DISTRICT COURT OF QUEENSLAND

CITATION:	*PRH v LPL & Anor* [2021] QDC 17
PARTIES:	**PRH** (Appellant) **v** **LPL** (First Respondent) And **CBW** (Second Respondent)
FILE NO:	4040/18
DIVISION:	District Court
PROCEEDING:	Hearing of Appeal
ORIGINATING COURT:	Magistrates Court at Brisbane
DELIVERED ON:	3 February 2021 (*ex-tempore)*
DELIVERED AT:	Brisbane
HEARING DATES:	2 and 3 February 2021 (substantive hearing on 23 and 24 July 2018)
JUDGE:	RS Jones DCJ
ORDER:	**1. That the original order be varied to the extent that the distance under paragraph 3 be reduced from 500 m to 200 m** **2. That the term of the ouster clause be reduced to six months ending on 5 August 2021** **3. That the appeal otherwise be dismissed, subject to the above variations**
COUNSEL:	Mr S Keim SC for the appellant The first respondent appeared on their own behalf Mr P McCafferty QC for the second respondent
SOLICITORS:	PVH Law for the appellant The first respondent appeared on their own behalf QPS Legal Unit for the second respondent

1. HIS HONOUR: I propose to dispose of this appeal now. I will give my reasons on an ex tempore basis and we will reserve the right to tidy them up and add cases if I consider it desirable before publication. I am concerned here with an appeal against a decision made by the Magistrate Court on 17 October 2018. The learned Magistrate hearing the matter made a number of orders including orders as to costs in a domestic violence proceeding.

2. The orders made were substantially to this effect: that the Appellant was prohibited from remaining at, entering or attempting to enter, approaching within 500 metres of the aggrieved's usual place of residence which is described as being located at the Sunshine Coast. The Appellant here being the Respondent in the Court below, was also prohibited from following or approaching within 500 metres of the aggrieved when the aggrieved is at any place.

3. There was also a named person. Orders were made in respect of her which also included that the Appellant be prohibited from remaining at, entering or attempting to enter, approaching to within 200 metres of the premises where the named person usually lived, worked or frequented. I will refer to that part of the order again in a moment. It was a condition of the domestic violence order that the first Respondent, in effect, have sole right of occupancy of that premises at Buddina for a period of seven years. There are, as I said, also some costs orders that were made.

4. On the 12th of November 2018, the Appellant filed his notice of appeal. The first 15 grounds of that notice of appeal really centred around the Court below denying procedural fairness to the Appellant by refusing to permit evidence to be led and wrongfully accepting, on the other hand, false and misleading evidence given by the first Respondent. There was also, originally, allegations of actual bias but that was abandoned. However, the submissions for the grounds of appeal concerned with perceived bias were maintained with. Thereafter, there were a number of submissions made in respect of the costs orders. In the proceedings below, the learned Magistrate made a number of adverse findings against the Appellant. Her Honour also made a number of adverse comments. Her Honour clearly had a dim view of the Appellant to the extent that Her Honour added the named person to the domestic violence orders in circumstances where no application was made for that to occur and, indeed, as I understand, the named person had to subsequently approach the Court to have those orders varied to have her name removed.

5. Given the learned Magistrate's failure to allow the Appellant to place significant portions of evidence before the Court, there has clearly been, as the Appellant contends, a denial of natural justice.

6. As much was accepted by Mr McCafferty QC who appeared for the second Respondent. I would also observe here that one could readily accept the submissions made going to perceived bias but having regard to the natural justice point, it is unnecessary to express a final view about the matter.

7. Mr Keim, as senior counsel for the Appellant, did not resile from his primary position which was to the effect that the appeal ought to be allowed and all of the orders and conditions imposed by the Court below be set aside forthwith. His fallback position, however, was that the matter be remitted back to the Court below to be heard and determined by a Magistrate other than the one who heard the matter initially. However, Mr Keim, nonetheless, urged me to make findings of fact based on the evidence or, perhaps, to be more precise on the lack of the evidence, supporting the finding that the first Respondent was not entitled to occupy the Sunshine Coast residence, in effect, for any longer and for me to make orders to that effect. Any such orders would, of course, be binding on the parties and I am unable to accept, as seemed to be suggested by Mr Keim, that those orders could, nonetheless, be varied or set aside in any proceeding remitted back to the court below.

8. The first Respondent, for reasons it is unnecessary to go into, also agreed that the matter ought to be remitted. However, she did not accept that Her Honour had made any errors of law. Mr McCafferty initially contended that the most appropriate approach would be to allow the appeal and remit the matter back to the Magistrates Court to be heard by another Magistrate and that I make temporary protection orders that would stand until the matter was finalised in the Court below. That, of course, would include the ouster condition. That could take months. As the first Respondent acknowledged, it could take up to a year to resolve.

9. This matter, including this appeal, has already been dragging on now for in excess of three years. Notwithstanding what seemed to be a united front in respect of remittal, I can see no benefit in remitting the matter and prolonging the agony. I am satisfied that I am able, on the material before me, to determine the outcome of this appeal. Her Honour's reasoning in respect of the domestic violence orders are set out in particular at paragraphs 32 to 37 and also paragraph 59 of her reasons for judgment. I do not intend to repeat them now. They are well-known to all present in the courtroom.

10. At paragraphs 135 and 139, her Honour made the following observations. In paragraph 135, her Honour said:

> *I note the sensible concession by counsel for the Respondent, Mr Longhurst, that the first and second limb of the requirements in section 37 of the DFVPA for the making of an order are satisfied. Given the Respondent's evidence in cross-examination, it was accepted that the incident in June 2016 was a terrible incident resulting in a large gash to the aggrieved's head and that it clearly constituted domestic violence. I note that in the Appellant's response to cross-examination concerning the June 2016 assault on two occasions, he used words to suggest that he was provoked and inflamed by the aggrieved into throwing five chairs at her head because she had the temerity to ask him a question about his relationship with the support he offered to his adult daughter.*

11. Then at paragraph 139, her Honour said:

To the Respondent's credit, after a two-day hearing, he provided instructions to his counsel to concede that, having heard his responses to cross-examination, the Respondent could not shy away from the overwhelming inference that could be drawn that an order was necessary or desirable.

12. It was submitted by Mr Keim that given the denial of natural justice point, the bias point and what was clearly the dim view which was expressed from time to time on the part of Her Honour below, that I ought to give little or no weight to those findings. And, to a similar effect, give little or no weight to the concessions made by counsel on the day. I am unable to accept those submissions. Mr Longhurst, then counsel for the Appellant, made his submissions over several pages with little or no interruption on the part of the bench. There is also no suggestion that he felt in some way prejudiced by the lack of evidence that had been presented nor what might have been seen as perceived bias on the part of the learned Magistrate. Indeed, his concessions, it seems tolerably clear, were based on what he observed during the course of the proceedings below. As I said, his submissions ran over several pages on day 2 from page 70 through to page 72. I will make just a number of references hopefully to make the point. At one stage at page 70 on day 2, Mr Longhurst when addressing the bench said:

Your Honour, I have a full appreciation of how this matter has proceeded, although I wasn't present for all of it. I've certainly gleaned in no uncertain terms the manner in which matters have progressed and I don't seek to stand here – indeed, I'm bound not to make submissions that don't carry any weight and there is no way I would use this platform to belittle or degrade someone for the sake of doing it but it's simply a matter that I ask your Honour to take into account at the end and come back.

13. Later at about line 37, he went on to say:

Now, I'm not going to say to your Honour, "Your Honour couldn't find that the first limb, domestic violence, has occurred." I'm not going through every detail. My learned friend has gone through most of the details and I'm not foolish enough to submit to your Honour that you didn't hear in cross-examination my client's response to each of those points. I ask your Honour that, though, with respect to making positive findings, your Honour doesn't [indistinct] need to go that far. It's accepted that the incident in 2016 [indistinct] was the chair-throwing incident. That occurred. Now, I referred to that in my cross-examination as a terrible incident and I stand by that. I don't – I wasn't using it as some turn of phrase, your Honour. It's a terrible incident objectively. It involved [indistinct] large gash to the aggrieved head. It's domestic violence undoubtedly. There's incidents where my client has on tape said things, no matter what the reasons amount to [indistinct] domestic violence as defined under the Act. That's not disputed. There are matters in dispute and I don't to pettifog them.

14. Later on Day 2 at page 71, he went on to say to the bench that he accepted that there were legitimate concerns that Her Honour would have and then at page 72, he said:

My submission is I can't avoid a finding, your Honour, that would make it necessary and desirable, at least in the short term. The parties have family, at least property disputes. They're going to be ongoing.

15. Later:

What I do submit for your Honour is that where that takes us under the Act is not from zero to a five-year order with every condition under the sun. Yes. An order is appropriate on all the facts before your Honour.

16. Then there was some discussion about what the terms of the order would be. I am unable to accept, having regard to the tenor of what Mr Longhurst advanced before the Court below, that he was acting in any way under duress or otherwise influenced by any other factors other than his duty to the Court, having regard to the evidence placed before the Court. When those concessions were brought to Mr McCafferty's attention, he accepted, at least as far as I understand it, that neither the denial of natural justice and/or the prejudicial points, which even if found in favour of the Appellant – which they would – would necessarily mean that the findings of the Court below in respect of the need for the domestic violence order simpliciter, ought be challenged, set aside, revised or even remitted. I agree with those concessions by Mr McCafferty.

17. At the end of the day, save for some variations which I will come to in a moment, I can see no reason why the appeal against the orders made by the Court below ought not be dismissed, as I said, subject to a number of variations to which I will now return. Issue, of course, was taken with a number of matters and, in particular, the seven-year ouster condition but was also with the term of the order and the requirement or, indeed, obligation that in some instances the Appellant approach no closer than 500 metres of the first Respondent.

18. It was submitted that the most common order which seemed to be accepted by Mr McCafferty was in the order of 200 metres. I can accept that the 500 metres is unreasonable in respect of order 2. It would seem to me appropriate to impose the same distance that was imposed in the other orders, being 5 and, insofar as the named person was then concerned, order 8; namely a distance of 200 metres. Leaving aside for the moment the ouster condition, there now being some two years and three months having elapsed, I do not intend to vary that term of the order.

19. Turning then to the seven-year ouster condition. From my reading of the reasons below, very scant reasons were given for the need for an ouster condition, let alone one that extended for a period of seven years in a property of which the Appellant is the registered proprietor. In paragraph 150 Her Honour said:

I am satisfied that an ouster order is necessary to minimise the disruption to the aggrieved consequent upon the many acts of domestic violence perpetrated by the Respondent against her, prior to an order being made subsequent to the making of a protection order on 21 November 2017.

20. At paragraph 152, Her Honour said:

Given the protracted campaign of abuse by the Respondent that an order in excess of the standard five-year period is warranted given the significant malice that the Respondent has demonstrated towards the aggrieved.

21. As I said, there seems to be a lack of reasoning that which would warrant the making of an ouster order for a period of seven years. Section 57 of the relevant legislation provides – bear with me – that the Court may when making a domestic violence order impose other conditions. Subsection (1) of 57 says:

A Court making or varying a domestic violence order must consider whether imposing any other condition is necessary or desirable to protect:

a) The aggrieved from domestic violence; or
b) A named person from associated domestic violence or a named person who is a child and being exposed to domestic violence.

22. Subsection (3) goes on to say:

The principle of paramount importance to the Court must be the principle of the safety, protection and wellbeing of people who fear or experience domestic violence including children are paramount.

23. As I have already said, there is little said as to why it is necessary or desirable to impose the ouster provision or condition that Her Honour did. There are a number of cases that make it quite clear that – and here I am referring, in particular, to a decision of the Magistrates Court in *Armour v FAC* [2012] QMC 22 where a number of observations were made including that any order should go no further than is necessary for the purpose of protecting the aggrieved and that the Act is intended to be protective legislation but it is not intended to be punitive upon the Respondent unless, of course, conduct warranted.

24. In my view, the imposition of a seven-year ouster condition is not only not necessary to ensure the protection of the first Respondent but it was also punitive and, indeed, having regard to the reasons of judgment, one suspects intended to be a punitive imposition on the Appellant.

25. The first Respondent accepted or, indeed, volunteered that she had the financial capacity to purchase the dwelling in which she now resides and is subject to the order. Clearly the Appellant does not want to sell it to her. When it was put to her why not just buy another comparable premises for at or about the same price, she responded by saying to the effect, it was her home, she felt safe there. She felt comforted by her neighbours and friends and also family members are now living nearby.

26. Now, all of that can be accepted, however, it is, as I have said, uncontroversial that the Appellant is the registered proprietor of that property and she is the registered proprietor of real property, being two units or apartments, one being in Brisbane and one in Sydney. And, as I have already said, she has said that she has the financial weatherall to purchase the subject land.

27. Having regard to the assets, notwithstanding that they might be mortgaged and leased and notwithstanding any other matter, having regard to her statement from the bar table, I am unable to accept that she does not have the financial capacity to not only purchase alternate premises but also to rent, at least for a short period of time, alternate premises. One can accept why she feels it is her home but in a strictly legal sense, it cannot be refuted that as things presently stand, at least prima facie, it is the property of the Appellant.

28. Mr Keim, in effect, submitted that having regard to the fact that the first Respondent has already been in occupation of this premises for the best part of two years and three months, that, she ought be required to leave the premises forthwith. Given that that property has been her home for a significant period of time and she clearly has emotional attachment to it, I do not consider it appropriate to require anything like immediate vacation.

29. That said, bearing in mind the financial matters to which I have referred and the fact that she has been in occupation of this premises for some two years and three months, in circumstances where it is difficult to ascertain exactly why it was necessary let alone desirable, that this ouster condition was required. Looking at the issue of necessity, one must bear in mind that there is a domestic violence order simpliciter already in place. The question then is: why is it necessary for the first Respondent to reside in this particular place for an extended period of time to ensure her safety and wellbeing? The answer is that it is not.

30. As to the desirability point, the domestic violence order already sets quite stringent conditions about the proximity to which the Appellant can come into contact or be near the first Respondent and a number of other conditions. And, as I have said, the first Respondent has the financial weatherall to occupy or purchase other premises or, at least, in my view, rent other premises for at least a short period of time. In this regard, she advised that the lease of her Brisbane unit will expire in December of this year.

31. As to it being desirable, it strikes me that to extend the ouster condition for any further considerable time, contrary to being desirable, would be undesirable. It is clearly an ongoing source of aggravation, irritation and emotionally stressful for the Appellant. I would immediately say that having regard to the Appellant's conduct, I do not have a great deal of sympathy for him. That said, an ouster period of seven years is clearly punitive and, in my view, far from being likely to reduce the risk of domestic violence for the reasons that I have already given, is probably more likely to be the cause of an increased risk of future domestic violence.

32. The orders that I will make but I will hear from the parties before making them final, would be to the following effect: that the terms of the orders be varied by reducing the distance, in paragraph 3, from 500 metres to 200 metres. That the term of the ouster clause or condition be reduced to six months from this coming Friday which will be the 5th of August 2018. Subject to those variations, the appeal is otherwise dismissed.

33. MR McCAFFERTY: Your Honour might have meant 2021, not 2018.

34. HIS HONOUR: What did I say?

35. MR McCAFFERTY: Twenty eighteen.

36. HIS HONOUR: Twenty twenty-one. The appeal is otherwise dismissed.