

24/03; [2003] VSC 376

SUPREME COURT OF VICTORIA

MILES v BARCA & ANOR

Byrne J

1, 9 October 2003

INTERVENTION ORDER – STALKING – COMPLAINT SERVED ON DEFENDANT – DISPUTE BETWEEN PARTIES SETTLED – COMPLAINT WITHDRAWN – COMPLAINT LATER REINSTATED – NO NOTICE OF HEARING GIVEN TO DEFENDANT – INTERVENTION ORDER MADE – BROUGHT TO DEFENDANT’S NOTICE – APPLICATION MADE BY DEFENDANT FOR REVOCATION OF ORDER – APPLICATION REFUSED AS NO JURISDICTION TO MAKE SUCH AN ORDER IN THE CIRCUMSTANCES – WHETHER MAGISTRATE IN ERROR – APPLICATION TO SET ASIDE AND REHEAR SOUGHT TO BE FILED WITH REGISTRAR – REFUSAL BY REGISTRAR TO ACCEPT APPLICATION - WHETHER REGISTRAR IN ERROR: *CRIMES (FAMILY VIOLENCE) ACT 1987, SS12, 16; CRIMES ACT 1958, S21A.*

B. issued a complaint for an Intervention Order against her neighbour M. in respect of M’s conduct relating to a gum tree. Before the complaint came on for hearing, the parties agreed to terms of settlement in relation to the tree and boundary fence. When the terms of settlement were not complied with and without giving any notice to M., B. caused the complaint to be brought on for hearing at which an order was made against M. prohibiting him from engaging in certain conduct.

When M. became aware of the order he applied to the Magistrates’ Court for revocation of the order; however this was refused by the magistrate on the basis of lack of jurisdiction. When M. subsequently sought to file with the Registrar an application to set aside and rehear, the Registrar declined to accept it on the ground that the Court had no power to hear it. Upon an originating motion in the nature of mandamus—

HELD: Declaration that the Magistrate and Registrar fell into error. Order that the Registrar accept the application to set aside and that the matter be reheard by another magistrate.

1. An application for an Intervention Order is a proceeding which is civil in character. It follows that the statutory, regulatory and other practices of the Magistrates’ Court with respect to the power to order a re-hearing where a party did not appear at the hearing of a complaint apply to applications made under the *Crimes (Family Violence) Act 1987* (‘Act’). Accordingly, the Registrar ought not to have refused to accept the application to set aside sought to be filed by M.

2. S16 of the Act empowers the Magistrates’ Court to order revocation of an intervention order. The section does not specify the grounds upon which an application may or may not be made. Accordingly, the magistrate fell into error in concluding that she had no power to revoke or vary the order made in M’s absence.

BYRNE J:

1. Although this application has not been a difficult one to resolve, its background is complicated. It comes to me as an application brought by originating motion filed on 25 August 2003 on behalf of the plaintiff, Lance Miles. On 18 June 2003 in proceeding R01029969, the Magistrates’ Court of Victoria at Dandenong made an intervention order against him upon the complaint of the firstnamed Defendant, Maria Barca. Mr Miles was not present in court when Mrs Barca’s complaint was heard and the order made. He says that, notwithstanding that he had been earlier served with the process, he was not notified of the date of hearing. His applications for a re-hearing and for revocation of the order were rejected on the grounds that the Magistrates’ Court lacked jurisdiction to entertain them. It is, to my mind, plain that the Magistrates’ Court does have this jurisdiction and I have indicated that I would, to that extent only, accede to this application and remit the matter to the Magistrates’ Court for it to determine these applications. These are my reasons.

2. Mrs Barca is a widow who lives alone at 15A Rawdon Hill Drive, Dandenong North. In the adjoining property, 17 Rawdon Drive, live Don Miles and Geraldine Miles, the parents of Mr Miles. I shall refer to them as “the Miles”. He himself had lived there for some 14 years until he had married. He now lives at Mount Eliza.

3. Although there have been pre-existing differences, even feuds, between the neighbours, the incident which provoked this proceeding concerned a manna gum tree which grows on the Miles property close to the Barca boundary. Mrs Barca on 14 March 2003 filed in the Dandenong Magistrates' Court a complaint, R00535969, against the Miles alleging that the roots of the tree encroached on her land, and caused damage to her property. She sought damages and orders that the Miles take steps to prevent future encroachment.

4. As a result of this Mrs Barca says Mr Miles trespassed on her property on 24 April. In her affidavit sworn on 26 September she describes the incident as follows:

"3. On 24th April 2003, I arrived home at about 1:15pm and saw the Plaintiff walking on top of my garage roof. I felt threatened by the Plaintiff, he came onto my property, the fence was damaged as a result of the Plaintiff using it as a ladder to get up and down from my garage roof. I felt as though I was continually being harassed and intimidated by the Plaintiff, he has also made derogatory comments about me, saying I was 'part of the mafia' etc."

5. And so, on 12 May 2003, she went to the Dandenong Magistrates' Court and made a complaint for an intervention order. These orders were originally available only under the *Crimes (Family Violence) Act 1987* where there was an apprehension that the defendant might do violence to or harass or molest a family member or damage their property. Family member is defined very widely but it does not include neighbours or relatives of neighbours. When the relationship of family member is not present an intervention order may be made only where the defendant has stalked the complainant within the meaning of this expression in s21A of the *Crimes Act 1958*. Sub-section (5) provides:

"(5) Despite anything to the contrary in the *Crimes (Family Violence) Act 1987*, the Court within the meaning of that Act may make an intervention order under that Act in respect of a person (the defendant) if satisfied on the balance of probabilities that the defendant has stalked another person and is likely to continue to do so or to do so again and for this purpose that Act has effect as if the other person were a family member in relation to the defendant within the meaning of the Act if he or she would not otherwise be so."

6. The statutory definition of stalking in s21A is in these terms:

"(2) A person (the offender) stalks another person (the victim) if the offender engages in a course of conduct which includes any of the following—

- (a) following the victim or any other person;
 - (b) telephoning, sending electronic messages to, or otherwise contacting, the victim or any other person;
 - (c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;
 - (d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);
 - (e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;
 - (f) keeping the victim or any other person under surveillance;
 - (g) acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of any other person—
- with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any other person and the course of conduct engaged in actually did have that result.

(3) For the purposes of this section an offender also has the intention to cause physical or mental harm to the victim or to arouse apprehension or fear in the victim for his or her own safety or that of any other person if that offender knows, or in all the particular circumstances that offender ought to have understood, that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result."

7. The complaint of Mrs Barca was that she was a victim of stalking by Mr Miles. In the summons which was issued in response to her complaint she alleges as follows:

"I HAVE KNOWN THE DEFENDANT FOR 14 YEARS. HIS PARENTS ARE LIVING NEXT DOOR TO ME. HE ALSO LIVED WITH HIS PARENTS UNTIL HE GOT MARRIED. HE TRESPASSED INTO MY PROPERTY AND I AM AFRAID OF HIM. TO SEE HIM OVER MY GARAGE ROOF GAVE ME TREMENDOUS SHOCK. I HAVE A LONG DISPUTE WITH THE FAMILY REGARDING AN OLD GUM TREE AND FENCE FOR OVER 2 AND A HALF YEARS AND MY

TENANTS BEFORE ME. WE HAVE HAD MEDIATION THAT FAILED AND ENDED WITH LANCE SAYING I WAS PART OF THE MAFIA AND LOTS MORE. SINCE THIS TIME I HAVE FELT HARASSED AND INTIMIDATED BY HIS FAMILY ON VARIOUS OCCASIONS. THERE IS CURRENTLY A CIVIL DISPUTE BEFORE THE COURT WITH HIS FAMILY. THE CONDUCT WILL CONTINUE UNTIL THE COURT WILL HELP ME TO PUT A FULL STOP TO THIS NIGHTMARE. I HAVE TRIED EVERY AVENUE AND MY SITUATION HAS NOT BEEN TAKEN SERIOUSLY. I AM A WIDOW AND LIVE ALONE. I AM AFRAID THAT THE FENCE WILL FALL DOWN AND THEIR DOG WILL COME IN MY YARD.”

8. The complaint and summons was served on Mr Miles on 20 May 2003. It directed him to attend the Dandenong Magistrates’ Court on 11 June 2003 at 9.30am for the hearing of the application. On the same day, 20 May 2003, he signed a notice of appearance stating that he intended to defend the application and giving the address of his lawyer in Pakenham.

9. I return now to the complaint made against the Miles regarding the tree. This was on 26 May the subject of a pre-hearing conference where a settlement was achieved. This settlement was recorded in a handwritten document signed by the parties. Mrs Barca was represented by a solicitor at this conference. In summary, the Miles agreed to trim the canopy of the tree at least annually, to remove all dead branches and all roots above and below the ground, to restrict the growth of these roots and to share the cost of replacing the boundary fence. They were also to pay Mrs Barca \$1,000 compensation within 30 days.

10. At this time, too, Mrs Barca signed another handwritten document disposing of the intervention order application which is in these terms:

“To Registrar Intervention Orders Dandenong Magistrates court R01029969 I, MARIA BARCA of 15 Rawdon Hill Drive, Dandenong North hereby unconditionally withdraw my application against MILES which had otherwise been set down for hearing on 11th June 2003.”

The document was signed by Mrs Barca and witnessed by her solicitor. Mr Miles was not present at this conference and was not a party to the settlement.

11. Meantime, Mr Miles was informed by his solicitor by letter dated 30 May that the intervention application had been withdrawn so that he had no need to attend to answer the complaint on 11 June.

12. Although this does not appear in the signed settlement agreement or in her affidavit, Mrs Barca appears to have been of the view that the Miles were to carry out the terms of the settlement within 14 days. This period expired on 9 June.

13. On the following day, 10 June 2003, Mrs Barca returned to the Magistrates’ Court and told the Registrar that the consent orders had been breached and that she wanted the intervention application “reinstated”. The Registrar on 11 June acceded to this application and adjourned her intervention application to 18 June for final orders.

14. Mr Miles said he heard nothing further and that he received no notice of the hearing to take place on 18 June. It seems that Mrs Barca took no step herself or by her solicitor to give him notice. She said she assumed that this would be done by the court or by the police. She did give to the police the registration number of his cars and therefore may have assumed that they would advise him. It does not appear that anybody thought to advise his solicitor whose address was in the notice of appearance.

15. On 18 June the intervention order application was heard by the Magistrate. Mr Miles was not present. Mrs Barca told the court what had happened on 24 April and that she felt threatened and intimidated by him. The Magistrate then made an intervention order which was specified to last until 18 June 2004 ordering that Mr Miles be prohibited from:

“* STALKING, ASSAULTING, HARASSING, THREATENING OR INTIMIDATING THE VICTIM/S OF STALKING. * APPROACHING, TELEPHONING OR CONTACTING THE VICTIM/S OF STALKING EXCEPT TO PARTICIPATE IN MEDIATION BY AGREEMENT WITH THE VICTIM/S OF STALKING. * KNOWINGLY BEING AT OR ON THE PREMISES SITUATED AT 15A AND 15B ROWDON HILL DVE DANDENONG NTH OR ANY OTHER PREMISES WHERE THE VICTIM/S OF STALKING LIVES OR WORKS. * DAMAGING PROPERTY OWNED/JOINTLY OWNED BY THE VICTIM/S OF STALKING.

* CAUSING ANOTHER PERSON TO ENGAGE IN CONDUCT PROHIBITED BY THIS ORDER. * THIS ORDER WILL LAST UNTIL 18/6/2004.”

16. Mr Miles says that he is aggrieved by this order which was brought to his attention by his solicitors only on 24 June 2003. On 30 June 2003 he made an application pursuant to s16 of the *Crimes Family Violence (Act) 1987* for revocation of the order. This application finally came on for hearing on 28 July before the Magistrate who heard Mrs Barca's application on 18 June. On that occasion the Magistrate was troubled that the revocation application was, in truth, nothing more than an attempt to appeal her order of 18 June. She pointed out that no application to withdraw the intervention order had been filed with the court. Accordingly, her order of 18 June was properly made. In fact, the solicitor for Mr Miles was contending that the order should be set aside as it had been made without jurisdiction because the defendant had had no notice of the hearing.

17. Mrs Barca appeared unrepresented before the court and opposed the application. She told the Magistrate, perhaps surprisingly, that when she signed the unconditional withdrawal on 26 May she was in fact coerced by her own solicitor to do so.

18. Having heard argument, the Magistrate concluded that she had no jurisdiction to entertain the revocation application. If Mr Miles wished it set aside, he might appeal to the County Court pursuant to s20. The application was therefore refused and no stay granted.

19. I have been told that appeal papers have been filed with the County Court but that this might not be heard for some time.

20. On 18 August 2003, the solicitor for Mr Miles sought to file in the Magistrates' Court an application to set aside the order and for the re-hearing of the intervention application on the ground that he did not appear in court to defend it and that he had good reason to do so. The Registrar, however, declined to accept this application on the ground that the court had no jurisdiction to hear it. She suggested that the proper procedure was for him to file an application for revocation. And so the circle was complete.

21. This application is made by originating motion pursuant to O56 seeking orders in the nature of mandamus compelling the Magistrates' Court to entertain the applications. Alternative relief finally disposing of Mrs Barca's intervention application was also sought.

22. I said at the outset that this case was not difficult to resolve. It is clear that the Magistrate and the Registrar were both in error as to their jurisdiction.

23. An application for an intervention order is a proceeding which is civil in character.^[1] It follows from this that, unless for some reason they are inconsistent with the *Crimes (Family Violence) Act 1987* or the rules made under that Act, the statutory, regulatory and other practices of the Magistrates' Court in its civil jurisdiction will apply to these applications. I would accept that this equally applies to the jurisdiction to make such orders under the *Crimes Act 1958* s21A; these include s110 of the *Magistrates' Court Act 1989* and O30 of the *Magistrates' Court Civil Procedure Rules 1989* dealing with the power to order a re-hearing where a party did not appear at the hearing of a complaint. It was not suggested before me that the application which was sought to be filed on behalf of Mr Miles was irregular in form. It follows, therefore, that the Registrar ought not to have refused to accept it on 18 August. I say nothing, of course, about whether the application should succeed. This is a matter for the Magistrates' Court. It is sufficient that I observe, as I do, that the Magistrates' Court had power to entertain the application. I did not understand the solicitor for Mrs Barca to contend otherwise before me.

24. Section 16 of the 1987 Act empowers the Magistrates' Court to order the revocation of an intervention order. The section does not specify the grounds upon which such an application may or may not be made. It is clear enough that the court is entitled under s12 to make an intervention order where the defendant has been served but does not appear so that it may have been open to the Magistrate on 30 June to reject the submission that the order of 18 June was not properly made notwithstanding that the defendant had had no notice of the adjourned date. A submission was advanced on his behalf to the contrary but it is not necessary that I determine this. Again,

it is clear that the Magistrate was entitled to revoke or vary the order if the justice of the case dictated this. She fell into error in concluding that she had no power to do so, particularly as the basis for the application was not that the order should not have been made on 18 June on the evidence then before her. Again, I did not understand the solicitor for Mrs Barca to contend before me to the contrary.

25. The argument against an order remitting the matter to the Magistrates' Court was that there was an appeal on foot and that this process should be allowed to take its course.

26. In certain circumstances, such a contention might cause me to hesitate to grant the prerogative relief sought, in the exercise of my discretion. Here, however, the uncontradicted evidence of Mr Miles points to a grave injustice which the court should not permit to remain undisturbed. The making of the intervention order is a serious matter carrying very serious consequences. A finding of stalking is a grave one, and a finding which carries with it considerable public opprobrium. It is apparent that, for one reason or another, that this application has suffered from serious procedural irregularities which I must endeavour to cure.

27. On behalf of Mr Miles I was urged to make an order dismissing Mrs Barca's intervention application. It was put that an analysis of her evidence in support fell far short of that required for a finding of stalking. I decline to enter upon this.

28. To my mind, the proper course is for Mr Miles to be permitted to bring his re-hearing application before the Magistrates' Court. If this is granted so that the intervention order of 18 June is set aside he will then have the opportunity to meet, if he can, the allegations made against him. Alternatively, he may prefer to seek a revocation order, if he considers this more appropriate. The Magistrates' Court, in either case, is the proper forum for this to be done. Since the magistrate who heard the original intervention application on 18 June has heard, and presumably accepted, Mrs Barca's evidence on that occasion, I think it desirable that any application for re-hearing or revocation which might be heard hereafter be dealt with by a different magistrate.

29. I therefore propose the following declarations and orders:

1. Declare that the Magistrates' Court of Victoria at Dandenong fell into error in concluding on 28 July 2003 that it had no jurisdiction to hear and determine the plaintiff's application pursuant to s16 of the *Crimes (Family Violence) Act 1987* for revocation of the intervention order made on 18 June 2003.

2. Declare that the Magistrates' Court of Victoria at Dandenong fell into error on 18 August 2003 in refusing to accept the application of the plaintiff for an order setting aside the intervention order made in his absence on 18 June 2003 and for a re-hearing of the complaint of the firstnamed defendant made on 12 May 2003.

3. Order that the order of the Magistrates' Court of Victoria at Dandenong on 28 July 2003 whereby it refused the application of the plaintiff for an order revoking the intervention order made on 18 June 2003 be set aside and that the revocation application be remitted to that court, constituted by a magistrate other than the Magistrate who made that order, to be determined according to law.

4. Order that the Magistrates' Court of Victoria accept the application of the plaintiff being Exhibit LM16 to the affidavit of Lance Miles sworn 25 August 2003 and that the Magistrates' Court, constituted by a magistrate other than the Magistrate who made the intervention order on 18 June 2003, hear and determine the application for re-hearing according to law.

30. I will hear counsel as to the precise terms of the orders to be made to give effect to these conclusions and as to costs.

[1] *Fisher v Fisher* [1988] VicRp 93; [1988] VR 1028.

APPEARANCES: For the Plaintiff Miles: Mr S Hardy, counsel. Duffy & Simon, solicitors. For the first Defendant Barca: Mr DeMarchi, counsel. DeMarchi & Associates, solicitors.
