DISTRICT COURT OF QUEENSLAND

CITATION:	*MNT v MEE* [2020] QDC 126
PARTIES:	**MNT** (Appellant) **v** **MEE** (Respondent)
FILE NO/S:	3759/19
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court at Ipswich
DELIVERED ON:	20 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2020
JUDGE:	Byrne QC DCJ
ORDER:	**1. Appeal dismissed.**
CATCHWORDS:	MAGISTRATES – APPEAL AND REVIEW – QUEENSLAND – APPEAL – where the appeal was brought pursuant to section 164(a) of the *Domestic and Family Violence Protection Act* 2012 (Qld) – where a Protection Order was made under section 37 of the *Domestic and Family Violence Protection Act* 2012 (Qld) – where the order was to be in force for a period of five years and contained 8 conditions – whether the Magistrate erred in fact and/or law by finding that the appellant had committed an act of domestic violence against the respondent – whether the Magistrate erred in law by failing to properly consider whether it was necessary or desirable to make a domestic violence order – whether the Magistrate erred in law by making an ouster order – whether the Magistrate erred in law by failing to provide adequate reasoning *Domestic and Family Violence Protection Act* 2012, s 4, s 8, s11, s 12, s 13, s 14, s 23, s 37, s 41C, s 56, s 57, s 63, s 64, s65, s 91, s 145, s 151, s 164, s168, s169 *Family Law Act* 1975 (Cth) *Uniform Civil Procedure Rule* 1999 (Qld) *ADH v AHL* [2017] QDC 103

Allesch v Maunz (2000) 203 CLR 172
Coal and Allied Operations Pty Ltd v AIRC (2000) 203 CLR 194
Fox v Percy (2003) 214 CLR 118
GKE v EUT [2014] QDC 248
House v The King (1936) 55 CLR 499
McDonald v Queensland Police Service [2018] 2 Qd R 612
MDE v MLG & Queensland Police Service [2015] QDC 151
R v Hooper; ex parte Cth DPP [2008] QCA 308
R v War Pensions Entitlement Tribunal; Ex parte Bott (1933) 50 CLR 228
Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679
Sudath v Health Care Complaints Commission [2012] NSWCA 171

COUNSEL: Mr S. Trewavas for the Appellant
Mr S. Kissick for the Respondent

SOLICITORS: Lexsolve Lawyers for the Appellant
Hall Payne Lawyers for the Respondent

1. The appellant appeals against the making of a Protection Order under section 37 of the *Domestic and Family Violence Protection Act 2012* (DFVP Act) by an acting Magistrate in the Ipswich Magistrates Court on 19 September 2019, and the dismissal on the same day of a cross-application for a Protection Order. However no grounds of appeal and no submissions were directed to the dismissal of the cross-application.

2. The order was ordered to be in force for a period of five years and contained a total of eight conditions, directed towards the appellant's dealings with the respondent and another named person. Those conditions can be distilled into the following broad summary:

    a) The appellant be of good behaviour towards both the respondent and the named person.

    b) The appellant must not be at or go within 50 metres of a nominated address ("the subject property"), effective from 10 October 2019. ("the ouster condition")

    c) The appellant must not contact or attempt to contact the respondent, directly or indirectly, subject to certain stated exceptions.

    d) The appellant must not approach within 50 metres of the respondent, subject to certain stated exception.

e) The appellant must not contact or attempt to contact the named person, directly or indirectly.

f) The appellant must not approach within 100 metres of the place of work or the residence of the named person.

Amended Grounds of Appeal

3. The amended grounds of appeal are in the following terms:

1. The learned Magistrate erred in fact and/or law in finding that the Appellant had committed an act of domestic violence against the Respondent, namely economic abuse, when such a finding was not open on the evidence.

   Particulars
   The learned Magistrate found:
   "I would be quite satisfied an act of domestic violence has occurred towards the respondent by the appellant.

   "Whereby a debt suddenly disappeared just prior to an application being made to the Federal Court for a property settlement. That certainly, in my view, could only be described as economic abuse."

   "Now as I have already indicated, I am quite satisfied that there is definitely economic abuse occurring on the part of the appellant against the respondent."

2. The learned Magistrate erred in law by failing to properly consider whether it was necessary or desirable to make a domestic violence order.

3. The learned Magistrate erred in law by making an ouster order on 19 September, 2019 as:
   a) The ouster order was in excess of jurisdiction as it was not the aggrieved' s usual place of residence;
   b) The learned Magistrate failed to take into account relevant considerations, namely the mandatory considerations in s 64(2) of the *Domestic and Family Violence Protection Act 2012* (Qld) **('the Act')**; and
   c) The learned Magistrate failed to take into account irrelevant considerations, namely "it is necessary for the protection of property"; and
   d) The learned Magistrate failed to take into account a mandatory consideration, namely the particular accommodation needs of the Respondent.

4. The learned Magistrate erred in law by failing to provide adequate reasons as to:
    a) what domestic violence had been proven by the Respondent on the balance of probabilities; and/or
    b) why it was necessary or desirable to make a domestic violence order in all of the circumstances and what evidence was relied on by the learned Magistrate to make that finding; and/or
    c) why the Court imposed an ouster condition pursuant to s64 of the Act, and what facts and circumstances were taken into account when deciding to make the ouster order."

4. Strictly, the reference to "ouster order" should read as "ouster condition". Nothing turns on this.

Nature of the Appeal

5. A person who is aggrieved by a decision to make a domestic violence order may appeal against the decision.[1] The making of a domestic violence order includes the making of a Protection Order.[2]

6. The appeal is to be decided on the evidence and proceedings before the Court below, unless the appellate court makes an order to the contrary.[3] There was no application in this appeal for an order to the contrary, and no such order was made.

7. Therefore, this appeal is in the nature of an appeal by re-hearing on the record. In an appeal of that nature it is necessary for me to consider the evidence and make up my own mind about the effect of it, particularly where any inferences are to be drawn from primary facts.[4] I must give recognition to the fact that the Magistrate had the advantage of seeing and hearing the witnesses in the evaluation of credit and in assessing the "feeling" of the case.[5] The onus is held by the appellant to show that there is some error in the decision under appeal.[6]

8. As the making of the Protection Order involves the exercise of a discretion, error of the kind explained in *House v The King*[7] will need to be demonstrated.

9. In the event that error is demonstrated, I must consider the whole of the evidence to determine whether the orders made are nonetheless justified.

---

1 Section 164(a) of the DFVP Act.
2 Section 23(2) of the DFVP Act.
3 Section 168 of the DFVP Act.
4 *Fox v Percy* (2003) 214 CLR 118 at [22]-[25]; *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679 at [43], [57]; *McDonald v Queensland Police Service* [2018] 2 Qd R 612 at [47].
5 *Fox v Percy* (2003) 214 CLR 118 at [22]; *McDonald v Queensland Police Service, ibid.*
6 *Allesch v Maunz* (2000) 203 CLR 172 at [23]; *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194, [14]; *McDonald v Queensland Police Service, ibid.*
7 (1936) 55 CLR 499 esp. at 505.

10. The powers of this Court in an appeal under the DFVP Act are found in section 169 of the DFVP Act. Under section 169(2), the decision of this Court is final and conclusive.

Legislative Framework

11. Section 4 of the DFVP Act sets out the principles for administering the Act. The primary principle is that the safety, protection and wellbeing of people who fear or experience domestic violence are paramount.[8] Other principles include that people who experience domestic violence should be treated with respect and disruption to their lives should be minimised[9] and that in circumstances in which there are conflicting allegations of domestic violence or indication that both person in a relationship are committing acts of violence, the person who is most in need of protection should be identified.[10]

12. "Domestic violence" is defined at section 8, and includes behaviour within a relevant relationship that is emotionally or psychologically abusive, economically abusive, behaviour that is threatening, coercive or in any other way controls or dominates the other person and cause him or her to fear for their safety or wellbeing.

13. The term "relevant relationship" is defined at sections 13 and 14, so far as is relevant to the present matter.

14. "Emotional or psychological abuse" is defined at section 11 as:

> ***"Emotional or psychological abuse*** means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person." (examples in the statute omitted)

15. "Economic abuse" is defined at section 12 as:

> *"**Economic abuse*** means behaviour by a person (the ***first person***) that is coercive, deceptive or unreasonably controls another person (the ***second person***), without the second person's consent—
>
> (a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
>
> (b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or a child, if the second person or the child is entirely or predominantly dependent on the first person for financial support to meet those living expenses.
>
> *Examples—*
>
> - coercing a person to relinquish control over assets and income
> - removing or keeping a person's property without the person's consent, or threatening to do so

---

[8] Section 4(1) of the DFVP Act.
[9] Section 4(2)(a) of the DFVP Act.
[10] Section 4(2)(e) of the DFVP Act.

- disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse
- without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses" (further statutory examples omitted)

16. Section 37 relevantly provides as follows:

> "**37 When court may make protection order**
> (1) A court may make a protection order against a person (the ***respondent***) for the benefit of another person (the ***aggrieved***) if the court is satisfied that—
> (a) a relevant relationship exists between the aggrieved and the respondent; and
> (b) the respondent has committed domestic violence against the aggrieved; and
> *Note—*
> See the examples of the type of behaviour that constitutes domestic violence in sections 8, 11 and 12, which define the terms *domestic violence*, *emotional or psychological abuse* and *economic abuse*.
> (c) the protection order is necessary or desirable to protect the aggrieved from domestic violence.
> (2) In deciding whether a protection order is necessary or desirable to protect the aggrieved from domestic violence—
> (a) the court must consider—
> (i) the principles mentioned in section 4; and …"

17. Section 41C(2) requires the Court to hear an application and cross-application together, unless it is necessary to her them separately for certain stated reasons.

18. Section 56 outlines the conditions that must be contained in a domestic violence order. Section 57 empowers the Court to impose any other condition, including an ouster condition, that the Court considers to be necessary in the circumstances and desirable in the interests of the aggrieved, any named person or the respondent to the application, subject to the principle of paramount importance at section 4(1).

19. Sections 63 and 64 provide the express power to make ouster conditions and the matters which must be considered by the Court. Section 65 allows for an ouster condition to take effect from a certain time.

20. In deciding any matter, the Court need only be satisfied on the balance of probabilities of the matter, and the rules of evidence do not apply.[11] Although not bound by the rules of evidence, it is well settled that the court's decision must derive from relevant,

[11] Section 145 of the DFVP Act.

reliable, and rationally probative evidence that tends logically to show the existence or non-existence of the facts in issue.[12]

Factual Background

21. In this judgment I will refer to the parties by their titles of appellant and respondent in the present appeal, so as to save confusion with the fact that each party was a respondent in the cross applications heard at first instance.

22. At the time of the hearing below, the appellant was aged 61 years and the respondent 63 years.

23. The respondent applied for a Protection Order on 13 April 2019. A temporary Protection Order was granted ex parte on 13 May 2019 on the basis of the statutory declaration forming part of the pro forma application document and a further explanatory affidavit which was undated.[13] The appellant filed a cross application on 16 April 2019. A temporary Protection Order was granted on 14 May 2019. The reason they were dealt with separately, and hence in breach of section 41C of the DFVP Act seems to have been through administrative error.

24. The final hearing was conducted on 19 September 2019 and in respect of both applications. Accordingly the earlier non-compliance with section 41C seems to be of no moment.

25. Evidence in chief of the witnesses at the final hearing was largely in the form of filed affidavit material. In that respect there were affidavits of the respondent dated 6 August 2019 and 12 September 2019, in addition to the pro forma application. There was also an affidavit of the aforementioned named person dated 2 May 2019.

26. In respect of the present appellant's case, there were two affidavits under his hand dated 8 August 2019 and 16 September 2019. There were also one affidavit each under the hand of the present appellant's two daughters and one son. The affidavit of one of the daughters[14] was inadvertently not marked as an exhibit and has not been provided to me. However it was obviously in the mind of the Magistrate and its contents can be gleaned from the submissions made. In the circumstances I do not consider its omission from the material before me to be fatal to my ability to determine this appeal.

27. The appellant and respondent had been in a de facto relationship. There is a dispute as to whether this commenced in about February 2015 or April 2016. It is common ground that the relationship dissolved in December 2018, although the parties continued to live on the same property.

---

[12] *Sudath v Health Care Complaints Commission* [2012] NSWCA 171; *R v War Pensions Entitlement Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 249-250, 256; *ADH v AHL* [2017] QDC 103, [46].

[13] Evidence at the final hearing suggests that it was signed on 13 May 2019.

[14] The one not called to testify.

28. Regardless of the fact that the relationship was not ongoing at the time of the filing of the respective applications, a relevant relationship for the purposes of the DFVP Act existed, whether a spousal relationship or a couple relationship, as both terms include relationships that existed in the past. There was no dispute at the final hearing that a relevant relationship existed.

29. At the commencement of the relationship, whenever that may have been, the present respondent owned two income earning properties; one a farm stay and the other a residential tenancy property. Each were in towns separate to each other and different from the town in which the subject property was located, although all were within driveable distance of each other. Apparently the appellant did not own any real estate but, according to the terms of a document entitled a "Deed of Agreement" dated 4 December 2009 executed by him and his son, he was entitled to live rent free with his son as consideration for a "loan" of $68,000 that the appellant had afforded to the son.

30. When the appellant and the respondent first met, the appellant did not have a registered builders licence, but he did acquire one on a date not identified in the evidence. He has asserted by affidavit that he has been a builder since 1989.

31. In or about October 2015 the appellant and respondent jointly purchased a block of land in a rural area ("the subject property"). It had on it a shed, and that was converted into cottage style accommodation with the intention to live in that whilst the appellant built a residence on the land. It is unclear to me on the evidence precisely how much progress had been made on the construction of the main dwelling, but this matters little. It is this property which is the subject of the ouster condition.

32. Both the appellant and respondent had an interest in horses, with the appellant in particular being a rider and trainer of horses for many years, probably since the early 1970's. Horse training facilities, including at least one stable, were constructed on the property, and the appellant asserted that he ran his horse training business from this property. The evidence established that a number of horses had been bought and were housed at the property at different times, although there is much dispute as to the ownership of the horses.

33. On 6 April 2019 a seminal incident occurred at the property, so far as is relevant to both applications. A 78 year old male friend of the respondent (who is the "named person" referred to earlier) attended the property in accordance with an arrangement that they would go out for dinner. There are differing accounts of what was initially said and done between them and the appellant, but whatever happened was sufficient for the respondent to activate a recording feature on her phone and record part of the conversation, which included that of an attending police officer, for the next 30 minutes.

34. The account of the respondent and the named person is to the effect that the appellant verbally attacked the named person as soon as he saw him on the property, and then later bumped or nudged him backwards to stop him entering the cottage on the

invitation of the respondent. The appellant's account does not concede that occurred and portrays a polite interchange and no physical contact.

35. The content of the recording is such that, as observed by the Magistrate, it is clear there was no love lost between the appellant and the respondent at that time.

36. The next day the respondent moved off the subject property and moved in with her son in Ipswich. She did not take all of her property with her and there was an ongoing dispute in the litigation as to what had been left behind, what was owned by her as opposed to being joint property, what she had been allowed to remove and what steps, if any, the appellant had taken to obstruct her removal of her property. She deposed to the effect that she felt uncomfortable living with her son and his family.

37. The respondent's application for a Protection Order was filed another 6 days later.

38. On 30 July 2019 the local council issued correspondence to both parties[15] to the effect that it had formed the view that "*a stable, an awning roof extension to the garage and a shed with laundry, toilet and shower have been constructed on the land without all necessary development permits*" and in effect requiring the parties to immediately cease using the buildings and to lodge an application for temporary occupation and also lodge any other development applications concerning the illegal works within 20 business days of the Council notice. Alternatively, it required the immediate cessation of use of the buildings and their demolition. The correspondence also mentioned the possibility of fines to a maximum of 4500 penalty units. It transpired in cross examination that the council's interest may have been piqued by an anonymous phone call from a male caller and also the (lately) admitted fact that the respondent had also enquired about the legality of the structures.

39. At the hearing the respondent was legally represented but the appellant was not. The respondent took no objection to be cross examined directly by the appellant.[16] Little of consequence emerged from the cross examination of the respondent apart from the matter of her enquiry with the council referred to above.

40. Cross examination of the appellant revealed that the $68,000 loan to the son had been forgiven in January 2019 without repayment or other compensation, notwithstanding the fact that the son's affidavit which had been adopted by the appellant, referred to it having been repaid. The appellant said that his son had indicated that he needed the money to buy a house in Toowoomba, and that was the reason it was forgiven. The dissolution of this "Deed of Agreement" meant, it was said, that the appellant could not expect to live with his son, and could not in any event as there was not enough space to do so in the new house.

41. It was also established that the appellant had first instructed solicitors to commence family law proceedings in February 2019, and from the terminology he used it seems

[15] Attachment JMcC-9 to the affidavit of the respondent filed 12 September 2019.
[16] *cf* section 151 of the DFVP Act.

he considered they had been commenced at that time. In fact, they had been filed the day before the hearing below. It was suggested to the appellant, but denied, that he was delaying any rectification of the subject property in order to maximise financial pressure on the present respondent.

42. Without dwelling on the minutiae of the cross examination of the appellant, it is sufficient to note that he had a tendency to be evasive, vague and argumentative when questioned about topics in which the cross examiner seemed to make headway.

43. The son was also very evasive when cross examined on the circumstances of the forgiveness of the loan debt. He otherwise confirmed that he was unable to house his father given the size of his house, and the two daughters' evidence was to the same effect in respect of their residences.

44. I have summarised some factual matters of substance in the context of the dispute. There were a large number of other allegations and cross allegations made. In my view it is unprofitable to consider these in detail. They can be broadly summarised as:

    a. Allegations and cross allegations of verbal abuse and threats of physical harm and damage to property.

    b. Allegations and cross allegations of misuse of and damage to property, whether personally or jointly owned.

    c. Allegations and cross allegations of financial control by one against the other.

    d. Allegations and cross allegations of misuse of joint finances.

    e. Allegations that the appellant deliberately harmed a horse or horses the respondent claimed to own, inferentially as a means of threatening and intimidating her.

    f. Allegations that the appellant often and deliberately would turn on lights and bang cupboard doors thereby depriving the respondent of the ability to get a good night's sleep.

    g. An allegation that on one occasion after they had separated but continued to live on the same property, the appellant got into bed with the respondent and would not leave when told to.

45. The state of the evidence on these topics was largely one of allegations and denial, or of allegation and acceptance of part of the allegation but an assertion of context to change the effect of the allegation.

46. There was a notable body of evidence of ongoing allegations of continuing misuse of the respondent's property since she left the subject property, and correspondence seeking the return of property which the appellant claimed he had complied with and the respondent denied he had.

The Magistrates Findings

47. In *ex tempore* reasons, the Magistrate correctly listed much of the legislative framework under which he was making his ruling.

48. Crucially to the outcome of the cross applications, the Magistrate made findings which were critical of the credibility and reliability of the appellant.[17]

49. He noted that there were cross allegations of control and economic abuse, but stated that it was hard to overlook the issue of the forgiveness of the debt "*just prior to an application to the Federal Court for a property settlement*." He considered that to be economic abuse and considered that he need not consider the matter any further.[18] He also concluded that it was obvious that there was no love lost between the parties, and the contents of the conversation of 6 Aril 2019 was evidence of that.[19]

50. He considered that the incident where the appellant got into the bed already occupied by the respondent bore "*all the hallmarks of being a controlling type of behaviour*.".[20]

51. He stated:

> "*I am quite satisfied that there is ample evidence before me, where on the balance of probabilities, I would be quite satisfied an act of domestic violence has occurred towards (the respondent) by (the appellant).*"

52. He considered that although there was evidence of domestic violence by the respondent towards the appellant, it was weak and he needed to decide whether the making of an order was necessary or desirable.[21]

53. He considered that the intervention by the council concerning the condition of the property as a matter for council and, although the respondent had some involvement, he did not consider that to be an act of domestic violence by her against the appellant. He noted the appellant's evidence that he was a registered builder and wondered firstly how the situation arose in the first place and secondly noted that rectification did not seem to be progressing. He accepted the respondent's submission that this amounted to controlling behaviour that was putting financial stress on the respondent.[22]

54. He found that there was "ample evidence" that an order is necessary so that both parties can put their lives back in order, and it was desirable to protect what interests

---

[17] Reasons page 6 lines 8 to 29.
[18] Reasons page 4 line 31 to page 5 line 2; page 5 lines 28 to 29.
[19] Reasons page 4 lines 31 to 38.
[20] Reasons page 5 lines 4 to 12.
[21] Reasons page 5 lines 16 to 26.
[22] Reasons page 5 line 36 to page 6 line 2.

both parties have in the property.[23] He later further explained the reasons for the ouster condition.[24]

The Parties' Contentions

55. I will now recite the arguments as they were developed in oral argument on the appeal, where they differ from the written outlines.

56. The appellant firstly contends, by reliance in part on the quoted passage from the *ex tempore* reasons reproduced at paragraph 51 herein, that the Magistrate found that only one act of domestic violence had occurred, and that was to do with the forgiveness of the $68,000 debt. He submits that the Magistrate did not reveal the reasons sufficiently to reach the conclusion he did. Further he contends that the forgiveness of the debt was something that could only be taken into account in the family law proceedings on a property settlement and, he says, "*relationship property settlements are a matter for the Federal Courts*"[25] and so shouldn't have been taken into account in the present matter, it being heard in the State courts.

57. In any event, it is said, the forgiveness of the debt could not be categorised as satisfying the two-stage test in section 12 of the Act in order to be classified as economically abusive, particularly as there is no evidence that the forgiveness of the debt denied the respondent any financial or economic autonomy, as required by the second stage of the test in that section.

58. Secondly, it is submitted that the Magistrate failed to have proper regard to the need for a Protection Order based on the future need for protection, relying on statements in *GKE v EUT*[26] and *MDE v MLG & Queensland Police Service*.[27] It is said that the Magistrate's reliance on protecting the respective interests in the property intruded into the exclusive jurisdiction of the Federal Court granted by virtue of the *Family Law Act*, and had he applied the appropriate legal test, he would have concluded that the making of the order against the appellant was not necessary or desirable.

59. Thirdly, it was submitted that the Magistrate had failed to properly consider the requirements of section 64 of the Act, and in particular the requirements listed at subsection (1). It is was said that relevant features were that the order could only be made in relation to the aggrieved's usual place of residence and it was not open to find that the subject property was the respondent's usual place of residence given that she had left the address at the time of the hearing, had filed the application nominating a different address and because the Magistrate should have accepted the appellant's evidence to the effect that she slept at the address only a few days a week. It was further submitted that the Magistrate failed to take into account the evidence as to the

---

[23] Reasons page 6 lines 4 to 6.
[24] Reasons page 9 lines 15 to 33.
[25] Transcript of appeal hearing 21 February 2020 page 1-12 lines 4 to 9.
[26] [2014] QDC 248, [32]-[33] per McGill SC DCJ.
[27] [2015] QDC 151, [55] per Morzone QC DCJ

respective availability of other accommodation for each of the parties, and further that the council intervention meant no-one could live there.

60. In the alternative, it was said that the protection of property was not a relevant consideration when considering whether to impose an ouster condition and so the Magistrate had taken into account an irrelevant consideration, and further that the division of de facto property is exclusively within the jurisdiction of the Federal Court under the *Family Law Act*.

61. Further, it was submitted that if the appellant succeeded on the first or second ground of appeal, the ouster condition necessarily fell away as it was not a free standing order; it could only be made as a condition of the Protection Order itself.

62. Finally the appellant contended that the Magistrate failed to give adequate reasons for his rulings. In oral submissions on the appeal it was clarified that this was more of a complaint arising from each of the other grounds rather than a stand-alone complaint, even though it was drafted as a separate ground of appeal.[28]

63. Although the Notice of Appeal stated there was an appeal against the dismissal of the appellant's cross-application for a domestic violence order, no arguments were advanced to support this, either in writing or orally.

64. The respondent submitted that the Magistrate had in fact made findings of both economic abuse and emotional or psychological abuse and as such the findings were that there were multiple acts of domestic abuse. The use of the singular rather than plural in the passage reproduced in paragraph 51 of this judgment should be seen as simply an infelicitous expression. The economic abuse, it is said, comprised both the forgiveness of the debt and his running down of the condition of the property.

65. The respondent argues that, given the actual findings made and the way they were expressed, it was implicit that the Magistrate found that there was real risk of future domestic violence and so it was necessary or desirable that the Protection Order be made. It was submitted that the appellant sought to downplay the extent of the domestic violence and also sought to sanitise the circumstances at the time of the hearing.

66. The respondent accepts the authority of the decisions in *GKE v EUT* and *MDE v MLG & Queensland Police Service*, but submits that they do not preclude the making of the Protection Order in the circumstances of this matter. It was that the affairs of the parties were not finalised at the time of the hearing below, and still are not and so, it is said, the risk continues.

67. In summary, it is said that given the factual findings and the findings of credit adverse to the appellant and the fact there were (and are) ongoing property and financial

[28] Transcript of appeal hearing 21 February 2020 page 1-7 lines 26 to 31.

disputes between the parties, the Magistrate was entitled to find that the making of the order was necessary and desirable.

68. As to the ouster condition, the respondent accepted that the condition had been made under section 64 of the Act (as opposed to section 63) and noted that section 64(1)(c) of the Act expressly contemplates that a party in whose favour the condition was made might need to return to the subject property. It was emphasised that the respondent's evidence was that she only left because she was in fear and it would be unjust to disqualify a person from the occupation of a property if the circumstances were that person left for their own safety. It was submitted that the fact the respondent had moved back into the property once the appellant had been ousted was some evidence supporting her version that she had always considered the premises to be her usual place of residence.[29]

69. It was submitted that the Magistrate justified the making of the ouster condition not solely on the basis of protection of the property, but that it was one of a number of factors. Further the council intervention was said to be a red herring; there was nothing in the council intervention that precluded the respondent from living on the property, only from using the unlawful improvements until they are approved.

Consideration

Ground 1: Did the Magistrate err in deciding that domestic violence was occasioned by the appellant on the respondent?

70. In the course of his reasons the Magistrate reproduced section 12 of the Act. It provides a conclusive definition of the term "economic abuse" for the purposes of the Act. Unfortunately the Magistrate did not, in the course of his *ex tempore* reasons relate the evidence to the relevant aspects of the definition. Had he done so, he would have realised that there is no or insufficient evidence that the respondent was denied the economic or financial autonomy she would have had but for the forgiveness of the debt. Nor is there evidence that the forgiveness of the debt resulted in the withholding of financial support necessary for meeting the respondent's living expenses.

71. In fact the evidence, if anything, tended to show that the respondent provided financial support for the appellant, regardless of the evidence of use of the respondent's funds by the appellant and the unilateral forgiveness of the debt. The evidence that was adduced at the hearing would satisfy an everyday understanding of the term "economic abuse", but the specific definition limits the meaning of the term.

[29] Transcript of appeal hearing 21 February 2020 page 1-28 lines 10 to 25.

72. I accept that there is a material error in the reasons of the Magistrate, and it falls to me to consider the matter afresh, based on the evidence adduced at the hearing below. The appellant now accepts this is the correct approach.[30]

73. As I have noted, the Magistrate's reasons were delivered *ex tempore*. I am conscious that on an appeal from such a judgment imprecision in the use of language might have less significance than it might otherwise be thought to have. [31] Bearing that in mind, and on a reading of the whole of the Magistrate's findings, I accept that his Honour based his finding of the existence of domestic violence on more than merely a finding of a singular act of domestic violence, being economic abuse constituted by the one act of the unilateral forgiveness of the debt. Having considered all the evidence, I too find that there are other bases to be satisfied to the required standard that domestic violence was perpetrated by the appellant on the respondent.

74. In considering the evidence, I have taken into account the adverse credit finding against the appellant made by the Magistrate. In my view, it was a finding that was open based on the material before me. I am also mindful that he had the advantage of seeing and hearing the appellant when he testified. This finding is crucial to the fact finding process, both at first instance and on appeal.

75. Although I am not satisfied that the incident involving the unilateral forgiveness of the debt owed by the appellant's son amounts to economic abuse as defined, I do consider that it comprises an aspect of overall controlling behaviour or emotional or psychological abuse, in the relevant senses. It is, in my view, not sensible in light of the timing and sequence of events to reach any other conclusion. The forgiveness of the debt the month before the appellant spoke to solicitors about family law proceedings suggests on the face of it that it was deliberate attempt to remove the asset (i.e. the debt owing) from the property pool which would inevitably be the subject of focus in the family law proceedings. That neither the appellant nor his son could satisfactorily explain how and why that occurred supports that view.

76. The appellant's submission that the forgiveness of the debt was a matter that could not be considered by the Magistrate cannot be accepted. The deficiency in the argument is demonstrated by recalling the oral submission that *"relationship property settlements are a matter for the Federal Courts*" alone. That submission can be accepted, at least as it relates to the facts of the present matter. But the Magistrate was not dealing with a relationship property settlement. He was determining if he was satisfied that certain acts, including the unilateral forgiveness of the debt, amounted to domestic violence. He was not encroaching into the issue presumably joined in the family law proceedings; i.e. a determination of how much, if any, of that debt should be considered to be part of the joint property, nor how much, if any, should be attributed as a debt owing to the respondent on a property division. The Magistrate was deciding

---

[30] Reasons page 6 lines 10 to 28.

[31] *R v Hooper; ex parte Cth DPP* [2008] QCA 308, [23].

a matter prescribed by State law, and considering an issue that falls within his jurisdiction. The submission must be rejected.

77. I am satisfied, as was the Magistrate, that the evidence concerning the manner in which the respondent's property was dealt with amounts to controlling behaviour[32] in the overall context of the relationship, and that contributed to the respondent's fear for her own wellbeing and safety. In addition to the express findings of the Magistrate, I also include the removal of the go-cart and placing it in the weather, the respondent being told what chairs she could sit on and the moving of her clothing and other property from the residence to variously the garage and into the weather in this class of evidence. It is noteworthy that at least some of that behaviour continued after the respondent had left the premises and was seeking the return of property pursuant to the terms of the Temporary Protection Order. The appellant's denials can be rejected given the findings as to credit and the ongoing correspondence issued by the respondent's solicitors in an effort to allow her to obtain all her property supporting her account.

78. The handling of the go-cart occurred on the same day as the removal of the respondent's clothing and other belongings and leaving them in the garage or in the weather. That all occurred on 2 April 2019. The respondent has reported that she was counselled by her doctor the next day, where she broke down and was referred to a domestic violence support service.[33] In my view there are aspects of the incident of 6 April 2019 which make it likely that the respondent has accurately reported these events of 2 April 2019, and they will be considered shortly.

79. I am satisfied, as was the Magistrate, that the incident involving the appellant getting into the bed already occupied by the respondent, at a time after they had commenced living apart on the one property, forms part of that controlling behaviour as described.

80. The respondent deposed to an incident involving the appellant applying unnecessary force to a horse.[34] The appellant denied any such incident occurred, but I accept the account of the respondent, however I am not satisfied that this was violence that was directed at the respondent. That said, I am satisfied that it demonstrated a willingness to inflict unnecessary violence and a lack of respect for the respondent's views and wishes.

81. I too am satisfied, as was the Magistrate, that the condition of the house and the lack of approvals for work done was another aspect of the appellant's controlling behaviour towards the respondent.

---

[32] Section 8(1)(f) of the DFVP Act.

[33] Affidavit of respondent dated 1 August 2019 at page 13 paragraph 70.

[34] The incident is deposed to in the respondent's affidavit dated 1 August 2019 at pages 10-11. The paragraphs are numbered 50 – 51, but there is a misnumbering of the paragraphs involved.

82. The Magistrate referred in his reasons to the council having "*effectively, condemned the property*".[35] In my view, that overstates the evidence. The effect of the notice is summarised in paragraph 38 herein. It is consistent with the respondent's submission in response to the complaints concerning the ouster condition that there was nothing that precluded the respondent from living on the property, only from using the unlawful improvements until they are approved.[36] I was informed at the hearing that the respondent moved back onto the property once the appellant had left it.

83. Nonetheless, I am satisfied that the admitted failure by the appellant to attend in any meaningful way to the rectification in the roughly two months between the council notice and the hearing[37] (i.e. more than the 20 business days allowed by the Council notice) is both domestic violence in that it is controlling behaviour which limited the lawful use of the premises and potentially affected the asset base for the intended family law proceedings, and evidences the nature of the previous relationship involving controlling behaviour by the appellant towards the respondent.

84. True it is that at least one of the two complaints or enquiries about the legality of the structures on the land came from the respondent after she had commenced her application for a Protection Order. I have no difficulty in accepting that she did this in the hope of gaining some forensic advantage in that application, but I am unable to determine if she realised that doing so may have resulted in the council issuing the notices that it did. Notably the evidence establishes that the notices were not issued directly as a result of those complaints or enquiries, but were after the appellant was interviewed by a council officer on the property. In my view her approach to council may demonstrate a determination to take whatever forensic advantage she could in the litigation, but it does not necessarily detract from her credibility. I also agree with the Magistrate that it does not amount to an act of domestic violence.

85. I am also satisfied that the events of 6 April 2019 occurred substantially as recounted by the respondent and the named person, even though he denied critical parts of that account, and that this reflects an aspect of the appellant's controlling behaviour towards the respondent.

86. The affidavit of the named person bears obvious hallmarks of overt bias against the appellant and this is also borne out in the recording of that date. Were it standing alone I would likely not have accepted it. However the essence of his account is substantially consistent with the account of the respondent, which I accept.

87. I think it is telling that the appellant approached the respondent and the named person shortly after the latter arrived at the property demanding to know who he was and ordered him off the property. The named person was clearly in the company of the respondent who was both entitled to be on the property and to have guests there. I

---

[35] Reasons page 5 lines 36 to 37.
[36] See paragraph 38 herein.
[37] Transcript of hearing at first instance attached to the affidavit of Brian Michael O'Shea page 1-41 lines 12 to 37.

accept that the sequelae of that confrontation, involved an unnecessary and unlawful assault on the named person, although both written accounts seem to me to be slightly embellished as to the extent of that assault. Nonetheless, in my view the appellant's actions that day are demonstrative of his controlling and at times irrational behaviour.

88. I think it is also telling that the respondent thought to record part of the conversation that day. It is consistent with her account that she had been told to do that by her doctor on 3 April 2020 and subsequently by the domestic violence counsellor. That she did so supports aspects of her account, at least on 3 April 2020, but is also in my view consistent with the actions of someone who had been suffering at the hands of a controlling partner for some time as she has alleged.

89. I have listened to that recording, as well as read the transcript.[38] It does not contain any admissions, although the appellant makes a number of accusations against and about the respondent which were not proven, and in most cases not sought to be proven, in the hearing below. The recording is clear and cogent evidence of the extent of animosity between the parties. That animosity appears to be deeply entrenched and flowed both ways, although the sense of it is that the respondent and the named person were content to move away from the argument but the appellant wanted to keep them engaged in it.

90. In my view, each of the instances of controlling behaviour collectively amount to emotional or psychological abuse, as defined.

91. There are a myriad of lesser complaints contained within the respondent's affidavits. They need not be considered in detail as the matters I have outlined are sufficient to find that domestic violence has been occasioned by the appellant on the respondent.

92. Error having already been established, grounds 2 to 4 inclusive need not be specifically considered and, as noted above, ground 4 was not pursued in oral submissions. However, it is necessary that as part of the independent exercise of my discretion I consider whether it is necessary or desirable that a protection order be made[39] and, if so, the conditions of the order.[40] The grounds pursued and the submissions made on the appeal will assist with determining what conditions are in dispute, although I must still consider what conditions, if any, ought to be included in protection order if one is made.

93. It can be accepted that the observations of McGill SC DCJ in *GKE v EUT*[41] and Morzone QC DCJ in *MDE v MLG & Queensland Police Service*[42] are accurate summaries of the approach to be taken under section 37 of the Act. In particular the

---

38 The recoding is actually audio visual, but the visual component shows nothing of any interest at all. The phone was obviously being used as an audio recorder only.
39 Section 37 of the DFVP Act.
40 See especially sections 56 and 57 of the DFVP Act.
41 [2014] QDC 248, [32]-[33].
42 [2015] QDC 151, [55].

cited passage from *MDE v MLG* contains a helpful summary of features that may assist with the relevant determinations.

94. Bearing in mind those matters, and in particular the mandatory requirements of section 37 (2)(a) of the Act in light of the findings I have made under the first ground of appeal, I am satisfied that it is both necessary and desirable that a Protection Order be made in favour of the respondent.

95. The recording of 6 April 2019 is a compelling piece of evidence to establish the extent of the bilateral animosity existing in the relationship to that time. It is not only what is said, but the manner of expression which tells compellingly in favour of the grant of the Order. It was of such a level that it is likely to linger for considerable time. There are then the ongoing acts by the appellant which amount to threatening or controlling behaviour and so are acts of domestic violence after the parties separate on that date.

96. Given the extent of the animosity evident in the material, the conduct of family law proceedings is unlikely to reduce the likelihood that the animosity will remain. I was told without demur that the family law proceedings had not reached the point of a conciliation conference at the time of the appeal hearing and it was expected that there was a long way to go in them, with little present prospect of a settlement being reached between the parties.[43]

97. I do not accept the oral submission by the appellant to the effect that as the parties are mature aged people who have now separated, it can be assumed that they will not misconduct themselves.[44] There are two points to be made about that. First, as far as I am aware, they are only separated because of the protection order, and the ouster condition in particular. Second, the history of their conduct tells against any such conclusion. It is true that there are no allegations of any notable instances of physical violence, and whilst that is a consideration, it is not a prerequisite to the making of an order that physical violence be inflicted.

98. In my view, it all leads to the conclusion that a Protection Order is, in the circumstances of this matter, both necessary and desirable. Doing the best that I can to look into the future, and bearing in mind the evidence from the hearing below and the findings I have made, I consider that the period of 5 years imposed by the Magistrate was appropriate. It of course remains open to either party to apply for a variation of that condition if circumstances relevantly change.[45]

99. That then leads to a consideration of what conditions should be imposed, particularly but not limited to the ouster condition.

---

[43] Transcript of appeal hearing 21 February 2020 page 1-30 lines 8 to 17.
[44] Transcript of appeal hearing 21 February 2020 page 1-18 lines 1 to 16.
[45] Section 91 of the DFVP Act.

100. The appellant has not made specific complaint of any of the conditions, other than the ouster condition. Leaving that latter condition to one side for the moment, none of the conditions appear to be unwarranted in light of the findings I have made, and I will not interfere with or change any of them.

101. Specific complaint was made about the ouster condition, and accordingly it warrants consideration in more detail.

102. Section 57(2) of the Act provides that I "*must consider whether to impose an ouster condition on the respondent in relation to the aggrieved's usual place of residence.*" The appellant's first point is that there is no, or at least insufficient, acceptable evidence that the subject property was the respondent's usual place of residence. He in particular relies on the appellant's evidence below that the respondent lived only a couple of days a week at the subject property, that she usually lived at one of her investment properties and that at the time the respondent lodged the application for the Protection order, and at all times during that litigation, she nominated her address as a different address again.

103. It is common ground that the subject property was jointly purchased by the appellant and the respondent in or about October 2015. Also as noted above, at that time the respondent also had two income earning investment properties. She moved from the subject property immediately after the incident on 6 April 2019 and then moved in with her son. She deposed that she considered this arrangement to be a short term proposition, that she did not like having to live with him and that it was done because she feared for her own safety. I was also informed without complaint that she moved back into the subject property once the appellant had left in obedience to the ouster condition.

104. Consistently with other findings of fact where the evidence of the appellant and respondent are in conflict, I prefer the evidence of the respondent. This is another example of the importance of the credit finding made against the appellant. Further, the fact that she moved in with her son rather than into one of the investment properties tends to suggest she did not often live at one of them before that time. I therefore accept that the respondent lived on the property most of the time, apart from a night or perhaps two per week when she was tending to matters at the farm stay property.

105. The respondent has deposed to the fact that she left the property through fear for her own well-being. The appellant's Counsel sensibly conceded on the appeal hearing that a place cannot cease to be a person's usual place of residence simply because he or she flees for their own safety, as I accept occurred here. That she fled for her safety is consistent with the fact that she recorded the conversation of 6 April 2019 and with the findings of fact I have made as to other episodes of domestic violence. The fact that the respondent returned to the subject property once the appellant had vacated it

is consistent with the proposition that she had only moved out through fear arising from further direct contact with the appellant.

106. It therefore follows that the nomination of a different address in the course of litigation was a consequence of her fleeing, and does not evidence an abandonment of the subject residence as being her usual place of residence. There is nothing in the words or context of the Act which precludes two people from having the same usual place of residence, even when one has fled the premises. In fact the express wording of section 64(1)(c) of the DFVP Act expressly recognises that an ouster order may be made in order to allow a party to "*return, to live in the residence*".

107. For those reasons I accept the subject property was, in the relevant sense, the respondent's usual place of residence.

108. The Act provides two different powers for the imposition of an ouster condition, namely sections 63 and 64. Some of the conditions which were imposed, those that I have already indicated I will not interfere with, appear to have been made under section 63. The expressly named ouster condition imposed by the Magistrate was, according to its terms, clearly enough made under section 64 and it is the appropriateness of a condition under that section that I will consider.

109. In light of the principles by which the Act is to be administered in section 4, the findings I have made, especially the extent of the animosity, favour but in my view are not necessarily determinative in favour of making an ouster condition. There are some further matters which should be considered.

110. First, it is submitted by the appellant that the evidence established that he had no alternative place of residence whereas the respondent had two other places at which she could live, or three if her son's address were included in the list. At face value, that is a correct statement of fact. However, the two properties owned by the respondent were income yielding investment properties, and to occupy one would upset that income stream. Further, the evidence was largely uncontested that she considered her son's residence to be a temporary measure, and one that she did not enjoy using. All these features, including the then lack of a readily available alternative residence for the appellant, are relevant features for the balancing exercise involved in the discretion involved in the consideration of an ouster condition but none are in themselves determinative.

111. Secondly, it was submitted that the subject premises could not be the usual place of residence as the council notice precluded the premises being used as a residence for any person. The true effect of the notice has been summarised at paragraph 38 herein. On the correct understanding of what the notice required, the submission must be rejected.

112. Thirdly, it is submitted that the Magistrate erred in considering that a relevant factor was the protection of the property. Although I am not considering whether that was an

error in order to determine if my discretion should be exercised afresh, I do not consider it was erroneous.

113. Section 64(1) of the Act requires that the decision maker must have regard to the matters in section 57 as well as the matters listed in section 64(1). It is a mandatory requirement, but the list is not conclusive. I accept that the protection of property is not a matter listed at section 64(1) but, because it is not a conclusive list of the only matters that can be considered to the exclusion of all other matters, it was not necessarily an error to have regard to that issue.

114. Further, section 57 must be considered. In the present context, section 57 requires that regard must be had to whether the making of an ouster condition is at least desirable, if not necessary, to protect the respondent from domestic violence. Section 8(2)(c) of the Act includes in the definition of domestic violence conduct which damages or threatens to damage the property of another. Hence it was not an error to consider that the "*protection of the property*" was a relevant consideration. In the fresh exercise of my discretion, I too consider it to be a relevant consideration and one that strongly favours the making of the ouster condition in the particular circumstances of this case.

115. The appellant again contends that the issue of how any property in the relationship was handled is not a relevant consideration because "*issues as to the division of de-facto property are exclusively within the jurisdiction of the Federal Court under the Family Law Act (Cth).*"[46] The submission must be rejected for reasons analogous to the reasons why the forgiveness of the debt fell within the exclusive jurisdiction of the Federal Courts.

116. The above cited submission is correct insofar as it goes. But the ouster condition has no effect on a division of the property. It is concerned only with access to the land, not the ownership to any or all of it. Whilst any such condition may be considered by the Federal Court, it is not necessarily bound by it and it will not preclude the sale of the property if necessary. If the Federal Court were to make an order inconsistent with it, the ouster condition can be amended.[47]

117. I note that the condition, as made by the Magistrate, included a return condition,[48] and as a result it did not take effect for a number of weeks after the hearing below to allow the appellant to remove his property. Although that condition would not be necessary if any order I make were to take effect from the present day, that is not the effect of any such order. I must consider what the appropriate order is as though I were making it at the time of the original hearing. It might be different if new or fresh evidence were adduced on the appeal,[49] but there has not. There is no encroachment into the exclusive jurisdiction of the Federal Court by the making of the ouster condition.

---

[46] Appellant's outline of submissions, paragraph 55.
[47] Section 91 of the DFVP Act.
[48] Section 65 of the DFVP Act.
[49] Section 164(2) of the DFVP Act.

118. The return condition was made for the benefit of the appellant. It has not been the subject of complaint on the appeal and appears to me to be an appropriate exercise of discretion in all the circumstances.

119. Balancing all competing features, I consider that it is appropriate to order an ouster condition in the terms in which it was made by the Magistrate.

Conclusion

120. Although I have found that the Magistrate erred in taking into account an irrelevant consideration in the finding of domestic violence, I have concluded that the Protection Order should have been made, albeit for reasons that differ from that of the Magistrate, and that the appropriate conditions are those that were imposed by the Magistrate. This is a situation analogous to the position where a court imposing sentence for a criminal offence has erred, but the appellate court concludes, as a result of exercising its sentencing discretion afresh, that the same sentence as that imposed should be imposed. Accordingly the appropriate order is that stated by the plurality in *Kentwell v The Queen*,[50] and the appeal will be dismissed.

Orders

121. The orders I make are as follows:

1. Appeal dismissed.

[50] (2014) 252 CLR 601, [42].