

Supreme Court New South Wales

Case Title: Cunningham v Cunningham

Medium Neutral Citation: [2012] NSWSC 849

Hearing Date(s): 21 June 2012

Decision Date: 27 July 2012

Jurisdiction: Common Law

Before: Button J

Decision:

(1) Summons dismissed.

(2) Defendant to have liberty to apply until 4pm, 3 August 2012, for an order as to costs.

Catchwords:

ADMINISTRATIVE LAW - proceedings in lieu of writs - whether costs order made with jurisdictional error

APPREHENDED VIOLENCE ORDERS - appeal of costs order - avenue of appeal - construction of s 99(3) of Crimes (Domestic and Personal Violence) Act 2007 - whether error in not ordering costs - whether proceedings frivolous or vexatious

STATUTES - Acts of Parliament - interpretation - purposive interpretation - whether s 99(3) of Crimes (Domestic and Personal Violence) Act 2007 dominant to s 99(2)

Legislation Cited:

Criminal Procedure Act 1986
Crimes (Appeal and Review) Act 2001
Crimes (Domestic and Personal Violence) Act 2007
Interpretation Act 1987
Local Court Act 1982 (repealed)

Local Court Act 2007
Supreme Court Act 1970
Supreme Court Rules 1970

Cases Cited: Constable Redman v Willcocks [2010]
NSWSC 1268
Franks v Franks [2012] NSWCA 209
Garde v Dowd [2011] NSWCA 115
John Fairfax Publications Pty Ltd v Ryde
Local Court [2005] NSWCA 101; (2005) 62
NSWLR 512
Kirk v Industrial Relations Commission of
New South Wales [2010] HCA 1; (2010) 239
CLR 531
Project Blue Sky Inc v Australian
Broadcasting Authority [1998] HCA 28;
(1998) 194 CLR 355
Public Service Association of South
Australia Incorporated v Industrial Relations
Commission of South Australia [2012] HCA
25

Texts Cited: Bullen & Leake & Jacob's Precedents of
Pleadings, 12th ed (1975) Sweet and
Maxwell
Peter Taylor et al, Ritchie's Uniform Civil
Procedure NSW (2005) LexisNexis
Butterworths

Category: Principal judgment

Parties: Warren Cunningham (plaintiff)
Christine Cunningham (defendant)

Representation

- Counsel: Counsel:
Self-represented (plaintiff)
C Fraser (defendant)

- Solicitors: Solicitors:
Self-represented (plaintiff)
Raj Haricharan (defendant)

File number(s): 2010/321034

Publication Restriction:

JUDGMENT

Introduction

- 1 These proceedings are an appeal against a refusal by a Magistrate to make a costs order against the defendant in favour of the plaintiff after the plaintiff successfully resisted the making of an Apprehended Domestic Violence Order ("ADVO") against him.

Unrepresented Plaintiff

- 2 It is convenient to deal at this stage with a preliminary aspect of the matter. The plaintiff appeared unrepresented. He had previously prepared and filed his own documentation, some of it handwritten. The defendant was represented by counsel.
- 3 As one would expect, the documents filed by the plaintiff were not in strict compliance with the rules of this Court. I enquired of counsel for the defendant whether he took any point with regard to that, and he informed me that he did not.

Chronology

- 4 The plaintiff and the defendant were married, and had three children together. Some time ago the marriage broke down, and the atmosphere became acrimonious. Family law proceedings were commenced with regard to their property and children.
- 5 On 28 September 2010, the defendant swore an application seeking an ADVO. The matter first came before the Local Court at Raymond Terrace on 5 October 2010 (the judgment of the Magistrate refers to 2011, but I infer that that must be a slip). On 18 January 2011 the matter was not

reached. It was unfortunately not reached again on 12 April 2011. On 27 June 2011, the matter came before Magistrate Allen.

- 6 It is noteworthy that the police did not make the application for the ADVO on behalf of the defendant. The defendant was represented by a solicitor. The plaintiff was also represented.
- 7 On 12 October 2011, at the end of the case for the defendant, the solicitor for the plaintiff sought to have the matter dismissed without the matter proceeding further. Ultimately, that submission was accepted by the Magistrate, and his Honour declined to make the orders sought by the defendant. His Honour delivered a judgment in support of that decision and made some findings of fact. I will return to that judgment later. In doing so I will refer to the parties in the Local Court by name, so as to avoid confusion due to their reversed roles as defendant in the Local Court and defendant in the Supreme Court. I infer from the written submissions prepared by counsel for the defendant that she is now known as Ms Luke. I shall also delete references to the name of their son.
- 8 Part of the evidence in the hearing was that, by letter of 14 July 2011, the solicitor for the defendant wrote to the solicitors then acting for the plaintiff, and, "without prejudice", offered to settle the matter on the basis that the interim order continue until the hearing date of 9 August 2011 (but presumably no further), and that each party bear their own costs.
- 9 The contents of that letter made its way into evidence before the Magistrate and was relied upon by both parties in their submissions to his Honour. His Honour also referred to it in the judgment.
- 10 As well as seeking dismissal of the application the solicitor for the plaintiff also sought costs. After dismissing the application for the ADVO, the Magistrate said, in refusing costs:

"[The solicitor then appearing for Mr Cunningham] has also made an application before me in respect to costs. Costs under the Crimes (Domestic and Personal Violence) Act of 2007 is covered in pt 14 of the legislation referred to as miscellaneous. Section 99(1) of the legislation which is headed Costs says:

"A court may in apprehended violence order proceedings award costs to the applicant for the order or decision concerned or the defendant in accordance with this section. Costs are to be determined in accordance with div 4 of pt 2 of ch 4 of the Criminal Procedure Act."

It says at subs 3:

"A court is not to award costs against an applicant who is the person for whose protection an apprehended domestic violence order is sought unless satisfied that the application was frivolous or vexatious."

Whilst I have declined to make the final orders based upon the discretion that is instilled in this court pursuant to s 16(1)(b) of the legislation, to my mind I could not be satisfied that this application was ever brought or continued for reasons that could be said to be either frivolous or vexatious or both.

Whilst there is clearly before the court an offer of settlement dated 14 July 2011 before this matter came to hearing on 9 August 2011, being the third date it was listed for hearing but the date it actually got on, I am satisfied as to the explanation and the motivation for that offer as was expressed to me by [the solicitor then appearing for Ms Luke] in her submissions in answer to the submissions made by [the solicitor then appearing for Mr Cunningham] at the close of her case.

It is a matter where, having considered it carefully, considering the nature of the application, the evidence upon which it is based, the way it has unfolded before me, I consider it to be the proper exercise of my discretion to decline the second of the applications made by [the solicitor then appearing for Mr Cunningham].

I DO NOT PROPOSE TO AWARD COSTS."

- 11 The registry file of this Court demonstrates that, on 18 November 2011, the plaintiff appeared in the District Court of New South Wales at Newcastle before Acting Judge Graham. The plaintiff was attempting to appeal the absence of a costs order in his favour. The appeal was struck out for want of jurisdiction in the District Court.

12 Thereafter the plaintiff filed a summons in this Court seeking to appeal from that refusal to order costs. The matter was heard by me on 21 June 2012.

Material before this Court

13 The plaintiff moved upon a summons that made it sufficiently clear that he was seeking to appeal the refusal of the Magistrate to award him costs. He also relied upon a number of affidavits with annexures. These were extensive and ranged widely. He also provided written submissions. As one would expect, there was no sharp distinction drawn in the written materials upon which the plaintiff relied between evidence and submissions, whether as to fact or law.

14 I permitted the plaintiff to address the Court virtually unfettered, and he did so for over an hour. I did not restrict him to the precise issue at hand. He was also permitted to address the Court in reply after counsel for the defendant had addressed, and to make oral submissions with regard to any costs order arising from this hearing.

15 Counsel for the defendant relied upon an affidavit of the defendant sworn on 23 March 2012. That affidavit annexed the transcript of the submissions of the parties to the Magistrate on 12 October 2011, and two judgments and orders of the Magistrate. I also received short written submissions from counsel for the defendant. He addressed the Court briefly.

16 I made it clear to both parties that I did not have a complete transcript of the proceedings in the Local Court. I invited both parties to provide that transcript to me if they wished to do so. I informed them that I did have the transcript of the submissions and judgment and orders. Neither party provided me with the transcript of the hearing before Magistrate Allen.

- 17 Finally, I checked with the plaintiff whilst he was on his feet that I had received copies of all of the documents upon which he relied.

Findings of fact of the Magistrate

- 18 In the judgment dismissing the application for an ADVO, the Magistrate reviewed the evidence before the Local Court. It is useful to extract a number of the findings of fact of his Honour. His Honour referred to the grounds set out in the written application seeking the ADVO. Part of that included the assertion that the defendant woke on 25 September 2010 to find that the son of the plaintiff and defendant was missing from her home. The application went on to state:

"He was present the evening before and [Ms Luke] knows that [Mr Cunningham] has come to her home during the evening and has taken their son with him. [Ms Luke] is concerned that [Mr Cunningham] would attend her home whilst she was asleep and apparently gain entry to it. She fears further harassment and intimidation and apprehends violence."

- 19 With regard to that serious allegation, the Magistrate found as follows:

"In the course of evidence before me it has become apparent that [Ms Luke] has accepted that the child [...], more about whom I will speak in these short reasons, left the home of his own accord on this occasion and that in effect, notwithstanding her belief and perhaps legitimate belief at the time, such was the nature of the acrimony between these parties, [Mr Cunningham] was not responsible for entering her home as she believed and removing the child or essentially, as she has asserted, kidnapping him."

- 20 In short, the Magistrate rejected that central allegation of the defendant that had been originally made many months before. However, his Honour did record:

"[Ms Luke] also gave evidence before me. [Ms Luke] stated that she remains fearful of [Mr Cunningham]. Notwithstanding save a few minor matters where she indicated he has driven slowly past her premises, there have been no real ongoing problems between them. [Ms Luke] says in her view the only reason she feels [Mr Cunningham] has not continued to menace and/or harass her as

asserted in the grounds to the application is because of the existence of the interim orders made by this court."

21 Furthermore, despite rejecting the allegation of kidnapping the child, the Magistrate made some findings adverse to the plaintiff (and indeed the defendant) throughout the judgment dismissing the application. I proceed to extract them:

"May I say I have little doubt that the exchanges between [Mr Cunningham and Ms Luke] during and following the marriage breakdown may have from time to time and likely would have been unsavoury, unpleasant and less than proper and on the evidence before me that appears to be clear and that on at least one occasion at a time when they were arguing about the child [...] during the course of that argument in the presence of a number of the children it appears that [Mr Cunningham] pushed at the very least [Ms Luke].

...

May I say for the purpose of these short reasons at this time that it appears uncontroversial that a number of incidents did occur, a number of incidents that are at the very least unfortunate, unsavoury and to some extent demonstrate a clear level of hostility at a time of the disintegration of this relationship. [The solicitor then appearing for Ms Luke] says clearly they have never been challenged and can be relied upon by the court.

...

What has become clear to me and to my mind any other person of an impartial nature who observed these proceedings unfold before this court whilst perhaps not readily discernible from the two dimensions of any written or typed page is that there remains a great deal of acrimony and effort on the part of each of these litigants at one-upmanship. To my mind neither of these litigants can be said to have covered themselves in any great glory.

...

As I have said, I have little doubt that at times between these two people there have been exchanges and there has been conduct on both parties that has been difficult, emotionally charged, [and] psychologically unsettling.

...

Having come to that conclusion, [that is, that the ADVO should not be made] I am not and it should not be read that I am in any way condoning the conduct that has been alleged on the part of [Mr Cunningham] from time to time. In my view he has acted in ways from time to time that could never be condoned by this court and it does not condone such conduct."

Submissions

- 22 The plaintiff submitted that the Court would apply common sense and seek to do justice in a sensible way. He emphasised that he had never been charged with an offence with regard to these allegations, that the police were not prepared to initiate the application for the ADVO, that he had successfully resisted the application, and that the application was originally founded on a wrong allegation that he broke into the residence of the defendant and kidnapped their son. He submitted that the "without prejudice" letter demonstrated that the defendant should not have proceeded with the application in the Local Court. When requested by me to focus upon the precise issue before this Court, he was content to adopt my formulation that his position was that the Magistrate was in error in failing to find that the application was frivolous or vexatious, and therefore costs should have been granted, any leave should be granted, and the appeal should be allowed. He stated that his costs were, as at the date of the hearing in this Court, \$13,433.00.
- 23 Counsel for the defendant submitted that the Magistrate had not fallen into any kind of error in determining the question of costs. He also sought costs of this matter if the plaintiff were unsuccessful.

Statutory Background

- 24 The application for an ADVO was brought pursuant to Part 4 of the *Crimes (Domestic and Personal Violence) Act 2007* ("the Act"). I extract ss 16 and 17 of the Act:

"16 Court may make apprehended domestic violence order

(1) A court may, on application, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears:

(a) the commission by the other person of a personal violence offence against the person, or

(b) the engagement of the other person in conduct in which the other person:

(i) intimidates the person or a person with whom the person has a domestic relationship, or

(ii) stalks the person,

being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

(2) Despite subsection (1), it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in, if:

(a) the person is a child, or

(b) the person is, in the opinion of the court, suffering from an appreciably below average general intelligence function, or

(c) in the opinion of the court:

(i) the person has been subjected at any time to conduct by the defendant amounting to a personal violence offence, and

(ii) there is a reasonable likelihood that the defendant may commit a personal violence offence against the person, and

(iii) the making of the order is necessary in the circumstances to protect the person from further violence.

(3) For the purposes of this section, conduct may amount to intimidation of a person even though:

(a) it does not involve actual or threatened violence to the person, or

(b) it consists only of actual or threatened damage to property belonging to, in the possession of or used by the person.

17 Matters to be considered by court

(1) In deciding whether or not to make an apprehended domestic violence order, the court must consider the safety and protection of

the protected person and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order.

(2) Without limiting subsection (1), in deciding whether or not to make an apprehended domestic violence order, the court is to consider:

(a) in the case of an order that would prohibit or restrict access to the defendant's residence-the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made, and

(b) any hardship that may be caused by making or not making the order, particularly to the protected person and any children, and

(c) the accommodation needs of all relevant parties, in particular the protected person and any children, and

(d) any other relevant matter.

(3) When making an apprehended domestic violence order, the court is to ensure that the order imposes only those prohibitions and restrictions on the defendant that, in the opinion of the court, are necessary for the safety and protection of the protected person, and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order, and the protected person's property.

(4) If an application is made for an apprehended domestic violence order that prohibits or restricts access by the defendant to any premises or place and the court hearing proceedings in respect of the application decides to make an order without the prohibition or restriction sought, the court is to give reasons for that decision."

25 Section 99 of the Act deals with the question of costs:

"99 Costs

(1) A court may, in apprehended violence order proceedings, award costs to the applicant for the order or decision concerned or the defendant in accordance with this section.

(2) Costs are to be determined in accordance with Division 4 of Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.

(3) A court is not to award costs against an applicant who is the person for whose protection an apprehended domestic violence order is sought unless satisfied that the application was frivolous or vexatious.

(4) A court is not to award costs against a police officer who makes an application unless satisfied that the police officer made the

application knowing it contained matter that was false or misleading in a material particular.

(5) Subsections (3) and (4) have effect despite any other Act or law."

- 26 For reasons that appear below, I have not felt it necessary to extract the portion of the *Criminal Procedure Act 1986* referred to in s 99(2).

Bases of appeal or review of the decision of the Magistrate

Appeal

- 27 It is noteworthy that the plaintiff did not seek to impugn in this Court the finding of the District Court. It was made clear from his written documentation and oral submissions that he was attacking the decision of the Local Court Magistrate, not the District Court Judge. Therefore I proceed to discuss the various bases whereby the plaintiff could appeal from the Local Court to this Court.
- 28 The Act provides for limited appeals pursuant to s 84. I need not extract the section, because it does not mention appeals to this Court.
- 29 There are three mechanisms of appeal from the Local Court to this Court that may be able to be engaged, depending upon how the proceedings in the Local Court are classified. The first would be by way of Division 4 of Part 3 of the *Local Court Act 2007*. That would apply if the proceedings were proceedings of the kind envisaged by Part 3 of the *Local Court Act*, which is entitled "*Civil jurisdiction*". The second would be by way of Part 5 of the *Crimes (Appeal and Review) Act 2001*. That would apply if the proceedings were classified as criminal proceedings. The third would be by way of s 70 of the *Local Court Act*. That would apply if the proceedings were classified as "application proceedings" of the kind envisaged by Part 4 of the *Local Court Act*, which is entitled "*Special jurisdiction*".

- 30 Turning to the first, I do not consider that applications for ADVOs fall within Part 3 of the *Local Court Act*. That Part is confined to determination of claims for debts, damages, recovery of goods, and the like.
- 31 Turning to the second, the traditional view is that applications for apprehended violence orders are not criminal proceedings: see *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; (2005) 62 NSWLR 512 at [20]. However, in the recent decision of *Franks v Franks* [2012] NSWCA 209, Basten JA (with whom Barrett and Hoeben JJA agreed) queried whether an application for an apprehended violence order should in fact be regarded as falling within the criminal jurisdiction of the Local Court: see [8] and [9]. But it does not seem to me that his Honour came to a conclusive determination with regard to the matter.
- 32 If the proceedings in the Local Court were criminal proceedings, there could perhaps be an appeal to this Court pursuant to Part 5 of the *Crimes (Appeal and Review) Act*. It is not clear to me how, if at all, an appeal against a refusal to order costs could fit within the concepts of "conviction", "sentence", or "interlocutory order" contained in that Part. It may be that there could be no such appeal. I know of no other authority on the point.
- 33 If the proceedings in the Local Court were not criminal in nature, then I consider that they would fall within Part 4 of the *Local Court Act*.
- 34 In the absence of clear authority to the contrary, and for abundant caution in light of the fact that the plaintiff is unrepresented, I shall proceed on the basis that an application for an ADVO is not a criminal proceeding, and that it falls within Part 4 of the *Local Court Act*.
- 35 I shall discuss later in this judgment whether, in truth, classification of an application for an ADVO as criminal proceedings or as falling within Part 4 of the *Local Court Act* substantially affects the appeal rights that the plaintiff has from the Local Court to this Court.

36 In accordance with the approach indicated above, I proceed on the basis that proceedings such as those under consideration are brought in the Local Court pursuant to Part 4 of the *Local Court Act*, which is entitled "*Special jurisdiction*". I come to that view by way of s 44 of the *Local Court Act* and s 91 of the Act. The former section may be sharply contrasted with s 36(1)(c) in the repealed *Local Court Act* 1982, which was to opposite effect. I have also considered s 93 of the Act, which is as follows:

"93 Jurisdiction of District Court under this Act

The jurisdiction conferred on the District Court by this Act is conferred on the Court in its criminal jurisdiction."

It is noteworthy that there is no similar provision with regard to the jurisdiction of the Local Court or the Children's Court under the Act.

37 Section 70 appears in Part 4 of the *Local Court Act*, and is as follows:

"70 Appeals

(cf LCA 1982, section 64)

(1) In relation to *any order arising from an application notice*:

(a) an application for annulment may be made in accordance with Part 2 of the *Crimes (Appeal and Review) Act 2001*, and

(b) an appeal to the District Court may be made in accordance with Part 3 of the *Crimes (Appeal and Review) Act 2001*, and

(c) *an appeal to the Supreme Court may be made in accordance with Part 5 of the Crimes (Appeal and Review) Act 2001,*

in the same way as such an application or appeal may be made in relation to a conviction arising from a court attendance notice dealt with under Part 2 of Chapter 4 of the Criminal Procedure Act 1986.

(2) *An application or appeal may not be made under subsection (1) in relation to an order referred to in that subsection if the making of such an application or appeal is prohibited by the Act or law pursuant to which the order was made.*

(3) If any other Act:

(a) provides for an appeal to the District Court against an order of the Court under that Act, or

(b) provides for an appeal against such an order without identifying to which court such an appeal is to be made,

such an appeal is to be made to the District Court in accordance with Part 3 of the *Crimes (Appeal and Review) Act 2001* in the same way as an appeal under that Part may be made in relation to a conviction arising from a court attendance notice dealt with under Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.

(4) If any other Act provides for an appeal to the Supreme Court against an order of the Court under that Act, such an appeal is to be made to the Supreme Court in accordance with Part 5 of the *Crimes (Appeal and Review) Act 2001* in the same way as an appeal under that Part may be made in relation to a conviction arising from a court attendance notice dealt with under Part 2 of Chapter 4 of the *Criminal Procedure Act 1986*.

(5) The Crimes (Appeal and Review) Act 2001 applies to an application or appeal arising under this section with such modifications as are made by or in accordance with the regulations under that Act.

(6) In this section, a reference to an order includes a reference to any determination that the Court has jurisdiction to make, and any penalty that the Court has jurisdiction to impose." (emphasis added)

38 It seems to me that a costs order (including an order to the effect that each party must bear their own costs, as here) with regard to an ADVO is an "order arising from" an application for an ADVO. Furthermore, I consider that it would constitute a "determination that the Court has jurisdiction to make".

39 The reference to Part 2 of Chapter 4 of the *Criminal Procedure Act* in s 70(1) is to summary trial procedure in the Local Court.

40 The reference in s 70(1)(c) and the balance of s 70(1) is to the following sections of the *Crimes (Appeal and Review) Act*:

"52 Appeals as of right

(1) Any person who has been convicted or sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the conviction or sentence, but only on a ground that involves a question of law alone.

...

53 Appeals requiring leave

(1) Any person who has been convicted or sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the conviction or sentence on a ground that involves:

(a) a question of fact, or

(b) a question of mixed law and fact,

but only by leave of the Supreme Court."

41 There is some disjunction between the limited rights of appeal to the District Court under s 84 of the Act, and the more expansive rights of appeal to the District Court and this Court under s 70 of the *Local Court Act*. I do not consider that I need to explore that issue further in this judgment. In any event, I do not consider that the Act affirmatively prohibits an appeal to this Court, to use the language of s 70(2) of the *Local Court Act*.

42 No regulations have been made of the kind referred to in s 70(5).

43 On the above analysis, it is apparent that, whether an application for an ADVO is to be classified as falling within the criminal jurisdiction or the special jurisdiction of the Local Court, all avenues of appeal from the Local Court to this Court must travel through Part 5 of the *Crimes (Appeal and Review) Act*.

44 Accordingly, I shall proceed to determine this appeal in accordance with those provisions.

45 In determining the statutory appeal, I consider that my task is to determine whether, accepting the findings of fact made by the Magistrate at the end

of the hearing, the failure of the Magistrate to order costs to the plaintiff demonstrates an error of law or fact that is amenable to appeal.

Prerogative relief

46 Separately, in light of the fact that the plaintiff is unrepresented, and for further abundant caution, I consider that I should also briefly consider whether any relief should be granted pursuant to s 69 of the *Supreme Court Act* 1970. Of course, the documents and oral submissions of the plaintiff do not refer to proceedings in lieu of writs. But I consider that he made it clear that he was seeking to impugn, by whatever means available, the failure of the Magistrate to make a costs order in his favour. I also consider that such an approach by me does no prejudice to the defendant.

Construction of s 99(3) of the Act

47 Section 99(3) is an unusual provision that, on its face, displaces the general principle of costs following the result in non-criminal matters.

48 In accordance with that subsection, it is only in cases in which a magistrate is affirmatively satisfied that the application was frivolous or vexatious that costs can be ordered against an applicant who, as here, is the person whose protection is sought pursuant to the application. That is a high hurdle for any defendant to an ADVO to clear. It is apparent that there will be very many cases in which an application for an ADVO is dismissed but no costs ordered in favour of a successful defendant, as a result of the operation of the subsection.

49 It is not entirely clear how s 99 is to operate in conjunction with Division 4 of Part 3 of Chapter 4 of the *Criminal Procedure Act*. In particular, it is not clear whether s 99(2) has work to do in addition to s 99(3) in a situation such as the present.

- 50 Davies J considered the general question in *Constable Redman v Willcocks* [2010] NSWSC 1268, a decision to which I was helpfully referred. Counsel for the defendant did not refer me to any other cases on the construction of s 99.
- 51 In *Constable Redman v Willcocks*, Davies J held that that Division of the *Criminal Procedure Act* has work to do by way of s 99(2), even despite s 99(4) and s 99(5). I respectfully agree with his Honour's reasoning in that case.
- 52 However, in contrast to this case, that case was to do with the question of available costs when the applicant is a police officer (who had mishandled the conduct of the application in court), not a person seeking protection as here. In other words, that case dealt with the interaction between s 99(2) and s 99(4), not s 99(2) and s 99(3).
- 53 Furthermore, at [37] Davies J noted the fact that s 99(4) focuses twice upon the making of the application by the police officer. His Honour regarded that as a "*small indication that the restriction in that sub-section is directed to the bringing of the application and not the way it is subsequently conducted.*" And yet it is noteworthy that s 99(3) is not expressed in the same terms, and speaks only of "the application". That provides some support for the proposition that that distinction between the bringing of an application and the conduct of the application drawn by Davies J is not able to be drawn in a situation such as this.
- 54 I have also considered the decision of *Garde v Dowd* [2011] NSWCA 115. But that case was to do with the correct construction of s 99(2), not whether s 99(2) had work to do above and beyond s 99(3) in the case of an applicant who is the person for whose protection an ADVO is sought. Indeed, Basten JA (with whom Giles and McColl JJA agreed) made it clear at [3] that "*[t]he only order which is challenged, pursuant to judicial review*

proceedings in this Court, is an order made in the Local Court that the applicant pay the respondent's costs "as agreed or assessed".

- 55 In accordance with the issues raised by the parties in that matter, s 99(3) is not mentioned in the judgment. In short, I do not consider that the decision in *Garde v Dowd* assists in determining the relationship between s 99(2) and s 99(3).
- 56 Furthermore, I have sought to construe the combined operation of s 99(2) and s 99(3) by way of reference to general principles of statutory construction. I have considered the purpose underlying the Act as a whole, in accordance with s 33 of the *Interpretation Act* 1987. I have also considered the provisions in the context of the whole statute, in accordance with what was said by the plurality in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69] to [71].
- 57 The underlying purpose of the Act is to provide protection and assistance to members of the community who are in danger from violence or the threat of violence. The Act creates a detailed regime whereby such persons can seek orders that limit, on pain of criminal sanction, the otherwise lawful actions of others. Part 2 of the Act states its objects consistently with the above summary.
- 58 One approach is to interpret s 99(3) as applying only to the original application made by a person in need of protection, and not to the application as a whole, thereby permitting s 99(2), and the provisions that apply to costs in summary criminal matters generally, to apply to the course of any such application in court. The alternative approach is to regard s 99(3) as being the dominant provision over s 99(2), thereby shielding persons in need of protection who are applicants from costs orders, unless the high hurdle in s 99(3) is cleared by a defendant. It

seems to me that the latter interpretation is more consistent with the underlying purpose of the Act, and the context in which s 99 appears.

59 In this Court, neither party submitted to me that the Magistrate was in error in confining his Honour's consideration to s 99(3), and not considering the possible application of s 99(2). Nor was any such submission made to the Magistrate by the solicitor then appearing for the plaintiff. In light of the factual differences between this case and *Constable Redman v Willcocks*, the differences in wording between s 99(3) and s 99(4), general principles of statutory construction, and the position of the parties, I proceed on the basis that s 99(2) does not apply in the circumstances of this case.

60 Having said that, s 99 is not without its difficulties, as both Basten JA and Davies J have noted. Furthermore, the plaintiff, due to his lack of representation, was not in a position to make submissions about the intricacies of the section, or the effect of *Constable Redman v Willcocks*.

61 I consider that, as against the possibility that the Magistrate and I are wrong in our construction of the section, I should make the following brief comments, on the assumption that Division 4 of Part 2 of Chapter 4 of the *Criminal Procedure Act* applies. I shall do so without extracting the relevant sections.

62 In this matter, there was no evidence before me of any procedural mishandling on the part of the defendant of the kind that the applicant police officer committed in *Constable Redman v Willcocks*. I certainly do not regard the continuation of the matter after the "without prejudice" letter was sent as falling into that category. As a result, it is seriously open to doubt whether, even if the Magistrate had applied the Division under consideration, his Honour would or should have made a costs order of the kind made in *Constable Redman v Willcocks*, or indeed any costs order in favour of the plaintiff.

63 Separately, I do not consider that I need to engage in lengthy analysis of the meaning of the phrase "*frivolous or vexatious*". Those words are well known to the law and import a high degree of inappropriateness in a cause of action, approaching an abuse of process. I am content to proceed on the basis of definitions derived from *Bullen & Leake & Jacob's Precedents of Pleadings*, 12th ed (1975) Sweet and Maxwell at p 145, and provided in Peter Taylor et al, *Ritchie's Uniform Civil Procedure NSW* (2005) LexisNexis Butterworths at [4.15.10] - [4.15.15]: "*A matter is frivolous when it is without substance or groundless or fanciful ... A matter is vexatious when it lacks bona fides and is hopeless and tends to cause the opponent unnecessary anxiety, trouble and expense*".

Decision

Appeal

64 Turning first to s 52 of the *Crimes (Appeal and Review) Act*, I do not consider that an error of law is demonstrated. I consider that the Magistrate applied the correct statutory test to the question of costs: namely, whether his Honour was satisfied that the application for the ADVO was frivolous or vexatious. I do not discern error in that approach.

65 It is noteworthy that the test contained in s 99(3) confines itself to "*the application*". The plaintiff sought to rely on earlier applications for ADVOs said to have been made by the defendant, and indeed the whole history of the matter. But it seems to me that the legislation confines a magistrate to making a judgment about the application that has been determined, not other matters.

66 As for s 53, I am reluctant to grant leave to the plaintiff to rely upon any error of fact. However, in light of the fact that his appeal has been rejected by the District Court, and that he is unrepresented, I do so, and proceed to analyse the factual findings of the Magistrate with regard to costs.

67 In light of the findings of fact of the Magistrate at the end of the hearing, I do not consider that it was erroneous for the Magistrate not to find that the application was frivolous or vexatious. It is true that an important part of the original allegation was ultimately accepted to be unfounded. But the Magistrate found that the plaintiff had indeed pushed the defendant on one occasion, recounted the evidence of the defendant that she continued to have fears, and referred negatively more than once to the behaviour of the plaintiff. The "without prejudice" letter did not demonstrate that the application should not have proceeded at all. It merely showed a readiness to settle. In all of the circumstances, I do not consider that the Magistrate was somehow bound to find that the application was frivolous or vexatious. Nor, on the facts as found at the end of the hearing, do I come to that affirmative conclusion.

68 Because I have not identified an error of law or an error of fact, it follows that I do not identify an error of mixed fact and law.

69 In short, I do not discern error of law or fact in the judgment or order with regard to costs in the Local Court that should attract intervention of this Court by way of a successful appeal.

Prerogative relief

70 I turn to consider the question of relief pursuant to s 69 of the *Supreme Court Act*. In order to succeed, the plaintiff would need to establish an actual or constructive failure to exercise jurisdiction (an order in the nature of mandamus); or an actual or constructive act in excess of jurisdiction (an order in the nature of prohibition); or other jurisdictional error or error of law on the face of the record, including the judgment (an order in the nature of certiorari): see generally *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 and *Public Service*

Association of South Australia Incorporated v Industrial Relations Commission of South Australia [2012] HCA 25.

71 In light of my findings that there was no error of law in the approach of the Magistrate, none of those matters are established. For completeness, I confirm that the plaintiff was represented by a solicitor in the Local Court, and there is no hint of a denial of procedural fairness in that Court.

Conclusion

72 In short, I consider that the plaintiff has not established any error of fact or law that could give rise to relief by way of a statutory appeal or by way of proceedings in lieu of writs. It follows that the summons will be dismissed.

Costs

73 The usual course would be for the Court to order that the plaintiff pay the defendant's costs.

74 However, it seems to me that, in light of the absence from Part 5 of the *Crimes (Appeal and Review) Act* of any analogue of s 28(3) or s 49(4) of that Act, the better view is that I do not have the power to make such an order with regard to this appeal, in which leave was not required to impugn the order on a question of law, and leave was granted with regard to any question of fact. I say that having considered s 52 and s 72(b) of the *Crimes (Appeal and Review) Act*, and r 14 of Part 51B of the Supreme Court Rules. Furthermore, because I have discussed prerogative relief only for abundant caution, and not due to any submission of the plaintiff, I do not consider that any costs order should be made against him in that regard.

75 These detailed aspects of costs were not discussed in the hearing. In light of that, I will make no order as to costs, but give the defendant liberty to

apply within 7 days of today's date with regard to any application as to costs.

Orders

(1) Summons dismissed.

(2) Defendant to have liberty to apply until 4pm, 3 August 2012,
for an order as to costs.
