

PARTIES: **Malogorski, Mark Anthony**

v

Peart, Harlan George

TITLE OF COURT: SPECIAL CASE STATED BY THE
COURT OF SUMMARY
JURISDICTION

SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 115 of 2011 (21131068)

DELIVERED: 21 October 2011

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JUDGMENT OF: KELLY J

CATCHWORDS:

Domestic and Family Violence Act – s 96 - external orders – period of registration – whether interim order under *Restraining Orders Act 1997* continues “in force in the jurisdiction in which it was made” when final order made

Domestic and Family Violence Act (NT), s 32, s 36, s 82, s 82(1)(a), s 82(2), s 93, s 96, Chapter 3

Justices Act, s 162

Restraining Orders Act 1997 (WA), s 16, s 16(1), s 16(4), s 16(4)(a), s 16(5)(b), s 16(5)(c), s 26, s 29(1)(a), s 29(3), s 31, s 32, s 32(1), s 32(2), s 32(3), s 33, s 43, Division 4

Balchan v Anthony (2008) NTSC 02; *Bonney v Thompson* [2011] NTSC 81, followed

REPRESENTATION:

Counsel:

Complainant:	I Taylor
Defendant:	P Bellach

Solicitors:

Complainant:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
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SPECIAL CASE STATED BY THE COURT OF SUMMARY
JURISDICTION

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Malogorski v Peart [2011] NTSC 86
No. 115 of 2011 (21131068)

BETWEEN:

MARK ANTHONY MALOGORSKI
Complainant

AND:

HARLAN GEORGE PEART
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 21 October 2011)

Facts

- [1] The defendant, Harlan George Peart was charged on complaint with breaching a domestic violence order. The matter came on for hearing before Mr Wallace SM in the Court of Summary Jurisdiction. At the hearing the following facts were either proved or admitted by the parties.
- [2] On 16 December 2009, the Magistrates Court at Kununurra in the State of Western Australia, made a violence restraining order pursuant to the *Restraining Orders Act 1997* (WA) (“the WA Act”) restraining the defendant in various ways and in particular in regard to the circumstances in

which he could have contact with the woman named in the order as the “person protected”.

- [3] That order recited: “The duration of this Order is interim”.
- [4] On 17 December 2009, a copy of that order (“the interim WA order”) was served on the defendant in Kununurra.
- [5] On 18 December 2009 the interim WA order was registered in the Northern Territory, at the Darwin registry of the Court of Summary Jurisdiction, pursuant to the procedures in Chapter 3 of the *Domestic and Family Violence Act* (NT) (“the NT Act”) which contains a scheme whereby an interstate order of this kind, once registered in the Court of Summary Jurisdiction, can be enforced as though it were a domestic violence order under the NT Act.
- [6] On 14 January 2010, the interim WA order was made into a final order of the Kununurra Court (“the final WA order”). The final WA order was expressed to remain in force for two years from 16 December 2009.
- [7] The final WA order was never registered in the Northern Territory.
- [8] On 21 June 2011 at Palmerston in the Northern Territory, the defendant allegedly came into contact with the “person protected” contrary to the terms of the restraints placed upon him in the interim WA order.

The proceeding in the Court of Summary Jurisdiction

- [9] During the hearing in the Court of Summary Jurisdiction, counsel for the defendant submitted that there was no case to answer because the interim WA order which had been made on 16 December 2009 had ceased to be in force in the State of Western Australia when the final WA order was made on 14 January 2010. As s 96 of the NT Act provides that an order registered under Chapter 3 of the NT Act “is registered for the period during which it is in force in the jurisdiction in which it was made”, the interim WA order was no longer registered in the NT and could not be enforced as a DVO under the NT Act. Further, as the final WA order was not registered under Chapter 3 of the NT Act, there was no registered order in force which could be enforced as a DVO under the NT Act.
- [10] The complainant contended that there was no need to register the final WA order. Rather, on the correct construction of the WA Act, the final WA order was merely a continuation of the interim WA order which therefore remained “in force” in Western Australia, and continued to be registered in the Northern Territory and enforceable as a DVO under the NT Act.

Case stated

- [11] Mr Wallace SM stated a special case for consideration of the Supreme Court pursuant to s 162 of the *Justices Act* to determine that question. The special case stated is appended as annexure “A” to this judgment. The question of law stated for the opinion of the Supreme Court on the case stated is whether, on a proper construction of the provisions of the WA Act, an order

expressed as interim under that Act continues to be “in force” within the meaning of s 96 of the NT Act, after the interim order is made final. Copies of exhibits 1, 2 and 4 tendered at the hearing before Mr Wallace SM (the interim WA order, the Northern Territory order which was made following registration of the interim WA order, and evidence of the final WA order in the form of a document headed “Notification of Determination of Interim Order”) are attached to the stated case.

Relevant Northern Territory provisions

- [12] Chapter 3 of the NT Act provides for registration and enforcement of external orders. An “external order” means an order in the nature of a domestic violence order (referred to in the NT Act as a DVO) made under a corresponding law.¹ “Corresponding law” means (relevantly) a law of a state prescribed by regulation.² The WA Act is prescribed as a corresponding law.³
- [13] Section 93 of the NT Act provides that the protected person, a police officer or adult on behalf of the protected person may apply to the court for registration of an external order. The court in this context means the Court of Summary Jurisdiction.⁴ Once registered, the registered external order is taken to be a court DVO that has been properly given to the defendant on the

¹ NT Act s 4.

² NT Act s 4.

³ *Domestic and Family Violence Regulations* Reg 3.

⁴ NT Act s 4.

date it is registered.⁵ The practical effect of that is that a registered external order may be enforced against a defendant in the same manner as a DVO made under the NT Act.

[14] Section 96 of the Act provides that the external order is registered for the period during which it is in force in the jurisdiction in which it was made.

Relevant Western Australian provisions

[15] Under s 26 of the WA Act, an applicant for a violence restraining order under that legislation must choose whether to have the first hearing of the application held in the absence of the respondent or to proceed directly to a defended hearing. If the first hearing is held in the absence of the respondent, at that hearing the court may (amongst other options) make a violence restraining order.⁶ If the duration of a violence restraining order made at such a hearing is more than 72 hours the order is “an interim order” and Division 4 of the WA Act (which prescribes the procedures after an interim order is made) applies.⁷

[16] Within 21 days of being served with an interim order a respondent must complete the respondent’s endorsement copy of the order and return it to the Registrar.⁸

⁵ NT Act s 97.

⁶ WA Act s 29(1)(a).

⁷ WA Act s 29(3).

⁸ WA Act s 31.

- [17] If a respondent returns the respondent's endorsement copy and indicates on it that the respondent does not object to the interim order becoming final, the interim order becomes a final order with the same terms as the interim order.⁹
- [18] If a respondent does not return the respondent's endorsement copy of an interim order within the 21 day period specified, the interim order becomes a final order with the same terms as the interim order.¹⁰
- [19] A final order under s 32 "comes into force" on the day on which the Registrar receives the returned copy of the order or at the end of the 21 day period within which the respondent is obliged to return the order as the case may be.¹¹
- [20] If the respondent returns the respondent's endorsement copy of an interim order within the 21 days and indicates on it that the respondent objects to the interim order becoming final, the Registrar is to fix a hearing and notify all parties of the hearing.¹² On completion of that hearing the court may make a final order of the type, and with the terms, the court considers appropriate.¹³

⁹ WA Act s 32(1).

¹⁰ WA Act s 32(2).

¹¹ WA Act s 32(3).

¹² WA Act s 33.

¹³ WA Act s 43.

[21] Section 16 of the WA Act provides for the duration of violence restraining orders. Under normal circumstances a violence restraining order comes into force when it is served on a person who is bound by the order, or if a later time is specified in the order, at that time.¹⁴

[22] Subject to a not presently relevant exception, an interim order remains in force until one of the following occurs:

- (a) a final order in respect of the matter comes into force;
- (b) a final order hearing in respect of the matter is concluded without a final order being made;
- (c) the interim order is cancelled or expired; or
- (d) in the case of a telephone order three months elapses from the time the order came into force.¹⁵

[23] Ordinarily,¹⁶ a final order which has become final under s 32 remains in force until:

- (a) the period specified in the order, or
- (b) if no period is specified, two years from the date on which the

¹⁴ WA Act s 16(1).

¹⁵ WA Act s 16(4).

¹⁶ ie except in the case of telephone orders which are separately dealt with.

interim order came into force.¹⁷

[24] Ordinarily, a final order made at a final order hearing under s 43 remains in force for:

- (a) the period specified in the order, or
- (b) if no period is specified, two years from the date on which the final order came into force.¹⁸

The Defendant's Contentions

[25] The defendant contends that the provisions of s 16(4) of the WA Act are clear and unambiguous. An interim order remains in force until one of the events specified in that subsection occurs. The first event is so specified, in paragraph (a), is when “a final order in respect of the matter comes into force”. In this case a final order came into force on 14 January 2010: therefore on that date the interim WA order ceased to be in force.

[26] Section 96 of the NT Act provides that the external order is registered “for the period during which it is in force in the jurisdiction in which it was made”. It is plain from s 16(4) of the WA Act that the period during which the interim order against the defendant was in force ended on the date on which the final order came into force, namely 14 January 2010. Therefore the Crown is unable to show that there was in force at the date of the alleged

¹⁷ WA Act s 16(5)(c).

¹⁸ WA Act s 16(5)(a).

offence a registered external order enforceable under the NT Act as though it were a DVO made under that Act.

The Complainant's Contentions

[27] The complainant on the other hand places emphasis on the provisions of s 32 of the WA Act: if the respondent does not return the respondent's copy of the interim order within 21 days, or if he returns it with an indication that he does not object to the interim order becoming final, then the WA Act provides that "the interim order becomes a final order with the same terms as the interim order". According to the complainant, an interim order that later becomes a final order should not be considered as a completely different and separate order to the final order; the final order should be seen as merely a confirmation and continuation of the interim order.

[28] Counsel for the complainant relies on the phrase "becomes a final order" in s 32 as indicating continuity between the interim order and the final order. She also relies on the fact that when specifying the duration of a final order under s 16, the legislature specified a period of two years from the date on which the interim order came into force. However, it should be noted that that only applies to an order that becomes a final order under s 32, and not to a final order made at a hearing under s 43.

Determination of the case stated

[29] Under the NT Act, there are provisions which are similar to those in the WA Act. Under s 32 of the NT Act a court may make a domestic violence order

(defined as a CSJ DVO) in the absence of the defendant, indeed in the absence of notice to the defendant. As soon as practicable after a CSJ DVO is made, a clerk of the court must give a copy of it to the parties and to the Commissioner.¹⁹ If a CSJ DVO is made in the absence of a defendant who is not given notice of the hearing at which the CSJ DVO was made, the copy of the DVO given to the defendant is taken to be a summons to the defendant to appear before the court to show cause why the DVO should not be confirmed by the court.²⁰

[30] In that case, the matter proceeds to a hearing and at the hearing, the court may confirm the DVO (with or without variations) or revoke the DVO.²¹ This may be done in the absence of the defendant provided the court is satisfied that the defendant has been given a copy of the DVO and the court has considered any evidence and submissions from the parties.²²

[31] Under this procedure in the NT Act, the *ex parte* order made under s 32 continues in force unless revoked. The confirmation process does not give rise to a new order, it simply confirms and continues the existing *ex parte* order.²³

¹⁹ NT Act s 36.

²⁰ NT Act s 37.

²¹ NT Act s 82.

²² NT Act s 82(2).

²³ *Balchan v Anthony* (2008) NTSC 02 per Riley J at [14]-[16]. In para [16] Riley J referred to similar views expressed by Mr Wallace SM in *Police v Lyons* (CSJ 999-0866, 22 July 1990). The same is not true of an interim *ex parte* order made under s 35 of the NT Act [*Bonney v Thompson* [2011] NTSC 81 at para [35].

[32] Because of this, and because the copy of the *ex parte* DVO made under s 32 of the NT Act is the only notice which is given to the defendant of the order which the applicant seeks to have made against him, the order which is confirmed under s 82 of the Act should be in exactly the same terms as the *ex parte* order made under s 32, including the duration of the order, unless the court specifically exercises the power to vary the order under s 82(1)(a).²⁴

[33] The question is whether the procedure under the WA Act is also of this nature. While there is some force in the submission that an interim order which “becomes” a final order in the same terms under s 32 is a continuation of the earlier interim order, and not a new order, it seems to me that the same could not be said of an order made under s 43 of the Act on a final order hearing, where the respondent has objected to the interim order becoming final. There is no suggestion in s 43 that following a final order hearing the earlier interim order “becomes” a final order. Rather, that section makes it clear that the court can make any order it sees fit following a final order hearing. Moreover, unlike an order that becomes final under s 32, a final order made under s 43 remains in force for two years from the making of the final (not the interim) order.

[34] It could be argued that, for the purposes of s 96 of the NT Act, an order which becomes a final order under s 32 of the WA Act should be treated

²⁴ *Bonney v Thompson* [2011] NTSC 81 at para [40].

differently from an order made under s 43 of the WA Act. However, I do not think there is any support for that in the WA Act. Section 16(4)(a) of the WA Act simply says that an interim order remains in force until a final order in respect of the matter comes into force, without distinguishing between whether the final order comes into being under s 32 or s 43. I am therefore of the view that s 43 final orders and s 32 final orders under the WA Act should not be treated differently for the purposes of s 96 of the NT Act. The effect of s 16(4) of the WA Act is that the preceding interim order ceases to be “in force” on the making of a final order in respect of the matter, whether that occurs as a result of the processes in s 32 or the making of a final order under s 43.

[35] There are also practical reasons for not making such a distinction. It could be very confusing for people interested in ensuring that a WA protection order was registered in the Territory to have to enquire whether the order they are dealing with is a s 32 final order which need not be registered if the preceding interim order had been registered, or a s 43 order which does need to be registered. In this case the defendant was served with a document headed “Notification of Determination of Interim Order”²⁵ which states “Please be advised that the interim order granted on the date shown above (16 Dec 09) was made final on 14 Jan 2010. A final order will remain in force for two years from the date the interim order was served unless otherwise specified”. The heading on the form indicates that it is given

²⁵ Exhibit 4 attached to the Case Stated (Appendix A).

pursuant to “s 32 and s 43” of the WA Act. The form does not state whether the final order was made as a result of a hearing under s 43, or whether the interim order became final as a result of one of the processes under s 32. If this is the usual form of notification of the making of a final order by the WA Courts, then a person with an interest in ensuring that a WA order is (and remains) a registered external order under Chapter 3 of the NT Act, would have no way of knowing from the face of the notification whether the final order is an order under s 32 of the WA Act which, on one view, might be a continuation of an earlier interim order, or an order under s 43 which, on any view of the WA Act, must be seen as a fresh order taking effect from the date it was made.²⁶

[36] It was submitted by the complainant, and conceded by the defendant, that as the purpose of both the WA Act and the NT Act is to protect people in need of protection, there are sound policy reasons to favour an interpretation of the legislation which ensures that there is no “gap” in protection between the making of a final order in WA and the registration of that order under the NT Act. In my view both the extent of such a gap and its consequences are minimal.

[37] It is open to a person protected by such an order (or other eligible applicant) to act promptly to register a final WA order in the NT once it is made.

There is no greater potential “gap” between the making and registration of a

²⁶ There is some clue in the fact that the duration of the order is stated to be two years from the date of the interim order, which, to those familiar with the provisions of s 16 of the WA Act would point to it being a s 32 final order, but the potential for confusion and error remains.

final order than there is between the making and registration of an interim order.

[38] It was submitted that a defendant would not be held accountable for a breach of an order in the period between the order being made final in WA and the final order being registered in the NT. However, a person who breaches a WA protection order can be held accountable for that breach in a WA Court, and if the conduct occurs in the NT and is criminal in nature, the perpetrator can be dealt with for that criminal conduct in the NT.

[39] Moreover, there is provision in the NT Act for enforcement of unregistered external orders in the NT for a period of 72 hours if a police officer reasonably believes a person in the Territory is a defendant named in an unregistered external order in force in the jurisdiction in which it was made. This provision was presumably inserted to enable such orders to be enforced during any such “gap” between the making of an interim or final external order and the registration of that order.

[40] For the above reasons, the answer to the question on the case stated, namely whether, on a proper construction of the provisions of the WA Act, an order expressed as interim under that Act continues to be “in force” within the meaning of s 96 of the NT Act, after the interim order is made final, is no.