IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

DUNFORD J

THURSDAY, 8 OCTOBER 1998

12228/98 - LEIGH SMART v PHILLIP JOHNSTON & ANOR

JUDGMENT

HIS HONOUR: In these proceedings the plaintiff, who was the defendant in the Local Court at Ryde, seeks declarations and orders relating to the conduct by the second defendant, the Magistrate, of proceedings brought in that court against the plaintiff by the first defendant for apprehended violence, including an order disqualifying the second defendant from further hearing the said proceedings on the grounds of actual or apprehended bias.

On 28 May 1998, the first defendant, Mr Johnston, lodged a complaint alleging that he and his parents were in need of protection from their neighbour, the plaintiff, and sought apprehended violence orders against him. The particulars in the complaint refer to verbal threats allegedly made by the plaintiff to the first defendant the previous evening, and verbal threats allegedly made by the plaintiff to the first defendant and his parents some two weeks previously. There was a reference to other occasions when there had been threats and verbal abuse.

A summons was issued returnable on 3 July 1998 at Ryde Court, but it was subsequently adjourned to 10 July, on which day the first defendant appeared in person and the plaintiff was represented by his solicitor, Mr File. When the matter was called on, enquiries were made by the Magistrate as to the length of the hearing and number of witnesses, and the matter was adjourned to 22 October. Mr Johnston then asked whether the conditions set out in the original complaint were in force in the meantime, to which the Magistrate replied that they were not, as no interim order had been made, and asked him whether he was seeking an interim order. He said he was. Mr File said that he would oppose the making of an interim

order. Whereupon the Magistrate said:

> "Very well, I will hear evidence about it later in the day. I won't be allowing cross-examination. I won't hear evidence from your client. If I'm satisfied that on the surface there appears to be cause for making an order, then, unless you are able to present some compelling argument, I will make an interim order."

Mr File asked could he call his client and was told no. The Magistrate went on to say:

> "The situation is that if I enter into hearings on a list day I will be totally swamped and nothing will get done."

Later, Mr Johnston went into the witness box and gave evidence that the first defendant had harassed and intimidated him and his aged parents for over 30 years and more recently, where there had been incidents which had included threats of violence. He gave evidence of the matter alleged to have occurred on 27 May this year and of another incident which he said occurred about two years previously. He said that there had been other incidents where verbal harassment had occurred, including one within the previous year, but not within the previous month. None of these incidents involved actual violence, although they were alleged to include threats of violence.

The Magistrate then asked Mr File whether he wished to make any submissions against the making of an interim order. He said that the evidence was disputed, to which the Magistrate replied:

> "I imagine that it is disputed, Mr File, but that is not a reason for not making the order."

Mr File then asked that the matter be adjourned until 2pm, so that a complaint that the plaintiff wished to file could be heard at the same time, and an interim order sought against the first defendant. The Magistrate refused that application on the grounds that he was only dealing with the matters which were presently before him, and said:

"If you want to take proceedings on what might be said to be as a retaliatory basis, there is no problem about that, but they will come into court in their ordinary course."

He thereupon adjourned the proceedings to 27 October for a fresh hearing, and made an interim order, noting that it was opposed.

The submissions on behalf of the plaintiff fall into two categories. Firstly, it is submitted that the making of the interim order constituted a breach of the rules of natural justice, a denial of procedural fairness and constituted an error of law in failing to permit cross-examination of the first defendant or refusing to allow the plaintiff to adduce evidence, and secondly, that in the conduct of the proceedings the Magistrate displayed bias and should be disqualified from hearing the substantive proceedings.

The provisions relating to orders for apprehended violence are contained in Pt 15A of the *Crimes Act, 1900*. S 562B provides that a court may, on complaint, make an apprehended violence order if it is satisfied, on the balance of probabilities, that a person has reasonable grounds to fear, and in fact fears, the commission, by another person, of a personal violence offence against that person, or the engagement of another person in conduct amounting to harassment or molestation of a person, being conduct that, in the opinion of the court, is sufficient to warrant the making of an order.

Subs (4) of that section provides that an order made under this section may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the Court.

S 562BB(1) provides that the Court may make an interim order if it appears to the Court that it is "necessary or appropriate" to do so in the circumstances and an interim order has, while it remains in force, the same effect as a final order made under s 562B.

S 562H provides for the making of interim orders by telephone, by the police, to an authorised justice, in certain limited circumstances of an urgent nature. It further provides that a telephone interim order is to be taken to be a complaint and is to

contain a summons for the appearance of the defendant at a hearing of the complaint by an appropriate court on a date as soon as practicable after the order is made, and, also, that a telephone interim order remains in force for fourteen days unless sooner revoked. A person, who knowingly contravenes a prohibition or a restriction specified in an order (including an interim order) is guilty of an offence and is liable to a fine of $5,500, or imprisonment for two years, or both: s 562I.

It is a fundamental principle of the common law that before making any order against a person affecting that person's rights or liabilities the Court, or tribunal, must hear both sides and, in particular, give both sides the opportunity of presenting relevant evidence and making representations: **Kioa v West** (1985) 159 CLR 551 at 582; **Heatley v Tasmanian Racing and Gaming Commission** (1977) 137 CLR 487 at 498-9.

There are exceptions to these principles depending on the nature of the proceedings and the nature of the rights to be affected, including applications for ex parte interlocutory injunctions and telephone interim orders under s 562H, but, in the case of those urgent applications, the matter is invariably brought back before the court within a short time, usually a few days, so that the respondent to the application can be heard, make representations and, if necessary, or appropriate, adduce evidence.

But these orders were to last until 27 October, a period of four months, and a breach of any of them would constitute a criminal offence rendering the plaintiff liable to fine and/or imprisonment.

S 562BB, to which I have referred, provides that an interim order may be made when it appears to the Court that it is "necessary or appropriate" to do so. The extent of the test "necessary or appropriate" has not been considered and, in a case where one party is unrepresented, it is not appropriate for me to attempt to define it, without full argument; but it is quite clear, in the present case, that the Magistrate did not direct his mind to whether an interim order was "necessary" or "appropriate"; but appears to have taken the view that, if there was a summons before him and it was adjourned, and there was any prima facie evidence of some incident at some time, even two years in the past (although there was, in this case, also evidence of a more recent alleged incident), the order should be made and

should be made without hearing evidence which may have been available to dispute that of the complainant.

In many cases under this part of the Act, there will be allegation, and counter allegation and denial; and in such cases, it may well be "appropriate" to make orders to, in effect, keep the parties apart until the final hearing, but only after the evidence of both has been heard and both sides given reasonable (as opposed to unlimited) opportunity to cross-examine. I emphasise that the opportunity to cross-examine, and indeed the opportunity to lead evidence, must be directed on such applications not to the general issue of whether the complaint has been established on the balance of probabilities, which would be the issue at the final hearing, but to the much more limited issue as to whether it is "necessary or appropriate" to make an interim order.

The fact that there are a lot of matters in the list does not affect this. One can and does have considerable sympathy for Magistrates dealing with long lists but, if the proper hearing of urgent applications for interim orders prevents other matters being heard, then it may be necessary for more Magistrates to be appointed.

Here there was no evidence of any actual violence and nothing to suggest that the making of an interim order was either urgent or "necessary". An interim order may, on the other hand, have nevertheless been "appropriate", but I am satisfied that the Magistrate erred in law in not directing himself to the proper test, and that he denied natural justice and procedural fairness to the plaintiff in refusing to allow his solicitor to call any evidence or to cross-examine the first defendant at all.

In some cases a defendant may be able to show, by cross-examination or other evidence, that the complainant is clearly lying or that the complaint has been brought for an ulterior or improper purpose, in which case it may not be proper to make the interim order. I am not suggesting that that is the case here, but if it was, the plaintiff was denied the opportunity of showing so. Accordingly, I am satisfied that the plaintiff is entitled to the declarations sought in paragraphs 1, 2 and 3 of the summons.

The plaintiff also seeks an order pursuant to s 134 of the *Justices Act, 1902* in the nature of certiorari, quashing the second defendant's decision to make an

apprehended violence order. S 134(1) provides that this Court may, by order, direct a justice to do any act relating to the duties of his office. It is not alleged here, and has not been shown, that the Magistrate has refused to exercise jurisdiction, or to hear a case. The complaint that has been substantiated is that, in hearing the application for an interim order, he erred in law and denied the plaintiff natural justice and procedural fairness. I am, therefore, not satisfied that an order under s 134 is appropriate, but it is a case where, in my view, the plaintiff is entitled to have the proceedings removed into this Court by certiorari and quashed by an order in the nature of common law and/or statutory prohibition.

The question arises then whether I should remit the application for the interim order to the Ryde Local Court for further hearing but, in my view, this is not appropriate, having regard to the fact that the final hearing is set down for the 27th of this month, less than three weeks away. I have no doubt that whether or not the first defendant's complaint is justified, the plaintiff will be very anxious to avoid any further incidents between now and that date. If the final hearing does not take place on that day, a fresh application can be made then for an interim order.

As to the plaintiff's complaint that in the conduct of the proceedings on 10 July the second defendant displayed bias and should be disqualified from hearing the substantive proceedings, the plaintiff relies, in particular, on the refusal to permit the plaintiff to adduce evidence or cross-examine the defendant on the application for the interim order, refusing to stand the matter down to 2pm so that the plaintiff could have his own complaint brought before the Court at that time and apply for an interim order, and his indication before hearing evidence that it was most likely that an interim order would be made.

The test for a reasonable apprehension of bias has been expressed by the High Court in **Livesey v the New South Wales Bar Association** (1983) 151 CLR 288, as follows:

> "A fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views about a question of fact which constitutes a live and significant issue in the subsequent case, or about the credit of a witness whose evidence is of significance, once such a question of fact."

See also **R v Watson ex parte Armstrong** (1976) 136 CLR 248.

As I have already found, the second defendant did not accord natural justice or procedural fairness to the plaintiff and erred in law in making the interim order, but none of those matters, in my view, indicates that he is not prepared to fairly hear the final application. His approach, as appears from the transcript, was that, as a matter of practice, he did not permit cross-examination, or hear evidence from defendants, when dealing with applications for interim orders on list days. He did not, in any way, single out this particular defendant for special treatment. The reference to the likelihood of the order being made was in relation to the likelihood of the interim order being made, not any final order. He misconceived his duty in relation to the hearing of the application for the interim order. Now that he has been corrected in that regard, there is nothing in any of these remarks, or in his approach, to suggest that he will not accord both parties a fair and unbiased hearing of the final application.

The reference to "retaliatory" in relation to the plaintiff's proposed application was unfortunate but, in my view, is such a minor slip of the tongue when dealing with a busy and no doubt extensive list that I would not read into it any apprehension of bias.

The application to have the second defendant disqualified from hearing the final proceedings has, therefore, not been made out.

I make declarations as in paragraphs 1, 2 and 3.

I order that the interim order made by the second defendant in the Local Court at Ryde on 10 July 1998 be removed into this Court and quashed.

I prohibit any further proceedings on the said interim order.

I order the first defendant to pay the plaintiff's costs of the proceedings so far as they relate to the interim order, as opposed to the issue of apprehended bias. I order that the first defendant have a certificate under the **Suitors' Fund Act** in respect of such costs.

I order the exhibit to be returned.

Date

13.10.98

Associate