SUPREME COURT OF QUEENSLAND

CITATION:	*A-G (Qld) v Fardon* [2015] QSC 20
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent) v **ROBERT JOHN FARDON** (applicant)
FILE NO/S:	SC No 5346 of 2003
DIVISION:	Civil Jurisdiction
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2014
JUDGE:	Peter Lyons J
ORDER:	The applicant pay the respondent's costs of and incidental to the application under s 22 of the *Dangerous Prisoners' (Sexual Offenders) Act* 2003 (Qld), including the costs of and incidental to the proceedings before Philip McMurdo J, on a standard basis.
CATCHWORDS:	PROCEDURE – COSTS – JURISDICTION – GENERAL – where the respondent is subject to supervision orders under the *Dangerous Prisoners' (Sexual Offenders) Act* 2003 (Qld) – where a warrant was issued under s 20 of that Act due to concerns held by the manager of the High Risk Offender Management Unit that the respondent would contravene those supervision orders by absconding – where an application for orders under s 22 of that Act was dismissed – where the respondent seeks costs – whether the Court has power to award costs under the *Dangerous Prisoners' (Sexual Offenders) Act* 2003 (Qld) STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – *Dangerous Prisoners' (Sexual Offenders) Act* 2003 (Qld) – where the respondent is subject to supervision orders under the *Dangerous Prisoners' (Sexual Offenders) Act* 2003 (Qld) – where a warrant was issued under s 20 of that Act due to concerns held by the manager of

the High Risk Offender Management Unit that the respondent would contravene those supervision orders by absconding – where an application for orders under s 22 of that Act was dismissed – where the respondent seeks costs – whether costs can only be awarded to the person the subject of a warrant under s 20 of that Act where the warrant is not based on a reasonable suspicion – whether that Act's aims prevent the grant of costs to a person the subject of a warrant under s 20 of that Act

Civil Proceedings Act 2011 (Qld) s 15

Dangerous Prisoners' (Sexual Offenders) Act 2003 (Qld) s 20, s 21, s 22

Uniform Civil Procedure Rules 1999 (Qld) r 678, r 680, r 681

Attorney General for the State of Queensland v Fardon [2013] QSC 264, cited

Attorney-General v Francis [2006] QCA 425, cited

COUNSEL: J Horton QC with M Maloney for the applicant

DP O'Gorman SC for the respondent

SOLICITORS: Crown Law for the applicant

Patrick Murphy for the respondent

[1] On 3 September 2014 Philip McMurdo J made orders under s 22 of the *Dangerous Prisoners' (Sexual Offenders) Act* 2003 (*DPSOA*). One order adjourned for hearing on 16 September 2014, the determination under that section of the question whether the respondent is likely to contravene a requirement of a supervision order made under the DPSOA on 4 October 2013. Another order was that, pursuant to s 21(2)(a) of the DPSOA, the respondent be detained in custody until the final decision of that question.

[2] When the matter came on for hearing on 16 September 2014, the applicant indicated that it was not intended to contend that the respondent is (or was) likely to contravene the requirement of the supervision order. I then made orders dismissing the application for the determination of the question, and that the respondent be released from custody, subject to the supervision order.

[3] The respondent now seeks his costs in relation to the application both of the hearing before Philip McMurdo J, and before me.

Background

[4] The respondent has now been subject to orders under the DPSOA for a very lengthy period. On 27 September 2006, he was released from custody subject to a supervision order. On three occasions, he breached conditions of that order,

including travelling to Townsville on 21 July 2007 without authority[1]. Subsequent proceedings under the DPSOA may be said to have culminated, for present purposes, in the supervision order made on 4 October 2013.

[5] At the beginning of September 2014, the respondent resided in a residence located within what was referred to as "the precinct" at Wacol. The precinct is an area apparently under the supervisions of the High Risk Offender Management Unit (*HROMU*), part of Queensland Corrective Services (*QCS*).

[6] At about 9.30am on 2 September 2014, another resident of the precinct (*other precinct resident*) telephoned Mr Wilson, then the Acting Manager-Operations within the HROMU. The other precinct resident told Mr Wilson that the previous morning (1 September 2014) the respondent had said that he was frustrated and stressed with supervision under the order. He had a legal matter currently pending (apparently relating to his supervision) which he felt was not going to be determined in his favour; and once that was confirmed, he had a plan to abscond from supervision. The respondent was said to have asked the other resident if he could make a vehicle available and drive the respondent to the Gold Coast/Canungra area, so that he could abscond to New South Wales. The other resident said that a third person (*third precinct resident*) was present when the respondent said these things.

[7] The respondent is subject to electronic monitoring, involving his wearing an ankle bracelet, the location of which can at any time be determined through the Global Positioning System (*GPS*). The other precinct resident and the third precinct resident were subject to similar monitoring. Mr Wilson gave evidence before Philip McMurdo J that the monitoring system indicated that the respondent was in the vicinity of the other precinct resident's house within the precinct between 8.30am and 10.32am on 1 September 2014.

[8] Mr Wilson did not ask the other precinct resident why he had not reported the matter earlier. Nor did he make any enquiry of the third precinct resident, as to his knowledge of the alleged statements by the respondent.

[9] A short time after his conversation with the other precinct resident, Mr Wilson sent an email to Ms Lynas, at that time the Director of the HROMU. The email summarised the information that had been conveyed, making it clear that the respondent had not indicated an immediate intention to abscond, but only to do so after learning that his legal matter had been determined adversely to him. The email recorded that Mr Wilson had asked the other resident whether he felt the respondent was serious, in discussing a proposal to abscond, to which that resident had replied, "I think he is just frustrated with curfew". The email also recorded Mr Wilson's view that the other precinct resident was "grandiose in his role as 'snitch'"; and noted that he always provided information at time when he himself was under increased pressure and scrutiny as he was at the time of his communication to Mr Wilson. Nevertheless, Mr Wilson expressed the view that there "still remains a concern" in view of the fact that the respondent had previously absconded (in 2007), and the respondent's current state of mind. He also identified steps to be taken to assess the respondent's state of mind, and to prevent his escape.

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[1] Some of the history is found in *Attorney-General for the State of Queensland v Fardon* [2013] QSC 264, particularly at [7].

[10] Ms Lynas responded shortly after, sending a copy of the email correspondence to Ms Embrey, the manager of the HROMU. Ms Lynas stated that, at that time, "we have all of the mechanisms in place to manage and respond to the risk" of the respondent's escaping, in the absence of credible evidence to support a contravention of the supervision order for the purposes of s 20 of the DPSOA. Ms Lynas also proposed steps to enable the further assessment of the respondent's state of mind.

[11] The same day, Ms Embrey signed a sworn complaint stating that she reasonably suspected that the respondent was likely to contravene a requirement of the supervision order. The stated ground for the suspicion was the respondent's purported claim to abscond, said to be "reminiscent" of the previous occasion on which he had absconded whilst subject to a supervision order. A warrant was issued the same day for the arrest of the respondent.

Statutory provisions and procedures

[12] Under s 20 of the DPSOA, if an officer of QCS reasonably suspects a person subject to a supervision order is likely to contravene a requirement of the order, the officer might apply for a warrant for the arrest of the person. A Magistrate is required to issue the warrant, if satisfied the grounds for issuing the warrant exist.

[13] Under s 21 of the DPSOA, if a person is brought before the Court under a warrant issued under s 20, the Court may order the release of the person, only if satisfied on the balance of probabilities that the person's detention is not justified because exceptional circumstances exist. Otherwise the court must order that person's detention, until the final determination of the Court under s 22.

[14] Section 22 applies if the Court is satisfied that the person the subject of the supervision order is (relevantly) likely to contravene a requirement of the order. The Court has power to make orders including a continuing detention order.

[15] On 3 September 2014 the present applicant made an application for orders under s 22, including a continuing detention order. That was the proceeding before Philip McMurdo J, heard on the same day. The respondent was represented at the hearing, and the validity of the warrant was challenged. His Honour held, on the material before him, that there was a reasonable basis for the suspicion to which Ms Embrey had sworn in her complaint. The result was that the respondent remained in custody, and the matter was adjourned for further hearing on 16 September 2014.

Submissions

[16] The parties produced a joint submission that it was within the Court's power to award costs, its source being rr 678 and 680 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*). These rules were made applicable by r 3 of the UCPR, the proceedings under the DPSOA being civil proceedings. I was referred to the decision of the Court of Appeal in *Attorney-General v Francis*[2], in support of the submission that the Court has jurisdiction to award costs.

[17] Notwithstanding that r 681 of the UCPR has the effect that ordinarily, costs follow the event, proceedings under the DPSOA are unusual. The applicant submitted that

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2 [2006] QCA 425.

an order could be made only in "truly exceptional circumstances"; and the respondent submitted that an order could be made for costs in "exceptional circumstances". The submissions recognised that the paramountcy which the Act affords to community protection meant that the taking of action under the Act should not ordinarily be affected by a fear that costs might be awarded against the applicant.

[18] Mr O'Gorman SC, who appeared for the respondent, submitted by reference to *Francis*[3] that the discretion must be exercised judicially taking into account relevant considerations, which are to be gleaned from the "special context" in which the discretion is to be exercised. It is apparent from the judgment that that is a reference to the procedures established by the DPSOA.

[19] Particular features relied upon by Mr O'Gorman in support of the application were that no evidence was offered by the applicant in support of the application; and insufficient care was taken in assessing the available information before commencing with proceedings. The email from Ms Lynas indicated that QCS had the mechanisms in place to manage and respond to risk associated with any attempt by the respondent to abscond.

[20] Mr Horton of Counsel, who appeared for the applicant, relied upon the finding of Philip McMurdo J that the warrant had issued validly, based on his finding to the effect that Ms Embrey reasonably suspected that the respondent was likely to breach a requirement of the supervision order. Mr Horton submitted that it followed that the only basis on which costs could be ordered was by reference to the emails of 2 September 2014, which had not been before his Honour. The relevant state of mind to be considered on this application was that of Ms Embrey (no doubt at the time at which she applied for the warrant). Mr Horton submitted that, since the relevant provisions of the DPSOA were directed to protection of the community, costs should not be awarded unless it was established that Ms Embrey did not reasonably suspect that it was likely the respondent would contravene a requirement of the supervision order. Mr Horton also referred me to the evidence which showed that on 5 September 2014, the other precinct resident indicated that he was not prepared to give evidence in relation to the present application.

Power to award costs

[21] In *Francis*, the Court of Appeal accepted that it had power to make a costs order in respect of an appeal brought to it under the provisions of the DPSOA. It is apparent from the Court's reasons that the Court considered the appeal to be a form of civil proceedings.

[22] In my view, there is no relevant distinction between an appeal to the Court of Appeal under the DPSOA, and proceedings in this Court under Division 5 of Part 2 of the DPSOA, including under s 22. It would seem that the ultimate source of power is s 15 of the *Civil Proceedings Act* 2011 (Qld). The exercise of the power is regulated by the provisions of Chapter 17A of the UCPR, made applicable by r 3 to civil proceedings in this Court. The relevant provisions include r 681, the effect of which is that costs usually follow the event. As *Francis* makes plain, it will

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[3] See at para [6].

nevertheless, commonly be the case that no order for costs is made in proceedings under the DPSOA.

Disposition

[23] In *Francis*, the Court stated that the discretion must be exercised having regard to the circumstances of each case. As mentioned, those circumstances include the relevant provisions of the DPSOA. It would follow that the consequences of an application for a warrant are not irrelevant to the question of whether an order for costs should be made. The fact that the provisions of Division 5 of Part 2 of the DPSOA are directed to ensuring the adequate protection of the community is also a very relevant consideration.

[24] No statutory provision has been identified which would support Mr Horton's submission that costs should not be ordered unless I was satisfied that the threshold for the issue of the warrant had not been established. The submission was based on the fact that the provisions are intended to ensure adequate protection of the community. However, that does not, in my view, provide a proper basis for a general conclusion that costs should only be ordered if the threshold for the issue of a warrant were not established. Supervision orders contain many requirements, the importance of which will vary significantly. Equally, they are capable of a range of breaches from the most trivial to those which are of considerable significance, in relation to the protection of the community. It could hardly be said that if a warrant issued after a trivial breach with no prospect of any adverse consequence for the community, nevertheless, the significance attached by the statutory provisions to community protection would mean that no costs order could be made.

[25] Section 20 of the DPSOA contains important provisions authorising a relevant officer to apply for a warrant for the arrest of a person who is subject to a supervision order on stated grounds. The result of the arrest is, of its nature, that the person is detained; and when the person is first brought before the Court, the person is to be further detained until a final decision under s 22 of the DPSOA, unless the person satisfies the Court that the person's further detention is not justified because exceptional circumstances exist. It is clear, therefore, that the making of an application for a warrant can have significant consequences for a person who is the subject of a supervision order, often resulting in the person being returned to custody.

[26] As the submissions of Mr Horton point out, these provisions are directed to ensuring adequate protection of the community. Thus when a person first comes before the Court under a warrant issued under s 20, if the Court is satisfied exceptional circumstances exist with the consequence that the person's further detention in custody is not justified, the Court may nevertheless amend the supervision order to include any other requirement appropriate to ensure adequate protection of the community[4]. At the final hearing under s 22, if the Court is satisfied that the person is likely to contravene, is contravening, or has contravened a requirement of a supervision order, then the person is to be detained, unless the person satisfies the Court that the adequate protection of the community can, despite the contravention or likely contravention of the supervision order, be ensured[5].

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4 See s 21(7)(b).

5 See s 22(2).

[27] As was recognised in *Francis*, success in the proceedings is a substantial factor in the respondent's favour[6]. However, such success will generally not be decisive.

[28] In the present case it was accepted that Ms Embrey had access to the information set out in Mr Wilson's email to Ms Lynas of 2 September 2014. That included Mr Wilson's concern, based on the fact that the respondent had absconded previously, and his current state of mind.

[29] On the other hand, it must have been apparent to Ms Embrey that there was substantial reason to doubt the accuracy of the information provided by the other precinct resident; and the likelihood that he was providing unreliable information to improve his own position. Beyond that, the information did not suggest an immediate intention on the part of the respondent to abscond; rather that would only occur after the respondent's "current legal matters" were decided; and then if (as expected) they were decided adversely to him.

[30] Beyond that, Ms Embrey had been informed by Ms Lynas that mechanisms were in place to manage and respond to any risk. Though not stated in her email, it was common ground that these included the fact that the respondent was wearing a GPS tracking device, removal of which would become immediately known by the authorities. This meant, so far as risk was concerned, the situation was very different from that in which the respondent had absconded in 2007.

[31] The objective of community protection to which the statutory provisions are directed means that considerable latitude must be given to an officer required to make a decision about whether to apply for a warrant under s 20 of the DPSOA. Mere errors of judgment, or the fact that the information on which the suspicion is based ultimately turns out to be incorrect, should not ordinarily result in an adverse order for costs. Nevertheless, the significant consequences which flow from the issue of a warrant require some balanced and mature consideration, before the application is made.

[32] In the present case, on the information available to Ms Embrey at the time when she applied for the warrant, there was no real reason for concern about any risk to the community. Indeed, the information did not suggest that the respondent intended to abscond immediately. There were real reasons to doubt the reliability of the information in any event; and there was scope for further investigation to establish its reliability. The consequences of the application were likely to be significant for the respondent. There is also the fact that the respondent has ultimately been successful in these proceedings. Weighing up all these considerations, this seems to me to be an occasion on which it is appropriate to make an order for costs. It was not suggested that, because the relevant conduct was that of Ms Embrey, no order should be made against the present respondent.

Conclusion

[33] I propose to order that the applicant pay the respondent's costs of and incidental to the application under s 22 of the DPSOA, including the costs of and incidental to the proceedings before Philip McMurdo J, on a standard basis.

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6 *Francis* at [7].