DISTRICT COURT OF QUEENSLAND

CITATION:	*GKE v EUT* [2014] QDC 248
PARTIES:	**GKE** (appellant) **v** **EUT** (respondent)
FILE NOS.:	Appeal 124/2013; Mag-00217821/12(6)
DIVISION:	
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court at Cooloongatta
DELIVERED ON:	27 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2014
JUDGE:	McGill SC, DCJ
ORDER:	**Appeal allowed; order made 15 March 2013 set aside; order in lieu that the respondent's application dated 23 November 2012 be dismissed. No order as to costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – Domestic violence – nature of appeal – whether intimidation or harassment – whether order necessary or desirable. FAMILY LAW – General – domestic violence legislation – whether conduct that harasses or intimidates – whether protection order necessary or desirable. *Domestic and Family Violence Protection Act* 2012 s 4, s 37, s 142. *BBB v RAB* [2006] QDC 80 – cited. *Briginshaw v Briginshaw* (1938) 60 CLR 336 – considered. *D v G* [2004] QDC 477 – cited. *DGS v GRS* [2012] QDC 74 – cited. *FCA v Commissioner of Police* [2014] QDC 46 – cited. *EBH v DH* [2001] QDC 16 – cited. *Helton v Allen* (1940) 63 CLR 691 – cited. *Johnson v Queensland Police Service* [2014] QCA 195 – applied. *M v M* (1988) 166 CLR 69 – cited. *MAA v SAG* [2013] QDC 31 – cited.

Mbuzi v Torcetti [2008] QCA 231 – applied.
Rejfek v McElroy (1965) 112 CLR 517 – cited.

COUNSEL: K M Hillard for the appellant

The respondent appeared in person

SOLICITORS: Russo Lawyers for the appellant

The respondent was not represented

[1] On 15 March 2013 a protection order was made in the Coolangatta Magistrates Court under the *Domestic and Family Violence Protection Act* 2012 ("the Act") s 37, against the appellant for the benefit of the respondent. By this appeal the appellant seeks to have that order set aside. The appellant has a right to appeal against the decision under s 164 of the Act, and the appeal was started within the time specified in s 165. By s 168, unless the appellate court orders that the appeal be heard afresh, "an appeal must be decided on the evidence and proceedings before the court that made the decision being appealed." It appears to follow that, unless there are grounds to order a rehearing de novo, there is no power to admit fresh evidence on the hearing of the appeal. Under s 169, in deciding this appeal I can confirm the decision appealed against, vary it, set it aside and substitute another, or set it aside and remit the matter to the Magistrates Court.

[2] The first question that arises is as to the nature of the appeal. Section 168 does not make the appeal one by rehearing, and the restriction on the consideration of only the evidence before the court that made the decision under appeal is consistent with the idea that the appeal provided is an appeal in the strict sense. The concept of an appeal being by way of rehearing is well established, and there are number of statutes which provide for such an appeal, so the absence of such a provision from division 5 suggests that what is intended is an appeal in the strict sense. On the other hand, s 142(2)(e) expressly provides that ch 18 of the *Uniform Civil Procedure Rules* applies to a proceeding under the Act. Chapter 18 is concerned with appeals, and operates only to the extent that the application of the rules is not inconsistent with the Act: s 142(1)(b).

[3] Part 3 of Chapter 18 deals with appeals to a court other than the Court of Appeal, and provides in r 783 for appeals to the District Court from the Magistrates Court. Rule 785 provides that the rules in Part 1, dealing with appeals to the Court of Appeal, other than specified rules, apply to such appeals, with necessary changes. Accordingly r 765(1) applies to such an appeal, and that rule provides that an appeal to the Court of Appeal is an appeal by way of rehearing. It follows that, by this somewhat convoluted path, the legislature has provided that the appeal to this Court is an appeal by way of rehearing. That has the consequences which have been laid down by the Court of Appeal.[1]

---

1 *Mbuzi v Torcetti* [2008] QCA 231 at [17]; *Johnson v Queensland Police Service* [2014] QCA 195 at [27].

History of the matter

[4] The respondent made an application to the Magistrates Court for a protection order by filing an application in Form DV1 supported by a statutory declaration dated 23 November 2012; there does not appear to be on the application a note of the date on which it was filed. The application was originally made returnable on 30 November 2012, on which date a temporary protection order was made by a Magistrate, notwithstanding that the appellant was not present and had not been served. That order also named three children of the aggrieved as persons protected by the order. On 31 January 2013 the respondent filed an affidavit, a one page document verifying a detailed statement to which a number of other documents were attached. On 19 February 2013 the appellant filed an affidavit to be relied on at the hearing. There was also an affidavit by his new partner.

[5] The matter came on for trial before a Magistrate on 1 March 2013, and was adjourned part heard to 15 March 2013. During the hearing the respondent gave evidence and was cross-examined, as did the appellant, who also called as a witness his new partner, who was also cross-examined. The Magistrate, after briefly considering the matter, made a protection order for which he gave oral reasons.

[6] Neither of the parties had the benefit of legal representation before the Magistrate, and evidently neither received any legal assistance in the preparation of the affidavit material. As a result it provides very little information in relation to the background to the application, though it appears there was no dispute that there was a relevant relationship between the parties. The parties indeed had three children together. They separated in June 2007,[2] and the appellant has been in a relationship with his new partner since June 2009.[3] There had been proceedings in the Family Court in relation to the parenting arrangements for the children, which were recorded in an order of the Family Court of 30 May 2011 which set out minutes of consent making detailed arrangements as to who was to have possession of the children and when.

[7] Those arrangements provided among other things that changeovers were to occur at certain specified public places. It provided for the parties to keep the other informed in relation to doctors and other health professionals attending the children, the respective parents authorised such doctors and other health professionals to release such information relating to the children's health and development to the other party, and went on to provide:

> "23 The father shall not be informed of, nor question the children as to any such location details of the mother's residential address.
>
> 24. That the parties communicate with each other either by email or text message for the purpose of arrangements for the time the father spends with the children."

---

2 According to the affidavit of the respondent.

3 Partner p 25.

The orders also provided in paragraph 15 that the appellant was not to consume alcohol during any period in which he was spending time with the children or while they were in his care or for a period of 12 hours prior to such a period.

Service of the Family Court documents

[8] It appears that the arrangements for the children under this order did not always work well; there was some evidence suggesting that, and the appellant alleged that the respondent had breached the order and was keeping the children from him, as she had previously. On 30 October 2012 he filed in the Family Court Registry an application seeking orders for the enforcement of parenting orders, including an order for the location and recovery of the children back to the father.[4] The appellant said in his affidavit that he was advised by a registrar (presumably of the Family Court) by telephone that the documents would have to be served on the respondent personally and immediately, though in oral evidence he appeared to modify this and to say that he was told the documents had to be served by 7 November 2013: p 30.

[9] The appellant in fact knew where the respondent was living, which he said was information he had been told by the children without his questioning[5], and said that he attended her residence on this occasion for this reason only. He said that he went at 7.32 a.m. with his new partner, knocked on the front door and waited and knocked again and waited, and after a time gently knocked on the window, and after about six minutes the respondent opened the front door, saw him and promptly closed the door. He told her he was serving court documents, that she needed to be in Court next Tuesday and that he would leave them at the front door, and they then left the premises. In her application for a protection order, the respondent said that when the appellant came to the house he was very aggressive and was banging on the front door and the two front windows, which got louder and louder and went on for about 10 minutes. Eventually she opened the door and when she saw him she closed it immediately as she was frightened. She said that he yelled through the door about the court papers and having to be in court, swearing as he did so, and that she was shocked and distressed by his presence.

[10] The partner in her affidavit gave an account of that incident in terms which were very similar to those in the affidavit of the appellant. She denied there was any swearing: p 32.

[11] The case seems to have been run before the Magistrate on the basis that what was relevant in terms of whether there had been domestic violence committed against the respondent was what had happened on that day. There was however a good deal of material from the respondent alleging that there had been earlier incidents of domestic violence during the relationship, and indeed after it had finished, both in the statement of grounds in her original applications for a protection order, and in her affidavit where she went through a large number of incidents dating back to June 2001. A few of these were the subject of specific cross-examination during the hearing, and in those cases the appellant denied that there was domestic violence,

---

4 Affidavit of appellant, Exhibit A.

5 Affidavit of appellant; this was supported by his partner: p 10.

but during submissions the appellant admitted that the parties had had a domestically violent relationship in the past, and said that it was perpetrated on both sides, of which he was not proud: p 1-74.[6] There is no time limit within which an application must be made if there has been domestic violence by the respondent against the aggrieved for the purposes of s 37(1) of the Act, and once the admission was made strictly speaking that requirement of s 37(1)(b) had been admitted.

Magistrate's reasons

[12] The Magistrate proceeded on the basis that there had been some domestic violence in the past relationship of the parties: p 1-78. The Magistrate went on to say that even if the incident of 7 November was not a further act of domestic violence there was still a question of whether it was necessary or desirable to make a domestic violence order. That in my opinion was correct. This was not a process of using the history of domestic violence as a reason for finding an act of domestic violence on 7 November. The Magistrate went on to make detailed reference to an earlier decision of his where he expounded his understanding of the issue raised by the third requirement before an order could be made, that the protection order was necessary or desirable to protect the aggrieved from domestic violence: s 37(1)(c).

[13] The Magistrate noted that there was a conflict of evidence and stated that the appellant was continuing to "bluff and bully the aggrieved right into this courtroom". The Magistrate found that the actions of the appellant on 7 November constituted an act of domestic violence, as a deliberate and calculated attempt to harass and intimidate the respondent: p 1-81. This was by conveying the message that he knew where she lived, and by giving her as little notice as possible of the upcoming court proceeding.[7] He went on to say that he did not make any particular finding about the credibility of the partner, and found her to be quite forthcoming; he said she was striving to be honest but she may not have been in a position to observe everything and to know everything that was going on. He said that, given the ongoing nature of the relationship and unresolved child rearing issues, and having regard to the need for risk management in this case and bearing in mind ss 4 and 37, he considered that the risk of further domestic violence was quite high and it was both necessary and desirable to make the protection order sought. The order was therefore made.

Was there domestic violence on 7 November?

[14] It was submitted for the appellant that the Magistrate erred in finding that this amounted to an act of domestic violence. It was submitted that the institution of the application in the Family Court and service of it could not constitute harassment or intimidation as defined in s 8 of the Act, and I would agree with that proposition; this was not a situation where there was such a repetition of applications that it could be argued that the persistent bringing of applications amounted to

---

6 Confusingly, the transcript of the two day trial treats each day as day 1; this in fact occurred on the second day. Although this occurred in submissions rather than during evidence, the Magistrate was entitled to act on this because the rules of evidence did not apply: s 145(1)(a).

7 I regard this as an adequate explanation of his reasons for the finding.

harassment.[8] It is unnecessary to consider whether, if there were so many applications to the Family Court as to amount to harassment or intimidation, that might give rise to a question under s 109 of the Constitution. But the Magistrate did not find that it was the filing and service of the application that was harassment or intimidation, but rather that the service of the application by the applicant personally, and late, was done to harass or intimidate.

[15] The appellant said that he had applied to the Family Court after the respondent withheld the children from him, and he was told by a registrar of the Court on the telephone that the application and affidavit in support had to be personally served, that there were only a couple of days left, he could not do it electronically and his advice was "you have to serve them yourself".[9] On the same page he said that he was told this on 29 October, the date on which the application was filed. He later said he was told by the Registrar that "I had to personally deliver them".[10] The application was returnable on 13 November, and the document was taken to her house for the purpose of service on 7 November, although at p 27 he said that he was told he had to give the documents to her "a week before she was due in court".[11] This was in fact nine days after he obtained the documents to be served, and did not give the respondent a week before she was due in court; that would have required service on 6 November.

[16] At one point he said he was told by the registrar that it had to be done immediately[12] but later he said that the registrar had said that "she had to have it at the latest on the 7th".[13] When challenged on this inconsistency his response was that he worked full time and could not do it on the previous days. He said the reason why it was not posted was because it was only eight or nine days before the hearing[14], and added that the registrar had told him he could not do it by post because the respondent would not get it in time.[15] However later he said that it was not posted because in his experience communication sent by post was ignored by the respondent.[16] When asked by the Magistrate why he did not serve the document on 31 October, the day after it had been filed, his explanation was that "that was the weekend", and he was planning a strategy so as not to involve the kids.[17] In fact 31 October was a Wednesday, as was 7 November. They turned up at about 7.30 a.m., and the appellant said that as far as he was concerned the children were then asleep.[18]

[17] The Magistrate did not believe that the appellant had been told what he claimed to have been told by the Family Court Registrar. That disbelief was justified by the terms of the *Family Court Rules*. Those Rules provide that in some circumstances a

---

8 Particularly if the applications were unjustified: *DGS v GRS* [2012] QDC 74; *MAA v SAG* [2013] QDC 31.
9 Transcript page 1-25-26.
10 Page 1-30 line 28.
11 Page 1-27 line 42.
12 Page 1-30 line 22.
13 Page 1-30 line 46.
14 Page 1-27 line 6.
15 Page 1-27 line 17.
16 Page 1-29 line 23.
17 Page 1-30 lines 36-40.
18 Page 1-30 line 42. This seems unlikely.

document requires "special service by hand", where the document must be actually handed to the person to be served or placed on the ground in the person's presence, and in others, "special service", which can be effected by post. The Rules however expressly prohibit one party to the proceeding from effecting special service by hand on the other.[19] Whether the registrar said that the application had to be served by special service by hand I do not know, but if he had I would have expected the registrar to go on to draw the appellant's attention to the fact that he was not permitted to effect that service himself; I regard it as inconceivable that a Family Court registrar would have told him that he was required to effect service by a manner which was contrary to the *Family Court Rules*. In my view the Magistrate correctly rejected these statements by the appellant as false.

[18] The other aspects of his account in relation to the circumstances and timing of the service were inconsistent, and implausible. The notion that there was insufficient time to serve by post was clearly not true, as was the suggestion that the appellant could not serve earlier because he was working fulltime; if he could take the time to serve on 7 November, he could have taken the time to serve on 31 October or later. In the light of the statements made by the appellant in relation to the timing and method of service of the application on the respondent, it is unsurprising that the Magistrate concluded that this evidence of the appellant ought not to be accepted.

[19] The appellant admitted that under the consent orders he was not to know of the location of the respondent's home.[20] There was some argument about the true effect of the terms of the order before me, and all it dealt with expressly was a prohibition on that information being provided by medical practitioners and others in a similar position, or on the appellant's questioning the children about the information. It is the clear tenor of the order that the appellant was not to know of her address and he admitted to that understanding of it. The appellant claimed that he had been told the address spontaneously by the children, although it is difficult to see how such a thing could come up in conversation without questioning.[21]

[20] There had been other applications in relation to enforcement of the order filed by the appellant, and this was the third such application.[22] He admitted that this application was ultimately dismissed[23], and that an earlier application on 21 May 2012 was also dismissed, though he said that provision was made by the court for him to catch up on the period of contact with the children that he had missed.[24] It may be of course that the application was dismissed simply because the respondent had agreed to abide by the terms of the original order. I suspect it would be possible for the making of repeated applications to the Family Court without justification to amount to "harassment", though it would have to be a clear case; it would certainly not be harassment simply because from time to time the respondent denied the

---

19 *Family Law Rules 2004* r 7.06(3).

20 Page 1-25 line 34.

21 Unless perhaps the children were deliberately subverting the respondent's desire to keep her residential address secret.

22 Respondent p 20.

23 Apparently because the wrong form of application was used: see affidavit of respondent annexure SD3.

24 Appellant p 37: see also affidavit of respondent annexure SD7.

appellant access to the children and he made an application to the Family Court to obtain it.

[21] Under s 8(1)(b) of the Act, domestic violence includes behaviour that is emotionally or psychologically abusive. That in turn is defined in s 11 as behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person. The concept of harassment and intimidation also appeared in the definition of domestic violence in the 1989 Act. One issue which arose under that Act was whether regard had to be had to the subjective state of mind of the person alleged to have been intimidated or harassed.[25] That matter is no longer an issue, since s 11 is defined in terms which make it clear that what matters is whether the behaviour torments, intimidates, harasses or is offensive to the other person. That depends not on the inherent character of the behaviour, but whether it has that effect on that person, a subjective matter. For that reason evidence of the subjective response of the aggrieved to the behaviour relied on is relevant and admissible.

[22] A number of examples are set out in the Act, most of which involve some persistence in the relevant behaviour, but, as I have said previously, I think there can be a single incident of conduct which intimidates, which would satisfy the definition in s 11.[26] Intimidation refers to a process where the person is made fearful or overawed, particularly with a view to influencing that person's conduct or behaviour. In the present case the respondent gave evidence that she was afraid of the appellant because he came to her house in this way, and if the effect of the appellant's conduct was to make the respondent fearful or overawed, and the conduct was undertaken with a view to influencing her conduct or behaviour, it seems to me clear enough that it was conduct that intimidated the respondent for the purposes of s 11, and in that way domestic violence.

[23] On the other hand, I remain of the view that a person is not going to be harassed by conduct which is constituted by a single incident. This was not a case where the appellant was coming repeatedly to the respondent's property, or otherwise hanging around where she would see him, and in my opinion there has to be some element of persistence before conduct can be properly described as conduct which harasses someone. I do not consider that that would be different if the respondent had claimed to have felt harassed by the appellant on this occasion even if that evidence were believed.[27] In my view conduct which is not capable of harassment because it lacks the element of persistence or repetition is not converted into harassment simply because of a subjective linguistic infelicity.[28] It is not just a question of whether the aggrieved finds something upsetting.[29]

[24] The effect of the respondent's evidence was that it was the fact that the appellant had come to the house, given the background of what she claimed was domestic violence towards her over a long period of time, and the fact that he was not

---

25 See for example *D v G* [2004] QDC 477 at [31].

26 *BBB v RAB* [2006] QDC 80 at [18].

27 As far as I can see she did not in fact say this.

28 It may be of course that such conduct would amount to emotional or psychological abuse as conduct which was offensive to the other person.

29 *BBB v RAB (supra)* at [19].

supposed to know her residential address, to which she really objected on this occasion. There was no evidence that she felt in any way fearful or otherwise intimidated by the short service, or at least relatively short service, of the application, the other matter to which the Magistrate referred. Short service of the application, even if done maliciously, could hardly amount to more than an annoyance to the other party. The matter could perhaps be tested by considering what effect late service of the application would have had on the applicant if it had been effected by mail to her parents' address on the same day; there was nothing in the respondent's evidence to suggest that she would have had any basis for complaint of anything amounting to emotional or psychological abuse in that situation. In my opinion therefore insofar as the Magistrate found that the late service of the application amounted to intimidation or harassment, that finding was not justified.

[25] Simply going to the respondent's residence would not necessarily amount to intimidation, but it seems to me that it is the sort of conduct which could amount to conduct which intimidated the respondent if in fact the respondent was put in fear by the presence of the appellant at her residence. There is no reason to doubt that that was in fact the attitude of the respondent on this occasion, and on this basis insofar as the Magistrate found that his deliberately going to her house on this occasion amounted to behaviour that intimidated the respondent it satisfied the definition of emotional or psychological abuse in s 7 and therefore amounted to domestic violence for the purposes of the Act. The significance of that finding is not diminished by the fact that the Magistrate also made other findings of domestic violence, or perhaps made findings of domestic violence on other bases, which in my opinion were unjustified.

[26] It follows that, insofar as the Magistrate found that the appellant had committed domestic violence against the respondent on 7 November 2013, that finding was, at least to some extent, justified by the evidence, and appropriate. That is my conclusion on the evidence before the Magistrate. It is however as I mentioned earlier not crucial to the outcome of the appeal, because s 37(1)(b) was satisfied anyway by the admission that there had been domestic violence by the appellant towards the respondent in the past. The crucial issue therefore was whether a protection order was necessary or desirable to protect the respondent from domestic violence. In deciding this the court was required to consider the principles mentioned in s 4: s 37(2)(a).

[27] Section 4(1) requires the Act to be administered "under the principle safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount." Further principles are set out in greater length in ss (2), which includes that people who fear or experience domestic violence should be treated with respect and disruption to their lives minimised. Nevertheless, s 37(1)(c) requires satisfaction that the protection order is necessary or desirable to protect the aggrieved from domestic violence. Accordingly the issue is not simply whether an aggrieved wants an order to be made, or indeed whether the aggrieved would feel better if an order was made, but whether the making of such an order is necessary or desirable, specifically for the purpose of protecting the aggrieved from domestic violence.

[28] This is concerned with the situation in the future, something which cannot be proved as a matter of historical fact, but depends on the Magistrate's assessment of the circumstances, bearing in mind the extent to which there is likely to be a continuing need for contact between the parties. It seems to me from the evidence that the respondent would very much like not to have to have anything more to do with the appellant, but in circumstances where they have had children together, and bearing in mind the terms of the family court order referred to in the evidence, it is clear that, at least for a long time, there is going to be some continuing contact between the parties, in connection with their respective rights and obligations in relation to the children. This is a relevant consideration.

[29] There is also the risk, given the history of the behaviour of the respondent, that she may in the future fail to comply with the requirements of the family court order, by unjustifiably withholding the children, and in those circumstances the appellant is entitled to take steps under the Commonwealth Act to enforce that order. The mere fact that he takes such steps does not and cannot amount to domestic violence for the purpose of the Act, however unhappy it may make the respondent. On the other hand, it does not justify conduct which does amount to domestic violence.

[30] The Magistrate adopted a number of propositions which had previously been stated in another decision of the same Magistrate. The first of these noted the distinction between an order being "necessary" and an order being "desirable", although the illustration of an instance where an order was thought to be "necessary" is not I think helpful, in circumstances where the focus should be on the prospect of future domestic violence otherwise occurring, rather than holding the respondent accountable for domestic violence. That seems to be tying the justification for the order to prior conduct. There are other mechanisms in the Act for giving effect to the purpose of holding perpetrators accountable.

[31] In my opinion it is clear that this wording was adopted because of concern that, if the requirement had been to show that it was necessary, that might have proved a more stringent requirement than the legislature had intended. I would expect a greater level of concern about the risk of future domestic violence, both as to the prospect of it otherwise occurring and to the reasonably anticipated seriousness of such violence, to be relevant to the issue of whether such an order was necessary to protect the aggrieved from domestic violence, and even if that level of satisfaction is not achieved, the court may be satisfied that there is a sufficient risk of future violence, of sufficient severity, to make it desirable for such an order to be made for the protection of the aggrieved from domestic violence.

[32] In my opinion the focus must be on the issue of protecting the aggrieved from future domestic violence, the extent to which on the evidence there is a prospect of such a thing in the future, and of what nature, and whether it can properly be said in the light of that evidence that is necessary or desirable to make an order in order to protect the aggrieved from that.[30] The Magistrate spoke about this in terms of an assessment of the risk to the aggrieved, and that I think was an appropriate basis for

---

30 *FCA v Commissioner of Police* [2014] QDC 46 at [36], as to the focus on the future in applying this provision.

analysis. I agree with the Magistrate that it is necessary to assess the risk of domestic violence in the future towards the aggrieved if no order is made, and then consider whether in view of that the making of an order is necessary or desirable to protect the aggrieved.

[33] I also agree that there must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future. Broadly speaking I agree with what the Magistrate said in the passage beginning "fourthly" of his reasons, though I would express the last sentence as "the risk of future domestic violence against an aggrieved must be sufficiently significant to make it necessary or desirable to make an order in all the circumstances."[31] In assessing such a risk, it is relevant to consider the fact that there is going to have to be some ongoing relationship because of the position of the children, and, if as the appellant alleges the respondent has been difficult and uncooperative in the past in relation to the arrangements for him to have the opportunity to spend time with the children, there is a risk that there will be situations arising of a kind which have in the past produced domestic violence.

[34] I would add that it is also relevant to bear in mind any changes in pre-existing patterns of behaviour which have already occurred; the fact that on this occasion the appellant, in going to the respondent's residence, did something which he had not previously done was therefore a relevant circumstance.[32] The Magistrate, approaching the matter on this basis, noting the ongoing nature of the relationship and the unresolved child rearing issues, expressed the view that the risk of further domestic violence was quite high, and that risk made it both necessary and desirable to make the protection order sought: p 1-81. It was unnecessary to find that the making of an order was both necessary and desirable, but on the face of it the Magistrate has made a finding of satisfaction as required by s 37(1)(c).

[35] In addition the Magistrate had the opportunity to observe both parties before him in the course of the hearing, and had the opportunity to make an assessment of the extent of the fear of the respondent, as well as the extent to which she wanted to be rid of the appellant, and whether there was the prospect in the future of her being uncooperative in relation to the children, to be assessed against a situation where it was conceded that there had been at least to some extent some domestic violence by the appellant to the respondent.[33] Any domestic violence by the respondent to the appellant would not be particularly relevant to the issues arising under s 37, bearing in mind the principle in s 4(2)(d) of the Act.

---

31 I suspect the distinction is simply one of semantics.

32 He had not previously served court documents on the respondent at her home: p 31.

33 I acknowledge that the appellant's position was that there had been domestic violence both ways in the past.

Briginshaw

[36] One of the matters raised on the part of the appellant was that the Magistrate had erred in law in failing to have regard to the principles laid down by the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336. The case concerned the standard of proof required on a petition for divorce on the ground of adultery, the court rejecting the proposition that proof beyond reasonable doubt was required. Five separate judgments were delivered, but only that of Dixon J is cited today. At pp 360-363 his Honour analysed in some detail the development of the standards of proof in criminal and civil matters, noting at the foot of p 361 that no third standard of persuasion was definitely developed, and, after describing the civil standard as depending on "the reasonable satisfaction of the tribunal", continued at p 362:

> "But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be inexact proofs, indefinite testimony, or indirect inferences."

[37] His Honour referred to some authorities, and continued at p 363:

> "The nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues …. But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected."

[38] This approach was endorsed in a joint judgment of three members of the Court in *Helton v Allen* (1940) 63 CLR 691 at 712, and endorsed by the whole Court in *Rejfek v McElroy* (1965) 112 CLR 517, a case which overturned decisions in Queensland which, despite the earlier decisions, had persisted in applying a rule that an allegation of criminal conduct in a civil matter had to be proved beyond reasonable doubt. It was also adopted by the High Court in *M v M* (1988) 166 CLR 69, a case dealing with the correct approach, in relation to the custody of or access to a child in the Family Court, of an allegation of sexual abuse of the child.

[39] There are situations where conduct which would fall within the definition of "domestic violence" in the Act would also amount to the commission of a criminal offence, but that definition is so wide that much conduct which would not amount to a criminal offence would fall within it. Indeed, it seems to me that it would be possible for some conduct to satisfy the definition of "domestic violence" even if it would not be generally regarded in the community as involving grave moral delinquency. For example, conduct may qualify as "emotional or psychological abuse" simply because it is offensive to the aggrieved, even if it would not be regarded by the community in general as offensive, if the aggrieved, for idiosyncratic, subjective reasons does regard it in that way.

[40] In this context, obviously some forms of domestic violence are more objectively serious than other forms, and the seriousness of a particular allegation is something which is relevant for the court to consider in deciding whether it is satisfied that it has occurred. It is also clear however from the analysis that a good deal depends on the scope of the matter in dispute. In the present case for example the finding of domestic violence on 7 November depended upon the correct characterisation of what occurred rather than a determination by the Magistrate of a particular matter on which the parties differed as to the factual events on that day. In these circumstances there was no relevant dispute about the facts, and the real issue was as to whether they were properly characterised as domestic violence. The considerations discussed by Dixon J are not concerned with that sort of analysis.

[41] There is another matter for consideration in the application of *Briginshaw*, and that is the significance of the reference by his Honour to the gravity of the consequences flowing from a particular finding. Strictly speaking, this was said in the context of the making of a finding of fact, rather than the exercise of a discretion, and s 37(1) of the Act confers a discretion on the court as to whether or not to make a protection order. Paragraphs (a) and (b) involve findings of fact, but paragraph (c) is rather directed to the test that is to be applied in the exercise of the discretion created by the section, as is shown by the fact that subsection (2) operates by reference to paragraph (c) rather than by the reference to the exercise of the discretion created overall by subsection (1).

[42] It is, I consider, relevant in deciding whether or not to make a protection order to consider the consequences of making or not making the order.[34] To some extent this follows from the application of the principles set out in s 4, particularly s 4(2)(a) and (c). In cases where there is a specific risk of domestic violence in the future if an order is not made, it is relevant to consider the seriousness of the violence that is threatened, as well as the credibility of the specific threat. On the other hand, it is relevant to consider the practical consequences of the making of an order to the person against whom the order is made.[35] If an order is sought against someone who is still living with the aggrieved, in deciding whether the order should require that person to stay away from where the aggrieved is living it is relevant to consider that that would require that person to move out of that person's current accommodation.[36]

[43] It may also be the case that the particular consequences of making a protection order will be unusually severe. If for example a particular person needed a license under the *Weapons Act* to carry out his usual business, such as a professional kangaroo or pig shooter, the court should have regard to the consequence which this would have for that person's work or business if an order were made. A more common example no doubt, and one which may be relevant to the present case, is that an order which required the person to have no contact whatever with the aggrieved ought not to be

---

34 See *DBH v DH* [2001] QDC 16 at [28].

35 The Magistrate made a comment at p 72 suggesting that he did not regard any adverse consequences of an order as relevant. I do not agree with that approach.

36 Of course that may be necessary to protect the aggrieved; but the practical effect of the orders ought to be considered.

made in circumstances where some continuing contact is necessary in relation to arrangements for possession of children.

[44] This analysis probably does no more than emphasise that, when deciding whether or not to make a protection order, it is appropriate for the court to have regard to all the circumstances of the case, including the consequences or possible consequence of making or not making the order to one or other party. This is because the statutory discretion is conferred in general terms. These considerations however do not displace the requirements in s 37(2), particularly the requirement to consider the principles mentioned in s 4, or the need to satisfy the test set out in s 37(1)(c).

Further submissions of appellant

[45] It was submitted that the Magistrate did not give procedural fairness to the appellant by putting to him clearly that his going to the respondent's house on 7 November was done deliberately to intimidate the respondent, but it seems to me clear that why the appellant had gone to the respondent's house that day, and whether that was made necessary by the requirement to serve the Family Court application as he claimed, were matters on which the appellant was cross-examined.

[46] Some other matters in the approach of the Magistrate were criticised on behalf of the appellant, with I think some greater force. The finding in relation to the credibility of the appellant's partner was not clear, but the Magistrate appears generally to have accepted her evidence. Although there were some adverse findings about some aspects of the appellant's evidence, there was no general statement about the reliability of the appellant's evidence, and so far as I can see nothing was said about the reliability of the respondent. Although it is understandable that aspects of the evidence of the appellant could not be believed, I find the comment that he had "continued to bluff and bully the aggrieved right into this courtroom" somewhat puzzling. The Magistrate did not explain this finding, and all I can say is I can find nothing in the transcript which conveys that impression to me.[37]

[47] It may be that there was behaviour seen by the Magistrate in the courtroom, but not apparent from the transcript, which justified this conclusion, but if so it would have been better if the Magistrate had explained that. The only incident referred to was the reference by the appellant in cross-examination to a videotape of the incident, which was then not produced. At p 14 the appellant in cross-examining the respondent asked:

> "If I could say to you that [the partner] is a witness and a video recording of that day be used in evidence, would you change your statement there?-- No."

[48] The Magistrate on p 15 asked the appellant whether he was going to put the videotape to the witness, and he said he did not have it because he had not put it in

---

37 The transcript is not satisfactory, since part of the first day was not transcribed, and a large part of the second day appears to have been transcribed twice.

his affidavit. The Magistrate said that he should have had it there and would have been able to put it to her if he had done so, and the appellant said he did not think he was allowed to do that since it was not in the affidavit: p 16. At the beginning of the hearing the appellant said he was relying on his affidavit and his partner's affidavit and continued "I have some photo evidence here that I'm happy to hand-up" but was told that he had been directed to exhibit those to an affidavit, and then said he would not worry about them: p 5. As a result there was no indication of what the photo evidence was.

[49] The Magistrate also referred to evidence from the partner that she was not aware of any such recording and that recordings did begin to be made after this incident: p 13. What seems to have happened is that the Magistrate treated the failure to produce the video and the partner's evidence as demonstrating that there was no such video recording, so that the questioning about the video recording amounted to bluffing and bullying the respondent. As it happened the respondent did not change her story as a result of the threat of showing the videotape. If in fact there was no videotape that was not a proper question, but I do not consider that the Magistrate was justified in characterising the appellant's conduct in that way, which may have influenced the decision that making a protection order was necessary or desirable. He may have believed this was a legitimate technique in cross-examination. His statements about the videotape did however reflect on his credibility.

Respondent's credibility

[50] It is, I think, particularly unfortunate that the Magistrate did not express any conclusions about the credibility of the respondent. It is difficult for me to form any clear assessment of her evidence, in the absence of any such finding, particularly when the cross-examination of her was so brief and, understandably, so often misdirected. The respondent said she had been told by the children that they had been questioned about their address, but at p 80 the Magistrate accepted that the appellant "may have inadvertently learnt of this address from his children". That appears to involve a rejection of the respondent's evidence on this point. The proposition that the partner may not have been in the position to observe everything and to know everything that was going on may have been directed to things that had occurred in the past, but could not be a comment in relation to what had occurred on 7 November, because on the respondent's evidence the partner was at the front door on that day, presumably next to the appellant: p 14. If the partner's evidence was regarded as generally reliable, does that mean that her evidence that the appellant did not swear on that occasion was reliable? If so it follows that the evidence given by the respondent that he did swear was false.

[51] The respondent claimed that the children had witnessed acts of domestic violence between the appellant and his partner, (p 22) but the partner denied that there had ever been acts of domestic violence towards her: p 6, p 23, p 24. The transcript suggests that at times the respondent was evasive when questioned: see for example the respondent's answers in cross-examination at p 21, line 20; p 22, line 15; and p 22, line 19; the two questions on this page follow a series of questions about a particular incident, and ought to have been answered by reference to that incident.

[52] It also seems to me that the Magistrate was more intolerant of cross-examination by the appellant than he was of inappropriate cross-examination by the respondent. For example, the respondent was asked whether she was present at any of the incidents referred to in her affidavit from the September school holidays in 2012 back to December 2008, and her answer was, "The children were there". That unresponsive answer produced the appropriate follow-up question "But you weren't there?" at which point the Magistrate intervened stating, incorrectly, "This has been asked and answered". The respondent's affidavit does not in fact make clear when she is speaking of things that she has seen herself or when she is speaking of things that have been reported to her by the children, or possibly others, so this was in my opinion a legitimate question, and her unresponsive answer required a follow-up. The Magistrate should have required her to answer the question, rather than the interfering in this way with proper cross-examination by the appellant.

[53] There was an element of evasiveness about the affidavit filed by the respondent. It complains about the use of family court applications as a means to exercise power and control, and says that they were dismissed, but does not say anything about the underlying basis for the application, and does not assert that the earlier orders in relation to possession had been complied with by her. Overall, I am wary of the credibility of the respondent.

The respondent's allegations

[54] The affidavit of the respondent is essentially a chronology of events, presented in reverse order, and the recent events mostly allege various things done to the children, presumably when the respondent was not present. There was some questioning of the partner in relation to these matters, and she said that she had not seen any violence towards any of the children by the appellant (p 24), though she did mention one occasion when one of the boys had dropped a collection of keys into the water at a marina, when the appellant became angry and said aggressive things to the boy: p 68. Given the seriousness of the situation, it is understandable that the appellant would become upset, and she said he subsequently apologised to his son for saying these things: p 70. She denied that he had struck the son on this occasion, and said that the son's behaviour when she saw him soon after this was not consistent with his having been struck: p 68.

[55] There was an occasion on 21 July 2012 when the boys were at a soccer game having been taken there by the respondent, when the appellant turned up and was alleged to have been yelling aggressively at the respondent about the family law issues. Her having possession of the children at that time was in breach of the order made by the Family Court on 21 May 2012, which provided that the appellant was to have them from 9.15 a.m. the previous day until 4.15 p.m. that day.[38] This was some of the extra time provided temporarily by that order, and it is understandable that in these circumstances the appellant would be angry with the respondent. The appellant when asked about this incident said that he had been to the pick up point on the previous day and the children had not turned up and he had sent a text and six emails to the respondent which had been ignored: p 39. He agreed that he was

38 Affidavit of respondent annexure SD7.

annoyed but he denied that he approached her aggressively on that occasion. He said that it was the respondent who kept screaming and grabbing one of the sons.

[56] This was not a matter resolved by the Magistrate in his reasons, nor can I resolve it, but it does seem to me that the respondent was in breach of the Family Court order at that time, and it looks from the material I have seen as though she may have been using the children's sport as an excuse for failing to comply with the orders of that court. It might be expected that this would be annoying to the appellant, and if he was speaking to her with a raised voice on that occasion I think that was at least understandable. I do not consider that this incident provides any support for the making of a protection order.

[57] There were also two incidents of aggressive yelling in November and December 2011 alleged in the affidavit; these were not matters explored in cross-examination.

[58] The affidavit contains numerous allegations of physical and verbal abuse prior to separation in June 2007, dating back to June 2001. It also alleges that on various occasions after that there was physical or verbal abuse or damage to property, up to an incident in January 2009 when the respondent alleges that the appellant threw her across a car park. This was reported to the police but there was some evidence that ultimately the appellant was not convicted of a charge in relation to this incident, although that was not conclusive for the purpose of these proceedings.

[59] It appears that after that incident there was an application for a protection order made by a police officer on behalf of the respondent, which order was made in March 2009 without admissions, though the respondent alleges the appellant breached that order in March and April 2009. She said that she moved to a women's refuge in May 2009 and she said subsequently the Family Court ordered supervised contact which extended over a period of eight months.

[60] The affidavit also contains a large number of allegations about the various things, of varying degrees of seriousness, alleged to have been done to or in the presence of the children. In circumstances where the Magistrate did not get to see the children himself, it is necessarily difficult to resolve conflicts of evidence in relation to matters of this nature. The new partner denied that there had ever been violence to the children in her presence: p 24. There are mechanisms available in the Family Court which facilitate the resolution of disputes concerning conduct towards children, but, so long as there is an order of the Family Court in place, it is a matter for that court whether the arrangements for possession of the children are varied because of the conduct of one of the parties. The children could be included in a protection order under the Act, and these were matters properly raised in the application, but it does not appear that the application was presented specifically on the basis of a desire to protect the children from domestic violence; rather my clear impression is that the basis of the application was to obtain an order that the appellant keep away from the place where the respondent was living. That was the matter particularly complained of by the respondent both before the Magistrate and on appeal.

Analysis concerning s 37(1)(c)

[61] As I mentioned earlier, on an appeal by way of rehearing I am required to review the evidence, to weigh the conflicting evidence and to draw my own conclusions, affording respect to the decision of the Magistrate and bearing in mind any advantage the Magistrate had in seeing and hearing witnesses.[39] It will be apparent from what I have already said that I consider that the approach of the Magistrate was incorrect in some aspects of his analysis of the characterisation of what occurred on 7 November 2013, and his conclusion that the appellant was continuing to bluff and bully the respondent right into the courtroom was doubtful. There is also the consideration that, although I think the Magistrate was correct in saying that the court needs to assess the risk to the aggrieved and assess whether management of the risk is called for by the making of an order, the Magistrate did not in his reasons explain the basis upon which he analysed the risk and reached the conclusion that the risk of further domestic violence was quite high.

[62] There were certainly allegations of serious and persistent domestic violence some years in the past, particularly prior to the parties separating, but it appears that once the earlier protection order was made there were few occasions on which it was even alleged that there had been anything in the way of domestic violence to the respondent. On at least one of those occasions the facts were disputed by the appellant, and it appears that the respondent had at that time withheld the children from the appellant in breach of a Family Court order. At the very least, this was a significant mitigating feature in relation to any verbal abuse of her.

[63] Although the respondent appears to have been quite upset about the discovery that the appellant in fact knew where she lived in November 2013, there was at that time no court order in place preventing him from going to where she was living, and in fact all he did on that occasion was serve the Family Court application and other documents, and then left. There was no violence offered or threatened to the respondent or her property on that occasion. This seems to have been the first occasion since early 2009 when the appellant had gone to a place where the respondent was living.[40] This was in the context of an application under the *Family Law Act* in respect of possession of the children, in circumstances where the appellant alleged that the respondent was in breach of the earlier order. When the matter came before the Family Court the respondent was ordered to provide a notice of address for service so as to avoid any difficulties about service in the future.[41]

[64] The appellant said that he wanted nothing to do with the respondent except as was necessary in view of the arrangements for the children: p 34. There was no other exploration during the hearing of the parties' intentions, and in particular the appellant's intentions in relation to future contact with the respondent. It may be, given the problems with the appellant's credibility, that any such evidence from the appellant would not have been accepted by the Magistrate, but this was also not a case where there was any evidence of any threats from the appellant to do anything

---

39 *Mbuzi v Torcetti* [2008] QCA 231 at 17.

40 It was the first such occasion mentioned in the respondent's affidavit.

41 I assume that it follows that there was no current notice of address for service for the respondent as at 7 November 2013.

in particular in the future, nor was there any basis in the evidence for a conclusion to the contrary of this. This statement appears consistent with what had in fact occurred for some years.

[65] In these circumstances, although it was relevant to take into account the fact that there will be a need for ongoing contact between the parties in order to give effect to the arrangements for the children under the order of the Family Court, I have some difficulty in seeing a basis upon which the evidence before the Magistrate leads to a conclusion that the risk of further domestic violence was quite high. Perhaps more importantly, this was not a case where the evidence suggested any real risk of actual physical violence towards the respondent in the future, or other serious domestic violence.

[66] If as the respondent seems to be saying she is terrified of the appellant and is put in fear by almost any contact with him, it is quite possible that in the future there will be circumstances which amount to intimidation on this basis and therefore fall within the wide definition of domestic violence, but so long as issues about the children are under the supervision of the Family Court the respondent is going to have accept some further contact with the appellant in relation to the children. In circumstances where it also appears that at the very least the respondent has not been assiduous in her compliance with the requirements of the Family Court orders in relation to the appellant's possession of the children, there is certainly a risk that there will be non-compliance by her in the future, and if that occurs the appellant is entitled to complain about that and to take steps to enforce the order of the Family Court. It would not be appropriate by the making of any order under the Act to interfere with his rights in that regard.[42]

[67] In all the circumstances I do not consider that the evidence supported a conclusion that it was necessary to make a protection order in order to protect the respondent from domestic violence, and, having had due regard to the principles mentioned in s 4, I do not consider that it was desirable to make such an order to protect the respondent from domestic violence. In my opinion there is no real risk of domestic violence as long as the respondent complies with the orders of the Family Court concerning the children. Therefore, the appeal is allowed, the order of 15 March 2013 is set aside, and the application for a protection order dated 23 November 2012 is dismissed.

Costs

[68] The Act provides in s 157 that each party to a proceeding for an application must bear the party's own costs, although the court may award costs against a party who makes an application which was dismissed if the court decides that the application was malicious, deliberately false, frivolous or vexatious. I would not make such a finding in relation to the respondent's application in the present case. It is not clear whether s 157 applies to an appeal; s 169 says nothing about costs and Chapter 17A is not made applicable by s 142 of the Act. Section 15 of the *Civil Proceedings Act*

---

42 Indeed there may be doubts as to whether any attempt to do so would be constitutionally valid.

2011 gives a general power to award costs in all proceedings unless otherwise provided, and has not been expressly excluded by anything in the Act. There is no inherent power to award costs, but s 11 provides a statutory power unless it is impliedly excluded by the provisions of the Act.

[69] On the whole, and without the benefit of proper legal argument on the point on behalf of the respondent, I do not consider that the Act does impliedly exclude the power in the *Civil Proceedings Act*, but I consider that that power should be exercised having regard to the specific provisions which do appear in the Act in s 157. I do not mean that that section is determinative of the question of costs on appeal, but the power to award costs should be exercised in the light of that legislative background. It follows that I do not think it is simply a matter of saying that costs should follow the event, and in all the circumstances I do not consider that in this case it would be appropriate to make an order for costs in favour of the appellant, notwithstanding his success on the appeal.