DISTRICT COURT OF QUEENSLAND

CITATION:	*Jobson v Fallon* [2007] QDC 126
PARTIES:	**LES GARY JOBSON** (Appellant) **V** **TRACY MAJELLA FALLON** (Respondent)
FILE NO/S:	D71/2005
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Beenleigh
DELIVERED ON:	18 May, 2007
DELIVERED AT:	Beenleigh
HEARING DATE:	5 March 2007
JUDGE:	Dearden DCJ
ORDER:	**Appeal dismissed**
CATCHWORDS:	APPEAL – *Domestic and Family Violence Protection Act* – strike out of Protection Order - costs
LEGISLATION:	*Domestic and Family Violence Protection Act* 1989 (Qld) ss 61, 63, 63(1), 63(1)(a)(i), 64, 65, 66
CASES:	*Byrnes v R* (1999) 191 CLR 1 *Coulter v Ryan* [2006] QCA 567 *Owen v Cannavan* [1995] QCA 324 *Schneider v Curtis* [1967] Qd R 300
COUNSEL:	Appellant appeared on his own behalf Mr J Briggs for the respondent
SOLICITORS:	Appellant appeared on his own behalf Legal Aid Queensland for the respondent

Introduction

[1] This is an appeal pursuant to the *Domestic and Family Violence Protection Act* 1989 ("*DFVPA*") in respect of a Magistrate's decision on 2 June 2005 at Beenleigh, refusing to order costs in favour of the appellant after striking out the respondent's application for a protection order.

Background

[2] The appellant and the respondent had been married with three children. The respondent made an application for a protection order in the Beenleigh Magistrates Court on 24 November 2004. Temporary protection orders were made in favour of the respondent on 22 December 2004, 19 January 2005, and 16 February 2005. The matter proceeded to hearing in the Beenleigh Magistrates Court on 2 June 2005.

[3] The respondent gave her evidence-in-chief by way of a written statement, and before the respondent was cross-examined, the appellant's counsel made a submission that no acts of domestic violence were established and that the application should be struck out.

[4] As a consequence of that submission by the appellant's counsel, the respondent's application for a protection order was struck out, and the appellant then did not proceed with a cross application for a protection order. The appellant's counsel made an application for costs pursuant to *DFVPA* s 61, which was refused by the learned magistrate. The learned magistrate held that the application for a protection order was dismissed "for want of evidence" but the learned magistrate did not, in making that finding, consider the protection order application to be "frivolous"[1].

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[1] Decision I10

The Law

[5] The appeal provisions of the *DFVPA* are contained in s 63. There is, however, no specific provision contained in the *DFVPA* empowering the District Court (or any other court) to hear an appeal in respect of a Magistrate's decision either to grant or refuse costs.

[6] The right to appeal is peculiarly a creature of statute[2]. Appeals are provided for in Pt 5 (ss 63-66) of the *DFVPA*. Relevantly (in the context of this appeal) s 63(1)(a)(i) provides:

> "(1) A person who is aggrieved by an order of a Magistrates Court or the Childrens Court constituted by a Childrens Court Magistrate, or a decision of a Magistrate –
> (a) to refuse an application for –
> (i) a protection order;
> .....
> may appeal to the District Court at or nearest to the place where the order or decision was made."

[7] Although there is no specific provision in *DFVPA* s 63 which provides jurisdiction for an appeal in respect of costs, it should be noted that the provision specifically provides that the appeal is available to "a person who is aggrieved by an order of a Magistrates Court .... or a decision of a Magistrate .... to refuse an application for .... a protection order". It is clear, in my view, that the appellant in this case is "aggrieved" as a result of the order of the learned magistrate to refuse the respondent's application for a protection order (and then to refuse the appellant's application for costs).

[8] As Holmes JA stated in *Coulter v Ryan*[3]:

> "One can regard a costs order made at, and in consequence of, the disposition of a complaint as one of the orders disposing of the complaint; or, as it was put in *Owen v Cannavan* [1995] QCA 324 at p 4, as 'referable to the determination of a complaint'".

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[2] *Byrnes v R* (1999) 191 CLR 1, 35 (per Kirby J)
[3] [2006] QCA 567, para 10

The learned magistrate's decision to refuse costs in the current matter was by way of a final disposition of the proceedings, in contrast to the situation in *Coulter v Ryan* which was an appeal from an order of a District Court Judge dismissing an appeal from an acting magistrate's decision to refuse costs thrown away following the adjournment of the hearing of the charge[4]. In my view, the learned magistrate made a "decision" in the following terms, namely, "the application for costs is dismissed"[5] and in my view that was referable to the determination of the original proceedings[6] (i.e. the application for a protection order).

[9] Accordingly, I consider that this court does have jurisdiction to consider an appeal against the decision of the learned magistrate to refuse the appellant's application for costs.

The merits of the appeal as to costs

[10] The power to award costs in respect of an application for a protection order in the Magistrates Court is highly curtailed. *DFVPA* s 61 relevantly provides that:

> "A court may not award costs on an application for –
> (a) a protection order .... unless the court dismisses the application as malicious, deliberately false, frivolous or vexatious."

The learned magistrate, while accepting that when "a matter in a domestic violence jurisdiction, is dismissed for want of evidence .... then it may be capable of being regarded as frivolous", concluded that in the absence of further evidence from the respondent and given the process on which the proceedings were terminated she could "by no means [be] satisfied, that [the protection order application] is [frivolous] on [the respondent's] part."[7]. The learned magistrate went on to state

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[4] *Coulter v Ryan* [2006] QCA 567, para 1 (per McMurdo P)
[5] Decision T10
[6] Cf *Schneider v Curtis* [1967] Qd R 300, 306 (per Gibbs J)
[7] Decision T10

that "I dismissed it [i.e. the application for a protection order] for want of evidence, which in this instance, I do not regard as frivolous."[8].

[11] The nature of an appeal under the *DFVPA* is, as set out in s 65, "by way of re-hearing on the record". After reviewing the learned magistrate's decision in respect of the issue of costs, I can see no basis on which to conclude that she erred in not concluding that the application was "malicious, deliberately false, frivolous or vexatious". As the learned magistrate pointed out during the course of submissions on the issue of costs, a conclusion as to whether the proceedings were "malicious, deliberately false, frivolous or vexatious"[9] was particularly difficult in a situation where proceedings had been dismissed by way of a no case to answer application made after the respondent's statement was tendered, and no oral evidence had been heard from either the respondent or the appellant[10]. Put simply, the learned magistrate clearly concluded that there was insufficient evidence to conclude that the proceedings were "malicious, deliberately false, frivolous or vexatious". The appellant's counsel could have led evidence on the costs issue, but chose not to do so.

[12] Having concluded that this court has the jurisdiction to consider the appeal, I am not persuaded that there is any basis on which the appeal should be granted. I do not consider that the learned magistrate's exercise of discretion in not ordering costs miscarried in any way.

Order

[13] Accordingly the appeal is dismissed.

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[8] Decision 110
[9] *DFVPA* s. 61
[10] Decision 18

Costs of the appeal

[14] Mr Briggs, who appeared briefed by Legal Aid Queensland on behalf of the respondent, advised the court that "if the respondent was successful on the appeal, no application would be made for costs of the appeal"[11]. Accordingly, I make no order as to costs.

[11] Appeal T15-16