SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Fardon* [2013] QCA 299
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ROBERT JOHN FARDON** (respondent)
FILE NO/S:	Appeal No 9428 of 2013 SC No 5346 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	10 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2013
JUDGES:	Morrison JA
ORDER:	**The orders of Peter Lyons J made on 4 October 2013 are stayed until the determination of the appeal in this matter.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN GRANTED – where the respondent has a history of sexual offending – where the respondent was detained in custody for an indefinite term for care, control or treatment – where the respondent sought a periodic review of the continuing detention order – where the primary judge ordered that the continuing detention order be rescinded and that the respondent be released from prison at 4.00 pm on 4 October 2013 – where the respondent was released from prison at that time – where an application, for the stay of the primary judge's orders pending appeal, was brought to this Court 4.30 pm on 4 October 2013 – where that application was adjourned, and the order of the primary judge stayed, until 9 October 2013 and again until 10 October 2013 – whether a stay should be granted *Dangerous Prisoner (Sexual Offenders) Act* 2003 (Qld), s 41

Alexander v Cambridge Credit Corporation Ltd (1985) 2 NSWLR 685, cited
Attorney-General for the State of Queensland v Fardon [2006] QSC 275, cited
Attorney-General for the State of Queensland v Fardon [2006] QSC 336, cited
Attorney-General for the State of Queensland v Fardon [2007] QSC 299, cited
Attorney-General for the State of Queensland v Fardon [2011] QCA 111, considered
Attorney-General for the State of Queensland v Fardon [2011] QCA 155, considered
Attorney-General for the State of Queensland v Fardon [2013] QSC 12, cited
Attorney-General for the State of Queensland v Fardon [2013] QCA 16, considered
Attorney-General for the State of Queensland v Fardon [2013] QCA 64, cited
Attorney-General for the State of Queensland v Fardon (No 2) [2011] QSC 128, cited
Attorney-General for the State of Queensland v Fardon [2013] QSC 264, overruled
Attorney-General for the State of Queensland v Francis [2007] 1 Qd R 396; [2006] QCA 372, considered
Attorney-General for the State of Queensland v Lawrence [2011] QCA 301, considered
A-G (Qld) v Lawrence [2011] QCA 347, cited
Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd [2008] 2 Qd R 453; [2008] QCA 322, cited
R v Fardon [2010] QCA 317, cited

COUNSEL: P J Davis QC, with 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] This is an application by the Attorney-General for a stay of the orders made by Peter Lyons J, on 4 October 2013, ordering the release of the respondent from custody on a supervised basis under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("*DPSO Act*").

[2] On 6 November 2003 orders were made under the *DPSO Act* that the respondent be detained in custody for an indefinite term for control, care and treatment. The order has been reviewed from time to time, as required under the *DPSO Act*.

[3] The orders by Peter Lyons J were made as a result of the latest review of the orders for the respondent's detention under the Act. The orders having been made on 4 October, the applicant filed a notice of appeal that day, and an application for a stay pending appeal.

The respondent's history

[4] The respondent's history, so far as it may be relevant to this application, can be conveniently taken from an earlier decision of this court in *Attorney-General for the State of Queensland v Fardon*:[1]

> "[2] The respondent is 62 years of age[2]. He has a serious past criminal history dating from a conviction in 1967, when he was aged 18 years, for attempted unlawful carnal knowledge of a girl aged under 10. He was then released on a good behaviour bond.
>
> [3] In 1978, the respondent raped and indecently dealt with a 12 year old girl, occasioning serious injury, and wounded her 15 year old sister who had come to her aid. He was arrested on those charges and on 16 March 1979 released on bail. He absconded to the Northern Territory and 18 months later was extradited to Queensland, where on 8 October 1980 he pleaded guilty and was sentenced to 13 years imprisonment.
>
> [4] The respondent completed eight years of that term and was released to work from May 1988 until 26 July 1988. While on parole in September that year, he travelled without authority to Townsville. On 4 October 1988, which was 20 days after he had been released from custody, he engaged in a prolonged violent assault upon a woman who he said had offered him sex in return for drugs. He was subsequently convicted of rape, sodomy and assault occasioning bodily harm, and sentenced to a term of 14 years imprisonment, which was to expire on 27 June 2003."

History of supervision orders

[5] The detention of the respondent under the Act commenced in November 2003 and was maintained until September 2006.

[6] On 27 September 2006, A Lyons J ordered that the respondent be released subject to a supervision order containing 32 conditions.[3] The respondent contravened that order in three ways: in May 2007, he attended a school on a prearranged visit to address students; in July 2007, he aided a neighbour who was also subject to a supervision order to disobey a curfew restriction; and later in July 2007, after discharge from custody on 13 July 2007, following his arrest on 12 July, he travelled without authority to Townsville.

[7] As a result of those breaches the respondent was returned to custody.

[8] On 19 October 2007, Margaret Wilson J ordered that he again be released on a supervision order under the *DPSO Act*.[4] Some further amendments had been made to the order.

---

1 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155 at [2]-[4].

2 He is now 64.

3 *Attorney-General for the State of Queensland v Fardon* [2006] QSC 275. There were 32 conditions which were set out in the final order made on 8 November 2006: *Attorney-General for the State of Queensland v Fardon* [2006] QSC 336.

4 *Attorney-General for the State of Queensland v Fardon* [2007] QSC 299.

[9] On 3 April 2008, the respondent was apprehended and detained in custody following a complaint of rape made by a 61 year old intellectually disabled woman. On 14 May 2010 the respondent was convicted in the District Court of rape, but on 12 November 2010 that conviction was quashed and a verdict of acquittal entered, the Court of Appeal concluding that "it was not open to the jury to be satisfied beyond a reasonable doubt" that the respondent was guilty.[5]

[10] On 20 May 2011, Dick AJ ordered that the respondent be released from custody subject to an amended supervision order.[6]

[11] An appeal was brought from those orders and a stay was granted by Chesterman JA, on 3 June 2011.[7] The appeal was allowed and the orders for release were set aside.[8]

[12] On 13 February 2013, Mullins J ordered the release of the respondent under a supervision order.[9] An appeal was brought against that order and a stay was granted by Muir JA on 14 February 2013.[10]

[13] The appeal was heard on 27 February and judgment handed down on 28 March 2013.[11] The matter was remitted for rehearing. As a consequence the review was reheard by the primary judge on 23 and 24 September, with orders being made on 4 October.

[14] On 4 October 2013, the primary judge refused an application for a stay pending appeal. An application to this Court was brought that afternoon and an interim stay was ordered, until 4pm on Wednesday 9 October. That was then extended until 4.00 pm on Thursday 10 October.

Legal principles on a stay application relevant to the *DPSO Act*

[15] The principles applicable on an application such as this have been laid down in a number of cases commencing with the judgment of Chesterman JA in *Attorney-General for the State of Queensland v Fardon*[12]:

> "[13] Keane JA pointed out in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 at 455:
>
> "... it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders. The fundamental justification for staying judicial orders pending appeal is to ensure that the orders

---

5 *R v Fardon* [2010] QCA 317 at [65].
6 *Attorney-General for the State of Queensland v Fardon (No 2)* [2011] QSC 128.
7 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111.
8 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155.
9 *Attorney-General for the State of Queensland v Fardon* [2013] QSC 12.
10 *Attorney-General for the State of Queensland v Fardon* [2013] QCA 16.
11 *Attorney-General for the State of Queensland v Fardon* [2013] QCA 64.
12. [2011] QCA 111 at [13]-[14]; see also *Attorney-General for the State of Queensland v Lawrence* [2011] QCA 301 at [5]; and *Attorney-General for the State of Queensland v Fardon* [2013] QCA 16.

> which might ultimately be made by the courts are fully effective ... ."

[14] Two principles commonly resorted to on stay applications are also relevant.

> "The first is that where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay ... . Secondly, although courts approaching applications for a stay will not generally speculate about the appellant's prospects of success, given that argument concerning the substance of the appeal is typically and necessarily attenuated, this does not prevent them ... making some preliminary assessment about whether the appellant has an arguable case."
>
> The passage is from *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 695."

[16] Chesterman JA went on to identify[13] the competing considerations that must be balanced on an application for a stay where the *DPSO Act* is involved:

(a) the applicant must show that "his appeal is arguable on substantial grounds *and that* the appellant may well lose the benefit of a successful appeal if the primary judgment is not stayed";[14]

(b) "the Attorney-General is only likely to lose the benefit of a successful appeal if the prisoner commits a serious sexual offence in the period between judgment at first instance and on appeal";

(c) "[i]f that should happen, the community would not have been adequately protected, and the means of ensuring that protection will have been lost";

(d) "[t]he magnitude of the risk that a prisoner might commit a serious sexual offence before an appeal against his release on supervision can be heard is therefore the critical factor";

(e) "[a]lso relevant is the consideration that the respondent has the benefit of a judgment ordering his release on supervision made after a contested hearing in which all the relevant evidence the parties wished to adduce was tendered";[15] and

(f) "[i]n addition, the principle of individual liberty, of even the meanest citizen, is basic and important in a democratic society underpinned by the rule of law, and is not to be taken away without good cause."

[17] Chesterman JA continued at [21]:

> "In practical terms, in order to justify the stay the Attorney-General must demonstrate a degree of likelihood that the order appealed against will not adequately protect the public and that a greater

---

13 [2011] QCA 111 at [15]-[16].

14 See also *Attorney-General for the State of Queensland v Fardon* [2013] QCA 16 at p 5.

15 *Attorney-General for the State of Queensland v Fardon* [2013] QCA 16 at p 5.

> degree of protection than that provided by the order appealed from is necessary pending the appeal. The relevant risk against which the community is to be protected is that of the respondent committing serious sexual offences. For the purposes of the Act and this application the risk of committing other offences, or of breaking the terms of the supervision order, is irrelevant, save to the extent that that risk indicates an increased risk of sexual re-offending."

[18] That the relevant risk to be assessed is that the respondent might commit a serious sexual offence prior to the appeal appears from *Attorney-General for the State of Queensland v Lawrence*.[16] In *Lawrence* the Court held that the assessment of the measure that will ensure adequate protection of the community involves an equation with two factors, namely the likelihood of conduct which will endanger the community, and the result of such conduct if it ensues.[17]

[19] Also relevant in assessing the risk is the fact that orders providing for supervised release can never be watertight. As was said in *Attorney-General for the State of Queensland v Francis*:[18]

> "The Act does not contemplate that arrangements to prevent such a risk must be "watertight"; otherwise orders under s 13(5)(b) would never be made. The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."

[20] As Chesterman JA put it, one needs to be able to conclude that a supervision order would be "efficacious in constraining the respondent's behaviour by preventing the opportunity for the commission of sexual offences".[19]

[21] One factor to be weighed where the time between the stay application and the hearing of the appeal is short, is the prospect that the respondent might be released if the stay is not granted only to be returned a short time later if the appeal succeeds. As to that Muir JA said, with reference to the present respondent:[20]

> "It is not irrelevant in that regard that the respondent has had a long period of incarceration, and that at recent times he has been released and returned to custody. It would not in my view be in the respondent's best interests that he be released into the community and at the same time exposed to the risk of being returned to prison within a very short period should the appeal succeed."

---

16 *Attorney-General for the State of Queensland v Lawrence* [2011] QCA 301 at [24].

17 *Attorney-General for the State of Queensland v Lawrence* [2011] QCA 347 at [90].

18 *Attorney-General for the State of Queensland v Francis* [2006] QCA 324 at [39]; see also *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155 at [27].

19 [2011] QCA 111 at [29].

20 *Attorney-General for the State of Queensland v Fardon* [2013] QCA 16 at p 6.

[22] There can be no doubt that the respondent's willingness to submit to the supervision regime is a relevant factor. In some cases it will be determinative. That was the case in an earlier decision of this court in relation to the respondent.[21] The court said:[22]

> "These orders have the character of a compact between the prisoner and the community: the prisoner is accorded a measure of personal freedom, but only provided he is willing to, and does, submit to a regime of tight control. Of substantial present concern is the respondent's demonstrated unwillingness to submit fully to that regime, hence Dr Grant's conclusion that "there must be considerable doubt therefore about the prospect of successful management in the community under such a supervision order"."

[23] That factor was also important in *Attorney-General for the State of Queensland v Fardon*.[23] The court held that, whilst the respondent had complied with some important conditions (governing alcohol and drug control), the respondent's

> "*present unwillingness fully to commit to the supervision regime, manifested in his disregarding and circumventing it, which precluded the conclusion that releasing him under a supervision order would ensure adequate community protection*".[24]

Arguable grounds to appeal?

[24] The applicant contends that there are arguable grounds to attack the learned primary judge's reasons. They include:

(a) having found that the respondent posed an unacceptable risk to the community in the absence of an order under the Act, his Honour assessed the risk by reference to the risk applicable to the "average sexual offender";[25]

(b) even if his Honour did not assess the risk that way, he was influenced by that irrelevant consideration;

(c) his Honour found that the major concern of the psychiatrists was that the respondent would form a relationship with a woman, in the course of which he would become exploitive and sexually demanding, and coerce her into sexual behaviour;[26] it is contended that his Honour tried to distinguish such offending as different from the respondent's previous conduct in 1980 and 1989, but did not explain how that differentiation was made; in essence it is contended that the effect of his Honour's approach was to say that such a risk, whilst serious, was able to be diminished in consideration because it was less serious than those he had committed in the past; and

(d) the decision was unreasonable and against the weight of the evidence; an important component of this contention was that

---

21 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155.
22 [2011] QCA 155 at [29].
23 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155 at [28].
24 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155 at [28].
25 Reasons at [93].
26 Reasons at [92].

> his Honour could not reasonably have had any satisfaction that the respondent would comply with a supervision order; and his Honour did not give sufficient weight to the consideration of compliance with the proposed orders.

[25] The respondent contends that the learned primary judge's reasoning was thorough and orthodox. They say that if the reasons are read in their entirety they do not disclose any error. The respondent is entitled to the fruits of success before the primary judge, and should not be denied that because the supervision regime is not watertight. They emphasise that the Act requires only that the risk to the community be reasonably and practicably managed.

[26] The respondent emphasises the view of the psychiatrists that the likely form of sexual offending would be in the context of a relationship which is then overborne, and that is not likely to occur between now and when the appeal is heard.

[27] One of the matters raised by the applicant is the reference by the primary judge, in paragraph [93] of the Reasons, to the risk of the respondent's reoffending being compared to the "risk that the average sexual offender would re-offend". It is contended that this shows the primary judge misdirected himself as to the correct test, because nothing in the *DPSO Act* refers to the average sexual offender or the risk that the hypothetical average sexual offender might re-offend.

[28] The respondent points out that paragraph [93] shows it was simply a suggestion by the psychiatrists which the primary judge referred to, not an infection of reasoning: see paragraphs [62] and [63] of the Reasons.

[29] It may be true that the phrase or concept arose with the psychiatrists, as is noted in paragraphs [62] and [63]. However, the primary judge seems to have given it weight in his consideration. In paragraph [66], having referred to the provisions of the *DPSO Act* which provide for orders under s 5(6) and s 13, he went on to say:

> "This rather suggests that the mere fact that a person who has committed a serious sexual offence has the same risk of committing a further sexual offence as the average sexual offender, does not provide a basis for making an order under Division 3 of the Act…"

[30] If, as the respondent contends, the "risk that the average sexual offender would re-offend" was merely a notation of evidence, the applicant asks, why did it receive further attention in paragraphs [66] and [93]?

[31] The possible effect of reference to the risk that the average sexual offender would re-offend, is that it diminished the risk against which s 13(6)(a) and, more relevantly, s 30(4)(a) of the *DPSO Act* is set. They require that adequate protection of the community must be ensured, and the risk against which the community is to be protected is the "unacceptable risk that the prisoner will commit a serious sexual offence" if released: see s 13(2) and s 30(1) and (3) of the *DPSO Act*. That, on one view, has nothing to do with the risk of the average sexual offender.

[32] It is not to the point to say that the psychiatrists mentioned that risk. Accepting that they did, that does not make it a relevant consideration under the *DPSO Act*.

[33] In my respectful opinion it is arguable that the learned primary judge has misdirected himself in a way that has affected the proper consideration of the

matters stipulated under the Act. That is not to say that the argument is strong; simply that it is arguable.

[34] A different point is the primary judge's treatment of the evidence relating to the risk of breaching the supervision orders, and reoffending.

[35] The likelihood of compliance with the supervision regime is something that cannot be demonstrated, according to the applicant's contentions in respect of the proposed grounds of appeal. The applicant points to the evidence before the primary judge which suggests that the respondent has not yet reached the point where he is prepared to submit fully and unconditionally to the supervision regime. In that regard reference is made to Dr Beech's report[27] where the respondent gave a qualified acceptance of the need to submit to the regime:

> "When pressed about how he would manage this transition, and the vicissitudes of supervision, Mr Fardon said that as long as he felt that people were being more accommodating to him, he would be able to get along with them. There was though a corollary, that if he felt that they were not being open to his requests and demands, that he would be more defiant."

[36] In this context the applicant points to the decision of this Court in *Attorney-General for the State of Queensland v Fardon*[28] in 2011 where the court said:[29]

> "These orders have the character of a compact between the prisoner and the community: the prisoner is accorded a measure of personal freedom, but only provided he is willing to, and does, submit to a regime of tight control. Of substantial present concern is the respondent's demonstrated unwillingness to submit fully to that regime, hence Dr Grant's conclusion that "there must be considerable doubt therefore about the prospect of successful management in the community under such a supervision order"."

[37] In my respectful opinion it is arguable that the primary judge gave insufficient weight to the evidence of the psychiatrists, namely that for the supervision orders to work the respondent had to be fully accepting of their need, and his need to co-operate. His Honour referred, in paragraph [85], to the respondent's reduced negativity and more cooperative attitude. However, nothing there seems to reflect a fully or reasonably fully compliant subject of the orders. The respondent did not, on one reading of the evidence, accept that he *must* cooperate, as opposed to indicating that he would do his best to do so, but with reservations.[30]

[38] The reports of Dr Beech and Dr Grant also contained qualified acceptance in relation to the supervision regime. Thus:

(a) Dr Grant reported the respondent's response to a supervision order as being "if I have to do it, I have to do it", but then: "He said he has no problems with clauses restricting his activities, providing that the supervisors follow the rules and don't keep applying extra provisions";[31]

---

27 Dr Beech's Report, 14 July 2007, p 7.

28 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155.

29 [2011] QCA 155 at [29].

30 See, for example, the passage from Dr Beech's report quoted in paragraph [35] above.

31 Dr Grant's Report, 22 July 2013, p 7.

(b) Dr Grant's assessment was that the risk for sexual reoffending was moderate, and could be reduced to low to moderate by an appropriate supervision order, "providing Mr Fardon was able to work within such a supervision program in a cooperative way";[32]

(c) Dr Grant was of the opinion that there had been "some improvement in terms of confidence that Mr Fardon would cooperate with a supervision order and remain breach free", and then added, "It does remain to be seen to what extent his current more positive attitudes translate to the reality of being released and the anxieties that he faces in the community"; his view was that the risk of re-offending could be contained and reduced by a supervision order "providing Mr Fardon's positive attitudes and cooperation persist beyond the prison environment";[33]

(d) Dr Beech's report included the respondent speaking of "confrontation" with staff, rather than contact, and describing a longstanding enmity towards Queensland Corrective Services ("QCS") staff; as to his relation with QCS officers in relation to his impending release, the respondent "said he found them more accommodating this time and he felt that he in turn would be more cooperative with them", but when pressed on how he would manage the transition and the vicissitudes of supervision, the respondent said that as long as he felt that people were being more accommodating to him, he would be able to get along with them, but "if he felt they were not being open to his requests and demands, that he would be more defiant";[34]

(e) Dr Beech expressed the view that a supervision order would reduce the risk of re-offending to moderate, saying "The difficulty really is in determining whether Mr Fardon would abide by an order. It is my opinion that he would be more willing to abide by a supervision order now";[35] what is noteworthy about that passage is that Dr Beech did not go so far as to say that the respondent was fully and unconditionally submitting to the supervisory regime.

[39] As set out below in paragraphs [51] to [73]; the psychiatrists' evidence identified real risk if the respondent's behaviour happened to be affected by alcohol or drugs. Whilst they each referred to the fact that the respondent, whilst in prison, had apparently resisted alcohol and drugs, if he was under their influence the risk of reoffending changed dramatically.

[40] However, it is arguable that the primary judge gave that evidence too little weight in his consideration. Where reference was made to the respondent's risk of breaching the supervision orders, and then reoffending, this gave little weight to the impact of taking in alcohol or drugs on the respondent's behaviour:

(a) in paragraphs [35] (third last sentence) and [50] (second sentence) of the Reasons the qualifications made by the psychiatrists are not adverted to;

---

32 Dr Grant's Report, 22 July 2013, p 12.
33 Dr Grant's Report, 22 July 2013, p 13. A similar reservation appears at p 14.
34 Dr Beech's Report, 14 July 2013, p 7.
35 Dr Beech's Report, 14 July 2013, p 12.

(b) that seems to have led to the conclusions in paragraph [88] (second sentence), [89] (last sentence), [91] (last two sentences) and [94] (last sentence), where the primary judge has accepted that any breach of the supervision orders would be readily detectable, not of immediate risk, not likely (at least when they first occur) to lead to reoffending, or so unlikely to do so that there is "little risk that [the respondent] would progress to the commission of a sexual offence".

[41] However, as the passages set out in paragraphs [59] to [73] below show, if the respondent breaches the supervision orders by absconding and indulging in drugs and alcohol, the risk is completely different. The psychiatrists' evidence included assessments that intoxication led to the respondent's most brutal offences,[36] that the risk of reoffending was very much a concern if drugs or alcohol was concerned,[37] that if the respondent was intoxicated the risk was "a whole new ball game",[38] and there was a risk that he could even reoffend against a child if intoxicated.[39]

[42] Since the indulgence in drugs or alcohol could occur whilst absconding (absconding being something each psychiatrist accepted as a risk) it is arguable that the primary judge's assessment of the risk miscarried.

[43] The culmination of this characterisation is in the last sentence of paragraph [92]. That, arguably, assesses the risk in a way that gives improper weight to the evidence of the impact of alcohol as drug use.

[44] An additional ground of appeal is that the decision of the learned primary judge was unreasonable and against the weight of the evidence. This ground focused on his Honour's finding that there existed good prospects that the respondent would substantially comply with the requirements of a supervision order.[40] By reference to the evidence, the contention is that substantial compliance is not compliance sufficient to meet the *DPSO Act*.

[45] Detailed reference to the evidence was made including the following areas:

(a) the respondent's history of unwillingness or incapability of complying with supervision requirements;

(b) his ongoing antipathy towards the QCS;

(c) his defiance and the fact that his willingness to comply with supervision is heavily conditional upon him considering the supervision to be reasonable;

(d) the fact that the respondent has not stated his unconditional willingness to comply with the supervision requirements in any clinical context, but only in an affidavit prepared for the proceedings before the primary judge;

---

36 *Attorney-General for the State of Queensland v Fardon* [2013] QSC 264 (Transcript, 23-24 September 2013, Peter Lyons J) ("Transcript") 1-32.

37 Transcript 1-48.

38 Transcript 1-48.

39 Transcript 1-46.

40 Reasons at [94].

(e) his response to Ms Spencer, the case officer, was indicative of his capacity to remain hostile towards the QCS personnel, distrust them, and react in an inappropriate way.

[46] The contention is that the compliance with the supervision order is something which is critical to the assessment of protection of the community. Requirements of such an order are, it is said, the ones by which the court takes steps to ensure adequate protection of the community.

[47] It is further contended that the learned primary judge approached the question as one of whether the respondent would commit a serious sexual offence, rather than whether he would breach the supervision orders.[41] It was contended that to do so was to misunderstand the test to be applied under the *DPSO Act*, and the importance of the assumption of the respondent's compliance in each of the psychiatrists' assessment of risk.

[48] For reasons which will appear, when I review the evidence dealing with the risk of non-compliance with the supervision orders, I consider this ground to be arguable. The weight of that evidence, and in particular the impact of potential use of alcohol or drugs on the respondent's behaviour, is against, at least arguably, the conclusion reached by the learned primary judge, namely that there would good prospects of substantial compliance.

[49] The foregoing is sufficient to show that the applicant has arguable grounds to appeal the decision of the learned primary judge. That, of course, says nothing about whether those grounds might succeed.

Evidence as to risk of non-compliance with orders

[50] It is impractical on an interlocutory application such as this to fully deal with all relevant evidence. Therefore I intend to refer only to those parts which I consider to be significant to the resolution of the application. A full consideration will no doubt occur on the appeal.

[51] Evidence before the primary judge came from Mr Smith, a psychologist, and two psychiatrists, Dr Beech and Dr Grant. All three had something to say about the risk of non-compliance with the supervision orders.

[52] Mr Smith did not do an assessment of the risk of the respondent's reoffending in an overall sense. His report was in his capacity as a treater of the respondent and was based on the fact that he had been treating the respondent on a weekly basis, for between 40 to 50 times since June 2012.

[53] He referred to the fact that the respondent had a very entrenched attitude of distrust towards those in the QCS, manifesting itself as a distrust of the motives of those presenting options to him, and an inability to overcome that distrust.[42] He said that distrust could present complications in the context of the supervision order in the community, if the respondent were given directions that he felt were unreasonable. Elevated levels of anxiety would certainly increase the chances of a negative outcome in situations where the respondent may feel pressured, unsure or

---

41 Reasons at [90] and [91].

42 Transcript 1-12.

concerned.[43] His view was that the respondent was more likely to react negatively in such a situation or a state of heightened anxiety.[44] He referred to the respondent's hostile, offensive and bad reaction to a case manager, Ms Spencer, in an exchange in September 2013.[45] Mr Smith said that incident certainly demonstrates that there is still the potential for an explosive response by the respondent.[46]

[54] When asked about the respondent's improvement and whether, in moments of anxiety, he would be capable of not behaving in a way that disregarded the conditions, Mr Smith said that he could not unequivocally say that it would not occur or that the respondent had progressed to the point where that sort of response was a remote possibility. He added:

> "Certainly, it is likely that there will be situations in the future that will be of – objectively looking at it, of greater impact that what has occurred to trigger this recent outburst."[47]

He said the recent outburst was evidence that there are ongoing difficulties for the respondent, regardless of what improvement may have been made, and that there would always be some kind of triggering background circumstance.[48]

[55] As to dealing with life outside the prison system, Mr Smith was of the view that the transition would replace one set of stressors with another set of stressors, and he could not qualitatively say which was going to be more or less stressful. He could not say that the situation in the community was likely to cause less anxiety than had been caused to him in prison.[49] He went on to say that it was difficult to compare the stressors in prison with those outside on release. He thought that the initial media attention would be extremely anxiety provoking for the respondent, and was something about which the respondent had a significant amount of concern. He went on:

> "… his ability to cope with correctional processes, decision-making directions, that sort of thing is probably something that will continue to be an area of sensitivity for him, I imagine, for the duration of any order that he might be put on. That's not to say it's definite that there will be incidents and breaches but, certainly, I think that the risk and the underlying concerns will be there for quite some time whether he remains in custody or he is released to the precinct."[50]

[56] Dr Beech reported that the respondent was a high risk for sexual reoffending.[51] He thought a supervision order, and some mitigating factors including reduced hostility and abstinence from drugs and alcohol, would reduce the risk to moderate.[52]

---

43 Transcript 1-12.
44 Transcript 1-13.
45 Transcript 1-13.
46 Transcript 1-13.
47 Transcript 1-14.
48 Transcript 1-14.
49 Transcript 1-15.
50 Transcript 1-20.
51 Transcript 1-25.
52 Transcript 1-25.

[57] As to the question of whether the respondent would abide by a supervision order, Dr Beech was only prepared to say that the respondent was more likely than not to comply, but he would not be drawn further on that point. In answering that issue he referred to the fact that the respondent was a psychopathic man whose sexual offending had been rape, but he was now in his sixties and the risk of someone at that age committing further rapes is quite reduced when compared to someone in their thirties. He referred to the fact that the respondent has been a hostile person generally towards the QCS, and on previous supervision orders.[53] He referred to the respondent's history of exploding when faced with a refusal of permission and, describing it as the respondent "goes off into a negative huff and then takes off".[54] As to whether the respondent would react the same way under supervision he said:

> "Yes, I think there's a risk – there's certainly a risk that that's how he will behave. I think the risk is less now if he sees that he's got someone like Mr Smith that he can talk to about it. And it's someone like Mr Smith who can say to him, well, listen, if you keep going down this track then you're going to breach this order."[55]

He then drew the distinction between the respondent's coping with the regulated system in prison and being released into the community. As to that he said:

> "And so it's just, I think, that when he gets released into the community, well, it destabilises him to a large extent because that system that he's used to and in which he has become compliant has been removed and he's placed in another system where the rules are different and he has to negotiate again to his circumstances. … And he pushes the boundaries."[56]

[58] Referring to the incident with Ms Spencer, Dr Beech thought it showed that there was still a capacity for hostility towards the QCS, and a capacity for the respondent to distrust them. It showed he could still be hostile, lose his temper, show some distain, or be dismissive. He also said that if things were going imperfectly or wrong when he was in the community, the respondent might still react in the same explosive or impulsive way.[57]

[59] Dr Beech saw the greatest danger occurring if the respondent absconded and was at large, and therefore unsupervised. During that time he might turn to drugs or alcohol and said: "… certainly it seems to me from his offending, that it's in an intoxicated state that his most brutal offences have occurred."[58]

[60] The return to drugs and alcohol were described by Dr Beech in these terms:

> "The most worrying scenario would entail his return to substance use and then intoxication, which could presage the release of pent up resentment and anger, release his earlier beliefs about the use of force, and involve the violent sexual assault upon an unsuspecting woman. I consider the last scenario to be much less likely given his age, his abstinence, and his lack of general violence over the past decade."[59]

---

53 Transcript 1-26.
54 Transcript 1-27.
55 Transcript 1-27 to 1-28.
56 Transcript 1-28.
57 Transcript 1-30.
58 Transcript 1-32.
59 Dr Beech's Report, 14 July 2013, p 12.

Even though he considered that scenario to be "much less likely", nonetheless it is evident that it remained as a real risk if the respondent returned to the use of drugs or alcohol.

[61] Something similar was said by Dr Grant in his report. He said:

> "The risk of re-offending in Mr Fardon's case is a result of his severe antisocial personality disorder and also the risk of a return to substance abuse. He has not abused substances for many years in the prison environment and expresses the determination not to do so in the future. Whilst that remains the case then that particular risk factor would not be relevant."[60]

[62] The proviso in the last sentence is an important qualification, and underlines that the risk would be present if the respondent were to return to the use of drugs or alcohol.

[63] Dr Beech was questioned about whether his main concern was if the respondent entered into a relationship with a female, and things were to escalate. His response was: "Well, that's one of the things I'd be concerned about. My overall concern is his ability to abide by a supervision order."[61] He went on to expand that it was not just relationships he was concerned about, but alcohol, drugs, being generally at large, and associating with antisocial people. He did not, on the face of it, accept the proposition that those matters could be supervised by the QCS. When that question was asked using the words "supervised by Corrective Services", his response was: "Monitored, yes."[62]

[64] Dr Beech expressed his greatest concern in these terms:

> "The great concern to me would be that he's out there, like I said, forming relationships. Because I think … [i]f I were to predict how he would sexually offend I think it would be along the lines of his most recent charge rather than a return to wanton brutal rape … [t]hat he'd be in a relationship and then within that relationship he would coerce a woman into sexual behaviours.[63]

[65] Dr Grant added an overall risk assessment of the respondent in these terms:

> "Well, I've said that I think he has quite a moderate to high risk of some kind of offending in the community, but I think you are trying to separate the sexual re-offending, I'd say it's a moderate risk at this stage."[64]

[66] He expressed the view that supervision orders are most effective if the person subject to them recognises the necessity for that order and resolves to work within that order to rehabilitate themselves. Such orders are less helpful in terms of reoffending if the person subject to them fights against the order, does not want to be on it and tends to stretch the limits. He drew a distinction between those who recognise the necessity for such an order and those who are passive aggressive about it.[65] He said, in that respect:

---

60 Dr Grant's Report, 22 July 2013, p 11.
61 Transcript 1-34.
62 Transcript 1-34.
63 Transcript 1-34.
64 Transcript 1-40.
65 Transcript 1-41.

> "Well, if you look at Mr Fardon's track record, he hasn't embraced supervision and he's tended to breach orders, but is probably evolving to the point, maybe, of recognising it a bit more clearly that he needs to comply with an order if he's going to be able to get into the community and live some sort of life outside prison. I think he's yet to get the point where he'd embrace the order as a positive thing in his life."

At which point, counsel cross-examining Dr Grant asked, "Yes. So he doesn't seem yet to meet in any full or comprehensive way, what you say is the proviso to your opinion of low/moderate?" To which Dr Grant replied,

> "I don't think he's reached the optimal for, really, doing well on an order. Put it that way."

Counsel then asked, "Yes. But he's rather a long way from …?" And, Dr Grant replied,

> "Yes. I think so, yes. A fair way from it. He's getting towards the point where he may be recognising that he needs to live within that order, if he was to be able to live in the community."[66]

[67] The respondent's own evidence on this question was that he was not saying that he was "all the way there" in terms of accepting the conditions under the order, and that he would have to accept those conditions

> "I'm not saying I'm all the way there, I'm saying it's a learning process, it's a curve, but … I'm learning now that I have to abide by what they say …"[67]

[68] Referring to his assessment of responses given by the respondent Dr Grant agreed that there was very little reference in what the respondent had said to any acceptance by him that the order was there for good reason. He went on:

> "That's probably true. I think, on the other hand, some of the arguments that he makes are reasonable, in that people are placed in the Wacol precinct, quite often, and there is very little to do there. And so boredom was a huge thing for him in the early stages when he was first released. And I think his request to do some gardening, or whatever, were probably not unreasonable, from the point of view of, give me something to do. Keep me occupied and I won't be so stroppy, or something. And that didn't happen, or it did eventually happen because he just went ahead and did it. But there was that kind of obstacles being put in his way, as he saw it. And I think there's some realistic part of that. But on the other hand, the rest if [sic] his attitude was pretty negative about this whole supervision order."[68]

[69] Dr Grant was also of the view that the respondent was experiencing a deal of anxiety about his transition to the community and how he would deal with it. A key

---

66 Transcript 1-41.
67 Transcript 1-61.
68 Transcript 1-42.

to his ability to do so was his interaction with Mr Smith, though he was of the view that the respondent had excessive expectations for what Mr Smith was going to be able to do for him, in terms of dealing with the QCS. He thought that there was a greater likelihood of a supervision order not working out, and of the respondent breaching it, if Mr Smith was not able to assist "to the extent that he [the respondent] wants it" or if the relationship went sour and the respondent became disillusioned with Mr Smith.[69]

[70] Dr Grant was of the view that there was still "quite a high chance of breach of supervision" and that the major worry "would be returning to alcohol and drug abuse in the context of being unsupervised …".[70] Leaving drugs and alcohol aside, Dr Grant expressed the view that the respondent would face difficulty in complying with the order as follows:

> "It's going to be more his ability to accept the limits. Work with them, rather than trying to work around them, which is what he's tended to do in the past – has tried to work around the order rather than comply with it. See what he can get away with rather than see how he can work with it. And that's been an issue. And that's – and then the concern then is that the more he gets away with, the more he tests the – stretches the limits, that he'll then get into a relationship and something bad will happen. Something, you know, one of the situations which might lead to a more serious offence."[71]

[71] Dr Grant did not think that there was any primary risk of the respondent suddenly assaulting a child, but qualified it by saying: "… that would be only more likely if he was intoxicated and really off the rails".[72]

[72] Dr Grant answered a question whether taking drugs and alcohol would be a concern, with the answer: "Very much so, yes."[73] He was also questioned about the proposition that the risk of sexual offending in a relationship was something that was not going to happen over night, but would be a progressive thing. Dr Grant answered, "You would expect so, yes. … [u]nless he's intoxicated … [i]f he's intoxicated it's a whole new ball game because …".[74]

[73] Dr Grant's assessment of the respondent's potential for breaching the supervision orders was quite high. Asked whether that was in the context of more minor infringements, such as digging a vegetable garden when he was told he should not, Dr Grant's answer was:

> "Yes, and attempts at absconding and so on, those sorts of things. … Absconding. Attempting to abscond would be the kind of expected breaches would be and – or, you know, arguing with the supervisors, refusing to talk to the supervisors, refusing to accept a direction and those sort of things … would be the most likely early indications."[75]

---

69 Transcript 1-43 to 1-44.
70 Transcript 1-44.
71 Transcript 1-44 to 1-45.
72 Transcript 1-46.
73 Transcript 1-48.
74 Transcript 1-48.
75 Transcript 1-50.

Discussion

[74] In my view the passages quoted above demonstrate a real risk that the supervision orders will not be effective, even in the short time period between now and when the appeal is heard. Even though the risk of sexual reoffending can be identified in terms of the respondent's abuse of a relationship, each of the psychiatrists was quite clear that the impact of drugs and alcohol would likely change that scenario. Dr Beech referred to the fact that the most brutal offences committed by the respondent had been when he was intoxicated. That was part of his overall concern about the respondent's ability to abide a supervision order. Dr Grant was very much concerned that the risk of reoffending would be affected by alcohol or drugs. As he said, if the respondent was intoxicated, "it's a whole new ball game". He also said that the risk of absconding was part of the aspect taken into account by him in assessing the risk of reoffending as high.

[75] In my opinion those comments should be seen in the light of the evidence from each of the psychiatrists that the transition for community would be a period of high stress and anxiety for the respondent, and therefore a situation likely to provoke the feelings of hostility and defiance which he had exhibited in the past. Indeed, Dr Grant's view was that the anxiety, and therefore the negative attitude, would be at its greatest in the early stages of release. In my opinion that points to the fact that the initial few weeks of such release would be a time when the respondent was undergoing heightened stress and anxiety, leading to a greater probability of breaching the orders than, perhaps, later under his supervision.

[76] One risk acknowledged by each of the psychiatrists was that of absconding, and therefore being at large, and combining that with the intake of drugs or alcohol. In that situation a fair reading of their evidence is that there is a very high likelihood of reoffending. Dr Grant went so far as to say that the respondent might even be capable of assaulting a child "if he was intoxicated and really off the rails".

Factor of interim release

[77] One factor taken into account in assessing whether a stay should be granted is that of whether a prisoner in the position of the respondent should be released into the community and then a short time later returned in the event that an appeal should succeed. Muir JA took that factor into account in *Attorney-General for the State of Queensland v Fardon*.[76]

[78] In this case that factor applies. The appeal can be heard in about seven weeks.

[79] In this regard there is one matter which should be noted. On 4 October the orders of the primary judge became effective at 4.00 pm. An appeal and an application for a stay pending appeal had already been foreshadowed before that time. The court was available and ready to hear the application ahead of 4.00 pm on 4 October. However, the court was told that counsel for each of the applicant and respondent were engaged in other court matters and could not be available until after 4.30 pm. So it transpired. That had the consequence that the respondent was released at 4.00 pm, only to be taken into custody again when the interim stay was granted at about 6.00 pm. The undesirability of that sequence of events occurring is plain. Applications such as this should, if possible, be brought before the point at which a prisoner is actually released, so that if a stay is granted such disruption is avoided.

---

[76] *Attorney-General for the State of Queensland v Fardon* [2013] QCA 16 at p 6.

Disposition

[80] The matters set out above persuade me that:

(a) there are arguable grounds of appeal;

(b) between now and the hearing of the appeal there is a real risk of reoffending, or danger to the community even under the supervision orders;

(c) that risk is, at least in part, due to the respondent's evident failure to fully commit to, or submit to, the supervision regime;

(d) if that risk comes to pass the applicant will have lost the benefit of a successful appeal, and the community will not have had their protection ensured;

(e) given the appeal can be heard in about seven weeks the period during which the respondent will be held in detention will be relatively brief; the deprivation of his liberty does not weigh against the grant of a stay until the appeal is determined; and

(f) it is appropriate, balancing the considerations referred to in the authorities cited in paragraphs [15] to [23] above, that a stay of the orders be granted until the determination of the appeal.

[81] The orders of Peter Lyons J made on 4 October 2013 are stayed until the determination of the appeal in this matter.