

27/09; [2009] VSC 476

SUPREME COURT OF VICTORIA

ZION-SHALOM v MAGISTRATES' COURT OF VICTORIA & ORS (No 1)

Harper J

13 October 2009

FAMILY VIOLENCE PROTECTION - JUDICIAL REVIEW - APPLICATIONS FOR CERTIORARI AND MANDAMUS – INTERIM ORDER GRANTED - WHETHER SUCH ORDER SHOULD BE STAYED PENDING DETERMINATION OF THE APPLICATIONS - APPLICATION FOR A STAY REFUSED: FAMILY VIOLENCE PROTECTION ACT 2008, SS8, 9, 31, 51, 53, 53.

1. S53 of the *Family Violence Protection Act 2008* provides that a court may make an interim protection order if a family violence safety notice has been issued for an affected family member and the court is satisfied, on the balance of probabilities, that there are no circumstances that would justify discontinuing the protection of the person until a final decision about the application. The onus is placed by legislation upon the person seeking to persuade the court that the protection should be discontinued.

2. S53 of the Act refers to the discontinuance not of the family violence safety notice, but the protection which that notice gives. It is that discontinuance (or continuance) with which the magistrate is then, pursuant to the legislation, concerned. It is the clear intention of Parliament to ensure that the protection of the affected family member continues unless the court is persuaded that such continuation is not justified.

3. Where there was a delicately balanced set of circumstances where the plaintiff had to live in his motor car as the only form of overnight accommodation available and on the other, there were real difficulties, both legal and practical, in requiring, in effect, the other party to reside elsewhere than the dwelling in which she currently finds accommodation, given the legislatively expressed intention, the proper conclusion is that the stay application be refused.

HARPER J:

1. I have before me applications for *certiorari* and *mandamus* following a hearing in the Magistrates' Court under the *Family Violence Protection Act 2008*. On the application the magistrate (her Honour D M O'Reilly) then had before her a family violence safety notice which had been issued by the Victoria Police against the present plaintiff following a complaint to the police by the third defendant. The allegations against the plaintiff are that he threatened to kill the third defendant, a person with whom it is alleged he was then in a family relationship. The third defendant maintains that the two were then living in premises in the Eltham area. It is common ground that they jointly own those premises, that they consist of a dwelling house, and that each of the plaintiff and the third defendant has, at least at times, nevertheless conducted a business from them.

2. A question has arisen about the jurisdiction of the court given that the relationship is in dispute. I accept that indeed there is such a dispute. I also accept, however, that the magistrate had some evidence put before her by the third defendant of the existence of a relationship of the relevant kind; and it seems to me appropriate, for present purposes only, to proceed upon the basis that the magistrate did not act beyond jurisdiction. In saying that, I reserve to the plaintiff the right to argue the point when the matter comes back to this Court.

3. Assuming for present purposes that the magistrate had jurisdiction, the question was whether her Honour should continue the protection afforded by the family violence safety notice. In this context, s53 of the *Family Violence Protection Act* is relevant.

4. So far as is relevant for present purposes, that section provides that the court may make an interim protection order (referred to in the section as an "interim order") if a family violence safety notice has been issued for an affected family member and the court is satisfied, on the balance of probabilities, that there are no circumstances that would justify discontinuing the

protection of the person until a final decision about the application.

5. As I understand this provision, its effect in the present circumstances is that the court may make an interim order if the relevant notice has been issued for an affected family member, and there is on the balance of probabilities no basis for concluding that the protection of the affected family member initially accorded by the notice should be discontinued.

6. Clearly, the onus is placed by legislation upon the person seeking to persuade the court that the protection should be discontinued. I have to assume that the magistrate was not so satisfied and that, whether properly or otherwise, she came to the conclusion that the continuation of the protection was appropriate.

7. I am now asked by the plaintiff to stay her Honour's order. I have jurisdiction to do so. I accept, however, that that jurisdiction should be exercised only in exceptional circumstances. The order made by the magistrate was an interim order. No final order has yet been made. This Court must not interfere with interim orders made by lower courts unless exceptional circumstances are shown to obtain.

8. It is submitted that in the circumstances before me such exceptional circumstances have been made out. Principal among them is the evidence, which I accept, that the plaintiff is presently living in a motor vehicle. Such living conditions are, it is unnecessary to say, totally inappropriate and unsatisfactory.

9. The evidence of the availability of alternative accommodation for the plaintiff is not as strong as the evidence of his present circumstances in relation to the motor car. He has sworn to his lack of financial capacity and he has sworn that he has no alternative accommodation. There is, however, little detail in the bare statements that constitute the current evidence on those points.

10. There is also evidence put forward on behalf of the third defendant that the plaintiff does have relatives in Melbourne, with a suggestion that accommodation might be available with them. That evidence, however, is as lacking in detail as the plaintiff's own evidence about his prospects of finding a roof over his head.

11. There is also evidence that the plaintiff is in poor health. That evidence too, however, is lacking in supporting detail. I have been told that medical evidence could be obtained and medical practitioners made available for cross-examination; but circumstances have prevented that procedure being followed this afternoon. I take into account the fact that the plaintiff is not in robust health. I cannot make any findings about particular medical conditions, although there is evidence of a problem with his heart. The seriousness of that condition has not been the subject of detailed evidence or submissions.

12. As against the plaintiff's circumstances, I must weigh the circumstances which the evidence indicates obtain in relation to the third defendant. She has made serious allegations against the plaintiff, in particular that he threatened to kill her; and she has sworn that she is in fear of him, and that she could not live under the same roof as he. There is also evidence of a motive which the plaintiff may have relating to the third defendant's assistance to the police in another matter. I can come to no conclusions about the strength of the motive said to arise from that evidence, but I take into account the fact that there is before me evidence of a possible motive for his alleged hostility towards the third defendant. It seems to me that I cannot simply dismiss this evidence.

13. The third defendant currently lives in the house which the two principal parties, the plaintiff and the third defendant, once occupied together. The evidence diverges between the parties about the use to which the premises had been put. The third defendant maintains that the premises were once used as domestic living quarters for both parties, as well as the location of the separate businesses of each. The plaintiff, on the other hand, contends that there was never a family relationship of any kind between the two, and that the residential arrangements at the premises were such that each had separate, and in effect exclusive, possession of his or her separate living quarters. In saying that, I am not certain of the position taken by the third defendant in relation to her own accommodation; but I understand that she asserts that she has lived in the premises ever since she jointly purchased them with the plaintiff.

14. The question, then, is whether at any time she lived in those premises with the plaintiff as a domestic partner, or whether his use was, for relevant purposes, entirely separate.

15. I accept that – whatever the domestic situation – the parties have used the premises for business purposes, and that the third defendant there currently carries on a practice as a naturopath. I further accept that she has clients from the surrounding suburbs who would be disadvantaged were she to be required to change her location from Eltham and its surrounds. I therefore conclude that any such requirement would affect her business and may in addition have adverse effects on the health of her patients as well.

16. In the end, it seems to me to come back to a question of statutory interpretation. It was submitted by the plaintiff that the magistrate ought not to have changed the position which obtained at the time that the family violence safety notice was issued. At that time, the third defendant had found (what she says was purely temporary) accommodation with her parents. The family violence safety notice alludes to the fact that she was not then using the Eltham premises as her place of accommodation albeit that, as I understand it, the third defendant alleges that her parents' home was no more than a place of temporary refuge. The police accept that, when the family violence safety notice was prepared by them, this is was their understanding of the position.

17. Nevertheless, the notice then became the platform for a submission on behalf of the plaintiff that the magistrate acted improperly in allowing the third defendant, who had alternative accommodation, to return to Eltham - while the plaintiff, who had none, was forced by her Honour to vacate those premises so that the third defendant could enjoy sole occupancy.

18. In response to that argument, Ms James, counsel for the second defendant, Ms Skinner, drew my attention to the wording of s53 of the *Family Violence Protection Act*, to which I have already referred. She pointed in particular to the reference in the legislation to the discontinuance not of the family violence safety notice, but the protection which that notice gave. It is that discontinuance (or continuance) with which the magistrate was then, pursuant to the legislation, concerned.

19. It is also a circumstance which, it seems to me, must weigh particularly heavily with me. It is the clear intention of Parliament, as I understand the legislation, to ensure that the protection of the affected family member continues unless the court is persuaded that such continuation is not justified. I must, I think, see the application for a stay against that legislative background.

20. It is, indeed, that legislative background which, in my opinion, tips the scales in what is a very unfortunately delicately balanced set of circumstances. On the one hand it is most undesirable that the plaintiff must resort to his car as the only form of overnight accommodation available to him. On the other, there are real difficulties, both legal and practical, in requiring, in effect, the third defendant to reside elsewhere than the dwelling in which she currently finds accommodation.

21. Given the legislatively expressed intention, I think that the proper conclusion to which I must come is that the stay application be refused.

22. I adjourn the further hearing of the application for *certiorari* to Monday, 19 October, and I indicate that I will hear the parties on any matter which is properly the subject of contention at that time, without any party being bound by anything I might have said this afternoon. (Submissions re costs)

23. I reserve all questions of costs until Monday, 19 October 2009.

APPEARANCES: For the plaintiff Zion-Shalom: Ms L Steiner, counsel. Raynal & Associates, solicitors. For the second defendant Elizabeth Skinner: Ms E James, counsel. Victorian Government Solicitor. For the third defendant Ann Karn: Mr C Fairfield, counsel. West Heidelberg Community Legal Service.
