affidavit in support to be served on the named respondent personally: *Costello v Courtney* [2001] 1 Qd R 481, 484. That requirement was reflected in the order of Judge Kingham made on 28 November 2012, as amended by the order made by Judge McGill on 12 December 2012. It is understandable that the primary judge did not embark on the jurisdictional questions raised by the applicant's applications for contempt and

disposed of them on the basis of the breach by the applicant of the requirement to serve the respective applications on each of the second, third and fourth respondents together with the supporting affidavit personally. There is no error in the approach taken by the primary judge in disposing of the applications on that summary basis.

[38] The applicant's complaints about the hearings before Judge Kingham and Judge McGill therefore need not be considered. The applicant's complaint that the primary judge did not adequately address the applicant's allegation that police had altered the police document concerning events on the evening of 5 March 2008 relates to one of the documents that the applicant claims was not provided in response to her summons. It is not necessary to consider this complaint, in view of the manner in which the primary judge disposed of the contempt applications.

[39] Most of the applicant's claims against the primary judge that he showed "perceived Judicial Bias" are unnecessary to consider, because of the operation of s 169(2) of the 2012 Act and s 66(5) of the Act. The fact that the primary judge dismissed the applications for contempt is not itself evidence of any actual or apparent bias.

Orders

[40] The second respondent's written submissions did not seek an order for costs against the applicant, if the application for leave to appeal were refused. Those of the third and fourth respondents did. The third and fourth respondents were appropriate parties to the application for leave to appeal as the relief the applicant was seeking affected them. In the applicant's written submissions filed in support of her application to transfer this application for leave to appeal to the Supreme Court of New South Wales determined on 23 September 2013, she suggested that "… both the Third and Fourth Respondents should be removed from the proceedings as to with the charges of Contempt of Court against both the Third and Fourth Respondents being withdrawn without costs." The applicant did not take any steps to discontinue the application for leave to appeal against the third and fourth respondents or otherwise minimise her exposure to an order for costs in favour of the third and fourth respondents. As the applicant has been unsuccessful against the third and fourth respondents, it is appropriate that she pay their costs of the application to be assessed.

[41] The orders which should therefore be made are:

1. Application for leave to adduce new evidence refused.
2. Application for leave to appeal refused.
3. The applicant must pay the costs of the third and fourth respondents of the application for leave to appeal to be assessed.