

***Armour v FAC* [2012] QMC 22 (21 November 2012) – Magistrates' Court of Queensland**

'Cross-jurisdictional applicability' – 'Domestic violence order' – 'Economic abuse' – 'Emotional and psychological abuse' – 'Family law' – 'Following, harassing, monitoring' – 'Necessary or desirable' – 'Physical violence and harm' – 'Principle of paramount importance'

Proceeding: Application for a Protection Order under the *Domestic and Family Violence Protection Act 2012* (Qld).

Facts: This concerned a police application under the *Domestic and Family Violence Protection Act 2012* (Qld) (the Act) for a protection order against the respondent in favour of the aggrieved.

Issue/s: Whether the respondent committed domestic violence against the aggrieved, and whether the protection order was 'necessary or desirable' as required under section 37(1)(c) of the Act.

Decision and Reasoning: The protection order was made, with Constanzo JJ concluding that it was necessary and desirable to protect the aggrieved from domestic violence. In relation to the meaning of 'necessary or desirable', his Honour noted that the test is framed in the alternative. A court may make a protection order if it considers it 'desirable' but not 'necessary' and vice versa. His Honour then considered the plain English meanings of both words (See at [17]). A finding that it is 'necessary or desirable' to make an order must arise out of a need to protect the aggrieved from domestic violence with the terms of the order (see at [18]). This need for protection, 'must be a real one, not some mere speculation or fanciful conjecture' (See at [19]). This involves an assessment of risk that is faced by the aggrieved. While the risk of further domestic violence must actually exist, it is not necessary that the need or the risk be significant or substantial. However, it must be, 'sufficient...to make it necessary or desirable to make the order in all the circumstances' (See at [20]).

In considering whether a protection order is ‘necessary or desirable’, a court must have regard to section 4 of the Act, but can have regard to other matters if relevant. For example, in the old equivalent legislation, the test was one of likelihood. It involved the court considering whether the evidence indicates that there was, ‘some real, significant likelihood’ that further acts of domestic violence would be committed. Something more probable than a mere ‘chance or risk’ was required (See at [23]). This test is not mandatory in the new legislation, but is still a relevant consideration. That is, if the evidence indicates that a respondent is likely to commit an act of domestic violence again, it may be ‘necessary or desirable’ to make a protection order under the new legislation. However, the likelihood test is clearly not determinative (See at [25]). Sometimes it may be appropriate to make an order if the risk is only ‘possible’ as opposed to ‘likely’ (See at [65]). See in particular from [27]-[70], where Contanzo JJ engages in detailed comparisons of the equivalent provisions in all state and territories, as well as analogous Commonwealth legislation. At [47], his Honour explains how provisions from one state or territory can be relevant to courts in another –

‘While the legislation in other States cannot affect the jurisdiction of this court, the types of considerations referred to by the various Acts may provide some insight into the types of considerations which may, in appropriate cases, be relevant considerations in the determination of whether it is necessary or desirable for this court to make an order. They certainly do not provide anything approximating an exhaustive list of possible relevant circumstances. Whether they are relevant will depend on the law in Queensland and on the facts and live issues of each case. What weight ought to be given to any such relevant circumstance must also depend on the overall facts and circumstances of each hearing. The types of considerations referred to by the various Acts may simply provide this court with some inkling about the types of considerations legal minds, and judicial minds, may need to bring to bear on the determination of issues raised under the Queensland Act. However, I have taken great care to look at the context in which each of the other state laws is drafted.’

At [52]-[70], his Honour extrapolated the relevance of the Court’s power to make orders prohibiting conduct under section 1323 of the *Corporations Act 2001* to domestic violence issues. The discretionary considerations listed in section 1323 may be relevant when a Magistrates’ Court is considering whether to make a protection order to protect the aggrieved from, ‘coercive, deceptive or unreasonably controlling economic abuse’ as well as other types of domestic violence (See at [56]).

In determining whether it is 'necessary or desirable' to make an order, a court will need to engage in a balancing exercise of public and private rights. That is, does the public interest in preventing domestic violence outweigh the private rights of the relevant parties? (See at [57] & [96]). At [61], his Honour observed that it may be 'necessary or desirable' to make an order, 'even if one of the grounds for finding that domestic violence has been committed by the respondent has ceased to exist,' and that, 'if one reason why it is decided that a risk of future domestic violence is because of ongoing contact, such as in family court proceedings or because of other unresolved relationship issues, the order may need, in appropriate cases, to extend beyond the likely conclusion of those proceedings or resolution.'

At [63], his Honour stated that it may be 'necessary or desirable' to make an order by having regard to evidence apart from the evidence that establishes domestic violence has been committed. All facts and circumstances may be considered, including evidence, 'which is properly before the court but which was not led by or relied upon by the applicant.' A court can draw reasonable inferences from this evidence, such as inferences that a respondent induced an aggrieved to withdraw their complaint or to commit perjury.

Another factor is the gravity of the situation. That is, even if on the evidence it could not be said that it was 'necessary' to make an order, the gravity of the situation could indicate that it would be still 'desirable' to protect the aggrieved with the order, in which case an order can still be made.