

DISTRICT COURT OF QUEENSLAND

CITATION: *KAL v DJL* [2022] QDC 152

PARTIES: **KAL**
(appellant)
v
DJL
(respondent)

FILE NO: D402/21

DIVISION: Appellate

PROCEEDING: Appeal

ORIGINATING COURT: Magistrates Court, Southport

DELIVERED ON: 24 June 2022 (*ex tempore*)

DELIVERED AT: Southport

HEARING DATE: 24 June 2022

JUDGE: Dann DCJ

ORDER: **1. Appeal allowed.**
2. The application for a protection order is dismissed.

CATCHWORDS: FAMILY LAW – DOMESTIC VIOLENCE – APPLICATION FOR A PROTECTION ORDER UNDER THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT – APPEAL – where protection order was granted based on a single act of domestic violence – where the applicant contended the order was not necessary – whether Magistrate erred in making a protection order

LEGISLATION *Domestic and Family Violence Protection Act 2012* s 4, 8, 11, 12, 13, 14, 15, 37, 57, 63, 64, 145, 168, 169

CASES *AHD v AHL* [2017] QDC 103
Allesch v Maunz (2000) 203 CLR 172
CDJ v VAJ (1998) 197 CLR 172
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194
GKE v EUT [2014] QDC 248
House v The King (1936) 55 CLR 499
JAW v Reed [2018] QDC 178

McDonald v Queensland Police Service [2018], 2 Qd R 612

MDE v MLG and Queensland Police Service [2015] QDC 151

MNT v MEE [2020] QDC 126

R v War Pensions Entitlement Tribunal: ex-parte Bott (1933)
50 CLR 228 at 249-250

Sudath v Healthcare Complaints Commission [2012] NSWCA
171

COUNSEL: Laing NJ for the respondent

SOLICITORS: Mark Savic Legal for the applicant
Evans Brandon Family Law for the respondent

Introduction

- [1] On 20 October 2021 a Magistrate of the Southport Magistrates Court made an order under s 37 of the *Domestic and Family Violence Protection Act 2012 (DFVPA)*. The learned Magistrate granted a protection order in favour of the respondent in this appeal against the appellant for a period of two years.
- [2] The appellant appeals against the protection order which was made against him.
- [3] The protection order made on 20 October 2021 provided:
- (a) *The respondent must be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved;*
- (b) *The respondent is prohibited from remaining at or entering or attempting to enter the aggrieved usual place of residence*

UNLESS OTHERWISE ORDERED THIS ORDER CONTINUES IN FORCE TO AND INCLUDING 19 OCTOBER 2023

Background

- [4] I will refer throughout these reasons to the appellant to this appeal as the appellant and to the respondent to this appeal as the respondent.
- [5] A temporary protection order was made on 25 March 2021 in favour of the respondent against the appellant. The appellant cross applied with a private application filed on

1 April 2021. The Magistrates Court determined that no temporary protection order was to be made at that point.

- [6] At the final hearing before the Magistrate, each party was represented by counsel and solicitors. At the start of that hearing, the appellant advised he was not going to press his application and it was withdrawn.¹
- [7] In terms of this appeal, whilst the appellant's notice of appeal stated he sought a hearing de novo of the proceedings the subject of the appeal, that was abandoned at the start of the hearing.
- [8] The notice of appeal as originally filed sets out eight grounds of appeal. However, once the appellant had legal representation the Court was informed by email dated 22 June 2022 and copied to the respondent's representatives that the appellant would not proceed with grounds 1, 2, 6, 7 or 8 of the appeal and would only proceed with grounds 3, 4 and 5 of the appeal.
- [9] I formally dismiss grounds 1, 2, 6, 7 and 8 of the notice of appeal.
- [10] The three grounds of appeal thus articulated are:
- (a) what was ground 3: The Magistrate in finding a suitable act of domestic violence, used a piece of correspondence sent by an unrepresented litigant (the appellant) to the respondent's lawyer as having enough cause to grant a protection order, the appellant does not believe that this in any way constitutes an act of domestic violence.
 - (b) what was ground 4: The Magistrate in her decision again makes mention of the benefit of having a protection order in place while settlement proceedings are in place, this again leads the appellant to believe that the facts of the case were largely moot.
 - (c) what was ground 5: The Magistrate as far as the appellant can determine did not refer to matters for consideration under the Act, submitted by the appellant.

¹ Transcript 1-6 ll 29 – 31.

[11] At the hearing of the appeal in oral submissions with the appellant’s solicitor I clarified and understood the grounds of appeal to be articulated as follows:

- (a) that the Magistrate erred in finding that the email of 23 March 2022 constituted an act of domestic violence;
- (b) that the Magistrate erred in not anchoring her decision about the need for a protection order in the evidence of this case, rather, determining the issue based more generally on the conduct of parties when facing family law proceedings; and
- (c) that, closely linked with the first ground, that if the respondent was in prospective fear of the appellant in respect of the email of 23 March 2021, it was not put to the appellant during cross examination that, in the absence of a protection order, he would seek to return to the matrimonial residence and cause damage to the appellant’s belongings or damage the property.

The nature of the appeal

[12] Section 168 of the DFVPA provides:-

“[168] Hearing procedures

- (1) An appeal must be decided on the evidence and proceedings before the Court that made the decision being appealed.
- (2) However, the appellate court may order that the appeal be heard afresh, in whole or part.”

[13] The decisions of other judges of this court as to the nature of the Court’s appeal powers is that they are to be exercised for the correction of error.² I refer to the passage of Judge Horneman-Wren SC of this Court set out in *JAW v Reed*³ at [13] in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* Gleeson CJ, Gaudron and Hayne JJ said:

“Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decisionmaker. That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that,

² *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203-204 [14]; *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23]; *CDJ v VAJ* (1998) 197 CLR 172 at [201]-[202].

³ [2018] QDC 178.

unless there is something to indicate otherwise, the power is to be exercised for the correction of error. ...”

Where the decision the subject of the appeal involves an exercise of a discretion, it is necessary to identify error of the kind explained in *House v The King*:⁴

“If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so.”

[14] Further, as Judge Byrne QC of this Court set out in *MNT v MEE*⁵ at [7] for an appeal by way of rehearing on the record, I am to consider the evidence and make up my own mind about the effect of it, particularly where any inferences are to be drawn from primary facts, giving recognition to the fact the Magistrate had the advantage of seeing and hearing the witnesses in the evaluation of credit and in assessing the “feeling” of the case.

[15] The appellant holds the onus to show that there is some error in the decision under appeal.⁶

[16] If error is identified, I must consider the whole of the evidence to determine whether the orders which have been made are nonetheless justified.

[17] In deciding an appeal this court’s powers are to confirm the decision appealed against, or vary the decision appealed against, or set aside the decision and substitute another decision or set aside the decision appealed against and remit the matter to the court that made the decision.⁷ The decision of the appellate court on appeal is final and conclusive.⁸

The applicable legislation

[18] Section 4(1) of the DPVFA prescribes the principles for administering it:

“4 Principles for administering the Act

⁴ (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

⁵ [2020] QDC 126.

⁶ *Allesch v Maunz* (2000) 203 CLR 172 at [23]; *Coal and Allied Operations Pty Ltd v ARC* (2000) 203 CLR 194, [14]; *McDonald v Queensland Police Service* [2018], 2 Qd R 612 at [47].

⁷ Section 169(1), *DFVPA*.

⁸ Section 169(2), *DFVPA*.

- (1) This Act is to be administered under the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.
- (2) Subject to subsection (1), this Act is also to be administered under the following principles –
 - (a) people who fear or experience domestic violence, including children, should be treated with respect and disruption to their lives should be minimised;
 - (b) to the extent that it is appropriate and practicable, the views and wishes of people who fear or experience domestic violence should be sought before a decision affecting them is made under this Act;
 - (c) perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people, and if possible, provided with an opportunity to change;
 - (d) if people have characteristics that may make them particularly vulnerable to domestic violence, any response to the domestic violence should take account of those characteristics;

Examples of people who may be particularly vulnerable to domestic violence –

- Women;
 - Children;
 - Aboriginal people and Torres Strait Islanders;
 - People from a culturally or linguistically diverse background;
 - People who have disability;
 - People who are lesbian, gay, bisexual, transgender or intersex;
 - Elderly people.
- (e) in circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, the

person who is most in need of protection should be identified;

- (f) a civil response of this Act should operate in conjunction with, but instead of, the criminal law.”

[19] Domestic violence is defined in s 8 of the Act as follows:

8 Meaning of *domestic violence*

- (1) ***Domestic violence*** means behaviour by a person (the ***first person***) towards another person (the ***second person***) with whom the first person is in a relevant relationship that—
- (a) is physically or sexually abusive; or
 - (b) is emotionally or psychologically abusive; or
 - (c) is economically abusive; or
 - (d) is threatening; or
 - (e) is coercive; or
 - (f) in any other way controls or dominates the second person and causes the second person to fear for the second person’s safety or wellbeing or that of someone else.
- (2) Without limiting subsection (1), domestic violence includes the following behaviour—
- (a) causing personal injury to a person or threatening to do so;
 - (b) coercing a person to engage in sexual activity or attempting to do so;
 - (c) damaging a person’s property or threatening to do so;
 - (d) depriving a person of the person’s liberty or threatening to do so;
 - (e) threatening a person with the death or injury of the person, a child of the person, or someone else;
 - (f) threatening to commit suicide or self-harm so as to torment, intimidate or frighten the person to whom the behaviour is directed;
 - (g) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the person to whom the behaviour is directed, so as to control, dominate or coerce the person;
 - (h) unauthorised surveillance of a person;
 - (i) unlawfully stalking a person.

- (3) A person who counsels or procures someone else to engage in behaviour that, if engaged in by the person, would be domestic violence is taken to have committed domestic violence.
- (4) To remove any doubt, it is declared that, for behaviour mentioned in subsection (2) that may constitute a criminal offence, a court may make an order under this Act on the basis that the behaviour is domestic violence even if the behaviour is not proved beyond a reasonable doubt.
- (5) In this section—

coerce, a person, means compel or force a person to do, or refrain from doing, something.

unauthorised surveillance, of a person, means the unreasonable monitoring or tracking of the person's movements, activities or interpersonal associations without the person's consent, including, for example, by using technology.

Examples of surveillance by using technology—

- reading a person's SMS messages
- monitoring a person's email account or internet browser history
- monitoring a person's account with a social networking internet site
- using a GPS device to track a person's movements
- checking the recorded history in a person's GPS device

unlawful stalking see the Criminal Code, s 359B”

[20] Section 37 prescribes when a court may make a protection order. It provides:

37 When court may make protection order

- (1) A court may make a protection order against a person (the *respondent*) for the benefit of another person (the *aggrieved*) if the court is satisfied that—
- (a) a relevant relationship exists between the aggrieved and the respondent; and
- (b) the respondent has committed domestic violence against the aggrieved; and

Note—

See the examples of the type of behaviour that constitutes domestic violence in sections 8, 11, and 12 which define the terms *domestic violence*, *emotional or psychological abuse* and *economic abuse*.

- (c) the protection order is necessary or desirable to protect the aggrieved from domestic violence.
- (2) In deciding whether a protection order is necessary or desirable to protect the aggrieved from domestic violence—
 - (a) the court must consider—
 - (i) the principles mentioned in section 4; and
 - (ii) if an intervention order has previously been made against the respondent and the respondent has failed to comply with the order—the respondent’s failure to comply with the order; and
 - (b) if an intervention order has previously been made against the respondent and the respondent has complied with the order—the court may consider the respondent’s compliance with the order.
- (3) However, the court must not refuse to make a protection order merely because the respondent has complied with an intervention order previously made against the respondent.
- (4) If an application for a protection order names more than 1 respondent, the court may make a domestic violence order or domestic violence orders naming 1, some or all of the respondents, as the court considers appropriate.”

[21] There is no dispute in this case that the relevant relationship exists, by reference to s 13, 14 and 15(1) of the DFVPA.

[22] “Emotional or psychological abuse” is defined at s 11 of the DFVPA as:

“**Emotional or psychological abuse** means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person. (The note in the statute containing examples has been omitted).

[23] “Economic abuse” is defined in s 12 of the DFVPA as:

“12 **Meaning of *economic abuse***

Economic abuse means behaviour by a person (the ***first person***) that is coercive, deceptive or unreasonably controls another person (the ***second person***), without the second person’s consent—

- (a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
- (b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or a child, if the second person or the child is entirely or predominantly dependent on the first person for financial support to meet those living expenses.” (Examples from the statute omitted)

[24] Section 56 of the DFVPA mandates conditions that must be included within a domestic violence order. Section 57 empowers the court to consider whether any other condition is also necessary or desirable to protect an aggrieved from domestic violence, a named person from associated domestic violence or a named person who is a child from being exposed to domestic violence. Section 57(2) mandates that a court making a domestic violence order must consider whether to impose an ouster condition on the respondent in relation to the aggrieved’s usual place of residence.

[25] Section 57(3) provides:-

- “(3) The principle of paramount importance to the court must be the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.”

[26] Section 63 provides for an ouster condition which is one imposed on a respondent that prohibits the respondent from doing any or all of the following in relation to the stated premises:

- (a) remaining at the premises;
- (b) entering or attempting to enter the premises;
- (c) approaching within a stated distance of the premises. (statutory notes omitted)

[27] There are further considerations in s 64 if the ouster condition would be in relation to the aggrieved’s usual place of residence and in respect of s 65 for return conditions in certain circumstances.

[28] The DFVPA provides that in proceedings under the Act the court is not bound by the laws of evidence or any practices or procedures applying to courts of record and they

inform itself in any way it considers appropriate.⁹ For a court to be satisfied of the matter, it need only be satisfied of the matter on the balance of probabilities.¹⁰ It is well settled that although a court may not be bound by the laws of evidence, a court's decision must derive from relevant, reliable and rationally probative evidence that tends logically to show the existence or non-existence of the facts in issue.¹¹

The background and lead up to the proceedings before the learned Magistrate

[29] At the hearing before the Magistrate, the Appellant was 56 and the Respondent 57 and, as earlier noted, the parties were in a relevant relationship,¹² having commenced this relationship sometime in 1995 and marrying the following year.

[30] The parties separated but remained living together on 14 January 2021.¹³

[31] On 22 February 2021 the Appellant received a letter asking him to vacate the house, which he did¹⁴ although in his affidavit he had sworn he continued to access the property for ablution and laundry as was his right; he saw the efforts of his wife to restrict access as symbolic.¹⁵ His affidavit also contained evidence that he had had a night living in a hotel, he had a couple of nights when he could stay in the house next door between Air BNB Bookings but otherwise he was forced to sleep in a garage two doors down from the marital home.¹⁶ Exhibit D to the affidavit contained photographs of a bed in a garage.

[32] In response to the letter from the solicitors asking him to vacate, he sent an email, on 22 February 2021, which was attached to his affidavit¹⁷ which said relevantly:

“Whilst I am shocked by the speed in which my estranged wife has engaged a lawyer, I must accept that this is the path that she intends to take. I have your request and accompanying documents and will attend to those as the information becomes available to me.

⁹ Section 145(1).

¹⁰ Section 145(3).

¹¹ *Sudath v Healthcare Complaints Commission* [2012] NSWCA 171; *R v War Pensions Entitlement Tribunal: ex-parte Bott* (1933) 50 CLR 228 at 249-250, [256]; *AHD v AHL* [2017] QDC 103 [46].

¹² *Domestic and Family Violence Protection Act 2012* (Qld), s. 37(l)(a).

¹³ Transcript 1-63 ll 7-8.

¹⁴ Transcript 1-63 ll 8-9.

¹⁵ Appellant's affidavit at [24]: Transcript 1-63 ll 14 – 16.

¹⁶ Appellant's affidavit at [22].

¹⁷ Page 26 forming part of exhibit D.

With regards to your request that I vacate the family home, there are currently no vacant rooms at number 41 Bemuda Street, an additional tenant moved in last night. I consider it an unreasonable request for me to vacate the family home when I have been the sole provider of the significant majority of costs related its purchase, upgrading and upkeep for many, many years and I don't see this getting any simpler over the coming months. As a result my estranged wife has built up a substantial savings account of approximately \$80,000 and, despite my repeated requests she has failed to contribute to those expenses. Should she wish to bring this back into the household budget perhaps this could be used to finance separate accommodation for me. I agree that being separate from my estranged wife under these new adversarial circumstances would suit the agenda, she can facilitate that by finding suitable accommodation elsewhere. I would ask that you communicate this situation to her.”

[33] The appellant sent the respondent’s solicitors an email on 3 March 2021 in which he offered for the respondent to purchase for \$11,000 the Holden Captiva which the respondent had use of but which, evidently, was in the name of a corporate entity. The appellant’s email said this was necessary to raise more funds to meet current and upcoming expenses, the majority of which relate to joint assets.¹⁸

[34] The appellant sent a further email to the respondent’s solicitors which is Exhibit E to his affidavit. The copy exhibited bears the date ‘2021-03-24 00:10’ although the copy on the Magistrates Court file bears the notation “*Sent: Tuesday 23 March 2021 11:11pm*”. It read:

“Dear Mr Brandon,

I write as a courtesy to my estranged wife to advise that I intend to resume residing in my home. The accommodation that I have available to me is untenable due to the ingress of water which is a hazard to my health, not to mention the issues that I am suffering with personal hygiene and laundry. I am aware that I have every right to reside in my own home without reference to my estranged wife. This is a courtesy only should my estranged wife find the prospect of my proximity uncomfortable, if that is the case she may wish to absent herself form the property. As I am responsible for the upkeep of the AirBNB property, I need ready access to it so cannot locate myself too distant from it

¹⁸ The text of the email is set out at [50] to the affidavit of the respondent affirmed 26 May 2021.

and I do not have the financial means to find a suitable alternative. I do not intend to interact with my estranged wife, however I do not expect my daily activities to be curtailed in any way by resuming my lawful right to occupy my own dwelling. I will not insist on the master bedroom but again this is an option that I lawfully have.

I will take up residence in my home in seven (7) days on 30 March 2021.”

- [35] The respondent applied for a protection order: the Form DV1 bears the date stamp of 25 March 2021. A temporary protection order was granted ex parte on 25 March 2021 in the Magistrates Court at Southport by Magistrate Payne.¹⁹ The basis for the temporary protection order was the form DV1 *Application for a Protection Order*, within which includes a statutory declaration of the respondent, and further included correspondence between the appellant and the respondent’s legal representatives.
- [36] The application for the temporary protection order provided, in summary, as the reasons for why it was necessary and desirable to grant an order:
- (a) that the marriage between the appellant and the respondent had irretrievably broken down;
 - (b) the appellant had relocated to an investment property situated next door to the family home;
 - (c) since relocating, the appellant had regularly returned in the evening when the respondent is asleep, through a side access gate and laundry door, leaving the side gate and laundry door unlocked after his visit;
 - (d) the respondent took practical steps to prevent this from happening, including initially placing a lock on the side access gate, however the appellant continued to gain access to the property after that;
 - (e) the respondent has commenced family law proceedings because she was given a notice by the appellant to commence proceedings to preserve a caveat she had lodged on an investment property. The respondent’s proceedings were served on 18 March 2021;

¹⁹ Temporary Protection Order, Order number 0018112519, of 25 March 2021.

- (f) that application seeks, amongst other interim relief, sole occupation of the family home;
- (g) on 23 March 2021 the appellant sent an email to the respondent's solicitors that he would be returning to the home as was his 'legal right' and that he had a 'legal right' to return to the matrimonial bed. The email was attached to the application;
- (h) the respondent is fearful for her safety particularly now she has commenced property settlement proceedings; and
- (i) the appellant belittles her (eg calling her fat, ugly and stupid) in the presence of the two children of the marriage who continue to reside at the family home.

[37] Further, in the form *grounds for a protection order*, the respondent referred to the following allegations and why a protection order is necessary or desirable to protect the respondent:²⁰

- (a) the appellant engaging in conduct seeking to control the respondent and cause her to feel intimidated and harassed, including control of the parties' finances throughout the relationship and sought to control and monitor the respondent's expenditure. An example of this was if the respondent transacted on a credit card, the appellant would call her and interrogate her about where she was, who she was with and why she was spending money;
- (b) the appellant became enraged when he learned she had a bank account in her own name and demanded she deposit those funds into an account he controlled. When she would not do so, he ceased making payments on the family home. The GCCC has commenced proceedings with respect to arrears and the appellant has had to seek relief from payments to the mortgage because of the current financial circumstances;
- (c) an isolated incident on a holiday some five years ago during which the Respondent alleges being accosted by the Appellant and his sister, during which the Respondent, fearing for her safety, locked herself in the bathroom;
- (d) that the Respondent had struggled with sleep since the Appellant had been entering the home at night; and

²⁰ Form DV1, Application for a Protection Order filed 25 March 2021 p 4 of 8 Q 6.

- (e) the Appellant belittles the respondent in the presence of her family, particularly the children, calling her fat, ugly and stupid. He frequently tells the Respondent she has bipolar, and tells her family and friends that. He tells the respondent certain things then says the reverse at another time and when she picks up the inconsistency he tells her she is crazy.

[38] That application disclosed that two adult children of the marriage resided in the family home.

[39] The orders sought were limited to the appellant staying away from the residence, which had been the former matrimonial home. No orders were sought, for example, that he stay away from her place of employment or other places she frequents.

[40] On 1 April 2021, the appellant filed a form DV1, similarly with a statutory declaration. No order was granted and ultimately, that application was dismissed at the outset of the trial. That document was not before me but counsel for the respondent read into the record certain parts of it which articulated that the appellant had negative concerns about the respondent's mental health.

[41] On 6 April 2021, the appellant filed a Form DV4, *Application to vary the temporary protection order* protecting the Respondent. On 29 April 2021, Magistrate Pink made variations to the TPO and directions, ultimately listing the matter for review mention on 29 July 2021.

[42] The respondent filed her affidavit-in-chief on 27 May 2021 which ran to 62 paragraphs and contained allegations, in summary, of:

- (a) the appellant excluding her from the decision making process when it came to finance [4] such that she was made to feel belittled and stupid and helpless [19];
- (b) being a guarantor on business documents for the appellant's business interests but being totally excluded from the goings on of the business, [5] with the appellant controlling business credit cards [17] and taking total control over all bank accounts and financial transactions, not just business interests [14] including lodgment of her tax returns and, in the year 2016 not receiving a tax refund which was due and which the appellant took in one of his accounts [15];

- (c) in the context of credit cards she dealt in her affidavit with a particular occasion where she received a text message on 4 February 2019 where he was swearing at her for using the card for putting petrol in her car [21]. No text message is attached to the affidavit. She dealt with another occasion in July 2018 where she paid by AMEX for dinner out with girlfriends and before she left the restaurant she alleges he got in touch with her and said it must have been a fucking good meal to cost that much [26] and an occasion whilst they were at Bunnings together and she paid for something on the credit card and an alert went off on his phone notifying him of the transaction [31] and an occasion in June 2019 when he called her after a purchase at a fruit and vegetable shop [33]. She also dealt with an occasion in June 2020 when she called him and asked him to pay for her dental work [38];
- (d) an incident on a family holiday in Bali where she was asleep in bed, and was awoken by the appellant and his sister screaming abuse and the husband standing over her waving his arms, which caused her to think he was going to physically attack her so she locked herself in the bathroom [9];
- (e) the appellant challenging her about her mental health. In 2019 he started telling her she was bi-polar [34] which continued throughout 2020 and also at that time he started saying she was suicidal [40] and suggested suicide to her in 2020 [42];
- (f) an occasion in May 2015 when they were dining with friends at a Chinese restaurant and when she suggested individual ordering, he reacted violently towards her screaming at her and she ran out of the restaurant [13];
- (g) he tried to control where she worked [22] and [24];
- (h) that she was working and earning her own money but she still felt he had power over her and she did not feel equal [16];
- (i) from June 2020 he started waking her and demanding money [39];
- (j) in an email of 3 March 2021 there was an email to her solicitor which she said was ‘threatening to sell her car’ [50] which he responded to the next day saying he would not pursue that matter and nature would take its course [51] which she took as a threat that the car would be repossessed [52];

- (k) she then took family law proceedings for the transfer of the vehicle into her name, and for exclusive occupation of the family home. She expressed her concern as “... *that despite the husband having moved out he would attempt to move back into the home in an attempt to exert further pressure and intimidate me ...*” [53]. That application was served on 18 March 2021;
- (l) in mid March 2021 the appellant cancelled her private health insurance without prior notice or consultation [55];
- (m) on 6 April 2021 he filed a notice of intention to defend in relation to proceedings commenced by the local council for unpaid rates on one of the investment properties, signing a legal document on her behalf without her permission or authorization [56];
- (n) she felt embarrassed and harassed by his application for a PO which contained allegations about her mental health and relationships with her work colleagues, which had been consistently made by the appellant during the relationship [58]; and
- (o) whilst she had sought for him to sign documents for the transfer of her mobile number not her own name from the business account and he had refused to do this, asserting that ‘her phone was transferred over a month ago’ [61] which was a total lie and that he continued to monitor the phone [62].

[43] The appellant filed two affidavits on 23 June 2021

- (a) the first, a 16-page, 107 paragraph affidavit with exhibits “A” through to “R”. which appeared to be responsive to the respondent’s affidavit; and
- (b) the second, a 7-page, 59 paragraph affidavit with exhibits “A” through to “G”. This affidavit appears to set out the appellant’s evidence to support his application for a protection order.

[44] As to the first of those affidavits (that being responsive to the issue raised by the respondent on her application for the protection order) he deposed, in summary:

- (a) the respondent has been a constant source of criticism and verbal abuse to him and more recently the children [6];

- (b) he made a conscious decision to challenge her behaviour 4 years ago [9] which met with denial and an escalation of verbal abuse and false accusations of mistreatment [10];
- (c) he decided to leave the relationship [12] and exhibited to his affidavit a series of text messages between them of 14 January 2021. He also exhibited a series of text messages of communications by text between them between 16 January and 5 February 2021 as evidence of how they were communicating with each other whilst they were separated and under one roof;
- (d) when he got the letter of 22 February 2021 asking him to vacate the home he was shocked but complied. His return correspondence to her solicitors (which is attached to his affidavit) sets out that he considered the request unreasonable and that there were no vacancies in the AirBnB dwellings (which, I infer, from other materials on the file were located in the same street as the marital home and were actively operated as a business). His evidence is that he was sleeping in a garage in the investment property [20] he visited the home after his wife had left for work and to interact with the children when they were there and he continued to use the property for ablution and laundry [24];
- (e) the Family Court proceedings which the respondent commenced were to suit her purposes, where she sought relief for sole occupation of the family home and to maintain a caveat, a deliberate assault on his financial, emotional and physical well being. She holds all the liquid assets of the marriage [25];
- (f) in explaining the email about returning to the family home, he deposed the garage where he was living was flooded [26];
- (g) he denied ever calling the respondent ‘fat, ugly or stupid’ [28] or that he ever attempted to intimidate or harass the respondent [32]. The respondent told him early in the relationship that the director at her workplace (a doctor) told her she was “manic depressive”. He has remembered this and tried to justify and accommodate the respondent’s manner and disposition [53]. He has begged her to seek assessment for a possible root cause for her abusive behaviour and his reference to bi-polar is a direct response to her telling him about manic depression, that being the former term for bi polar disorder [54];

- (h) he was shocked to learn of the obtaining of the TPO, ex parte and shocked and distressed by the claims in the application [31];
- (i) he agreed that he had controlled the finances in the relationship as he was the one who continued to pay all the expenses and he had never sought control of or been privy to the respondent's personal finances until now [33];
- (j) as to the use of credit cards, he deposed that the respondent had two companion credit cards and he enquired of their use when he needed to identify vendors to separate business and personal expenses. He deposes that he texted her about who "Go One Better" was and she replied the local petrol station. Whilst his affidavit is that the text exchange is exhibited, it is not. What is exhibited is the petrol receipt;
- (k) he denied having any control over her spending. On one or two occasions where he asked her about social dinners he asked if they had reimbursed her for the whole costs of the bill [36];
- (l) the respondent has had her own personal account since they met. She has always had exclusive and private access to her own earnings and until recently he had never sought those funds to pay bills. The respondent's words, he deposes where that the money she earns and has inherited from her mother is 'my money' [37];
- (m) the investment properties run at a significant loss and he has to meet shortfalls monthly [38];
- (n) the council has commenced litigation because of the respondent's refusal to contribute to the marriage's finances, despite having been told of the impending shortfall in 2019 and the first request for financial input in June 2020 [39]. The respondent was the contact on record for Council and was not doing anything or telling him about the outstanding rates and charges [42];
- (o) the respondent has \$80,000 in liquid assets but has refused to contribute [40];
- (p) the Bali incident which the respondent had referred to was not as she suggested [43] - [46];
- (q) the respondent has a history of initiating confrontations – with two examples given [50] – [53]; and

(r) he denies the bulk of the claims in the respondent's affidavit.

[45] On 25 June 2021, the appellant's sister, filed an affidavit in support of the appellant. It was limited to the matters going to the alleged incident of isolated violence on holidays some years before and the appellant's sister was not called to give evidence before the magistrate.

[46] On 19 July 2021, the respondent filed a 'Reply' affidavit in respect of the appellant's affidavit in support of his application for a protection order. I will deal largely with that when I deal with the evidence in cross-examination.

The hearing before the learned Magistrate

[47] On 12 October 2021, the matter proceeded to a hearing before the learned Magistrate. Both parties were represented by counsel and solicitors.

[48] At the commencement of the hearing, the Appellant, through his Counsel, made an application to withdraw his application for a protection order. Leave was granted and his application was dismissed. Therefore, only the Respondent's application for a protection order continued to the hearing.

[49] The only witnesses were the appellant and the respondent, each of who was cross examined. Broadly speaking each maintained their evidence as given on their affidavits.

[50] The respondent:

(a) maintained that where she did not deal with something in her reply affidavit, she did not accept it. She denied being abusive to him. She had not gone to police because she was scared and her lawyers gave her advice to get a TPO after the emails about selling the car. She was concerned because he was entering the property late at night and she felt intimidated and scared;²¹

(b) she understood she was a director and shareholder of the appellant's company because she'd been told by the bank she was²² and the appellant had led her to believe she was;²³

²¹ Transcript 1-35 ll 8-9.

²² Transcript 1-49 ll 8-16.

²³ Transcript 1-52 ll 8-9.

- (c) she did have shares of about \$40,000 and cash of about \$35,000 before depleting it with legal fees;²⁴ and
- (d) In re examination the respondent swore she felt very scared because the appellant had demanded she pay for the car and that he would be moving back into the house whether she liked it or not.²⁵ She was afraid he would destroy her belongings or damage the property.²⁶

That the appellant has been in the last 18 months quietly telling me that I'm suicidal. He sent a text to my sister on 27 February saying that it was her fault and when I self-harm myself it would be her fault, which made me scared to think that he may be planning to do something that it would make it look like I've done something myself. And I've never been suicidal in my life, despite him continuing saying I have. I've worked for 30-odd years in an emergency department. I've dealt with a lot of suicidal cases and I've lost friends and I found it a very selfish way and I could never do that to my children, which I love dearly.

And then further:

What, if any, concern do you have about 'Mr L' returning to the matrimonial home. "I fear he will continue and insult me further emotionally like he did. He would regularly call me fat and ugly and insult my intelligence. Told me that I'm a mere woman and I should just worry about doing the dishes and the washing and that he will harm me or harm the property.

[51] The appellant:

- (a) confirmed in his evidence that in his own application for a protection order his opinion was that the respondent suffered from narcissistic personality disorder vulnerability (accepting he has no medical qualifications)²⁷ it was his heartfelt conviction that the respondent suffers from a deep-seated and long term mental health condition, is mentally ill, is hypersensitive to criticism, and his behaviours;²⁸
- (b) confirmed the respondent has refused to seek assessment or treatment despite his constant requests and that he has wanted her to undergo a mental health

²⁴ Transcript 1-51 ll 26 – 29.

²⁵ Transcript 1-60 ll 25 – 31.

²⁶ Transcript 1-60 ll 35 – 36.

²⁷ Transcript 1-66 ll 25 – 26.

²⁸ Transcript 1-66 ll 24 – 46.

assessment;²⁹ and that he believed the respondent would have benefitted greatly from a period of intensive treatment at a mental health facility;³⁰

- (c) denied calling the respondent crazy³¹ and denied having repeated or common conversations that she suffers from mental health illness and requires treatment;³²
- (d) he agreed he may have mentioned throughout 2019 that she had bi-polar but this was not throughout³³ and it wasn't a theme in 2020;³⁴
- (e) he denied that he said to the respondent that she was suicidal or that in February 2021 she was bi-polar and suicidal³⁵ and he denied ever saying to her in an argument in September 2020 to 'do yourself a favour and knock yourself out';³⁶
- (f) whilst he agreed he was desperate to get back to his property, his evidence was equivocal as to what he said to Justice Middleton when asked the question;³⁷
- (g) he rejected that the issue of subpoenas to their children to give evidence was done because it would be upsetting to the respondent³⁸ noting that he believed it was the respondent who had first involved the children by deposing in an affidavit that he called her fat, ugly and stupid in front of the two children that live with her;³⁹
- (h) he denied her version of 'the Bali incident';⁴⁰
- (i) he agreed he made the money to pay the bills and controlled the finances as a matter of course;⁴¹
- (j) he absolutely denied having any control over the respondent's spending;⁴²
- (k) he confirmed the respondent is a guarantor of some of his business interests, and said she had never asked for access to the post office box for the business mail;⁴³

29 Transcript 1-67 ll 1 – 5.
 30 Transcript 1-67 ll 15 – 17.
 31 Transcript 1-67 ll 45 – 47.
 32 Transcript 1-68 ll 8 – 10.
 33 Transcript 1-68 ll 30 – 31.
 34 Transcript 1-68 ll 35.
 35 Transcript 1-68 ll 39 – 40.
 36 Transcript 1-68 ll 42 – 45.
 37 Transcript 1-70 ll 4 – 14.
 38 Transcript 1-73 ll 30 – 31.
 39 Transcript 1-73 ll 19 – 23.
 40 Transcript 1-73 l 33 – 1-74 l 16
 41 Transcript 1-74 ll 24 – 28.
 42 Transcript 1-74 ll 30.
 43 Transcript 1-74 ll 35 – 43.

- (l) he rejected he had ever said to the respondent words to the effect “you worry about the housework and I’ll worry about the finances”,⁴⁴
- (m) in respect of the 2016 tax return, the accountant was responsible for lodging that, they claimed the extra expenses jointly as a matter of course and the refund was paid into their joint account with her agreement⁴⁵ because the estate needed it, the losses needed to be topped up and it was agreed,⁴⁶
- (n) he denied waking the respondent in the morning in June 2020 demanding transfer of money from her to him on one or more occasions;⁴⁷
- (o) he denied the specifics about texting her for the purchase of fuel in 2019 or swearing at her in respect of use of the credit card⁴⁸ he did get notifications when the credit cards got used, which happens every day in nearly everyone’s account as it is a service from the bank and he didn’t consider it controlling that he was advised of activity on his cards⁴⁹ the notifications came with the card;⁵⁰
- (p) he denied the comment concerning the dinner she paid for on her AMEX card in 2018;⁵¹
- (q) he denied her account of the incident at the dentist’s in June 2020;⁵²
- (r) as to the Holden Captiva he gave an option to try to get money into the company to pay bills, he didn’t make a demand and she has all the cash⁵³ he accepted if it wasn’t going to come from the car it had to come from somewhere else⁵⁴ it was financial desperation⁵⁵ and the statement that nature will take its course was because the company as about to become insolvent;⁵⁶

44 Transcript 1-75 ll 1 – 2.

45 Transcript 1-75 ll 21 – 35.

46 Transcript 1-75 ll 38 – 43.

47 Transcript 1-76 ll 1 – 6.

48 Transcript 1-76 ll 20 – 24.

49 Transcript 1-76 ll 26 – 40.

50 Transcript 1-77 ll 16 – 17.

51 Transcript 1-77 ll 1 – 2.

52 Transcript 1-77 ll 22 – 37.

53 Transcript 1-78 ll 14 – 25.

54 Transcript 1-78 ll 42 – 45.

55 Transcript 1-79 ll 6 – 8.

56 Transcript 1-79 ll 11 – 12.

- (s) his email to the respondent's lawyers of 23 March 2021 was not in response to the issue of the family law proceedings but because he was living in a flooded garage;⁵⁷
- (t) he cancelled three insurance policies in 2020 because he could not afford them, two for him and one for her;⁵⁸
- (u) he had been advised that the mobile phone had been transferred over;⁵⁹
- (v) he denied trying to control her personal finances in the family law proceedings, rather he was seeking to maximise the financial dividend for both of them;⁶⁰ and
- (w) he agreed he sought an order in the Family law jurisdiction for the respondent to undertake a comprehensive mental health assessment to identify and address underlying mental health issues because it was, at the time, a need he thought she had.⁶¹

[52] At the end of the evidence, the Magistrate made directions for the filing and exchanging of written submissions on a short timetable and reserved her decision to be given *ex tempore* on 20 October 2021 at 8.30am.

[53] I have traversed the evidence before the magistrate in some length so as to grapple with the grounds of appeal, which I can do in shorter compass.

The learned Magistrate's reasons

[54] The Magistrate gave her decision as indicated. She set out the nature of the application, the procedural steps which had been taken and the material which each party relied.

[55] The Magistrate said she had considered all the matters before the Court today, all oral evidence and all written submissions.

[56] The Magistrate set out that she had to consider and be satisfied of the three limbs of s 37 of the DFVPA before the Court had power to make a protection order. She set out that

⁵⁷ Transcript 1-79 ll 18 – 33.

⁵⁸ Transcript 1-80 ll 22 – 23.

⁵⁹ Transcript 1-80 ll 35 – 44.

⁶⁰ Transcript 1-81 ll 31 – 43.

⁶¹ Transcript 1-81 ll 45 – 47.

the standard of proof, as the proceedings were civil proceedings, was on the balance of probabilities.

- [57] The Magistrate then stated: *“I am always careful at the commencement of a matter to review the originating application, to try to see the impetus which led to the applicant coming to the Court on the first occasion”*.⁶²
- [58] The Magistrate then stated that it appeared from the application for the protection order that the respondent was spurred to make the application by the appellant’s email of 23 March 2021 to her solicitors advising that he would be returning to the marital home to reside.
- [59] The Magistrate stated the email was sent after the appellant had left the matrimonial home and the parties had separated. She went on to state *“This, in my view, is a very provocative step for the [appellant] to make. And in my view could potentially have led to a lot of acrimony between the parties. In my view this was an act of domestic violence in itself. I understand that the [appellant’s] accommodation may not have been entirely suitable, but his email was not the correct way to go about negotiating a settlement to these issues.”*⁶³
- [60] The Magistrate stated that subsequently on 8 September 2021 the Federal Circuit and Family Court made orders giving the [respondent] sole and exclusive occupation of the matrimonial property and exclusive use of a particular vehicle.
- [61] The Magistrate then observed: *“The [respondent] in her affidavits before the Court set out allegations of financial abuse and control by the [appellant]. She also set out allegations of the [appellant] alleging she had mental health issues. A lot of this material sets out various incidents, which marked, in my view, the deterioration of a marital relationship. Some of these incidents could potentially be regarded as domestic violence, whilst others would not.”*⁶⁴ I interpolate, at this point, that the Magistrate did not identify which matters would go into which category.

⁶² Decision p 2 ll 33 – 35.

⁶³ Decision p 2 ll 42 – 46.

⁶⁴ Decision p 3 ll 3 – 8.

- [62] The Magistrate went on to observe that the question of financial abuse is always vexed. She stated that in this particular matter, the [respondent] had access to other funds and, in her view, it would be difficult to allege that the financial control was to such a level that could satisfy the high bar required to satisfy such a conclusion. She also stated that a lot of the material was more relevant to the Federal Court proceedings.
- [63] At that point in her decision the Magistrate stated she had to take into account the third limb of s 37, whether, it is necessary or desirable to make an order, taking into account where the parties are at this moment in time.
- [64] The Magistrate set out the following list of circumstances:
- (a) prior to the Federal Circuit Court proceedings and prior to the involvement of legal representatives certain orders may have been necessary or desirable;⁶⁵
 - (b) several months down the track, after the intervention of the Federal Circuit Court, after the Court having made some interim orders, after parties being separated for a period of time at this point the need for certain orders may be alleviated;⁶⁶ and
 - (c) this is not a matter in which there has been what she regards as police involvement, in that the [appellant] being charged or convicted for breaching the temporary protection order which has been in place since 20 May 2021⁶⁷ “*so basically that has been abided to to a certain level*”;⁶⁸
 - (d) “*The parties are before the Federal Circuit Court seeking a finalisation of their property issues. Based on prior, what I regard as fairly aggressive behaviour by the respondent, particularly, when he gave notice to return to the matrimonial property after separation, I have concerns that similar aggressive behaviour might occur or be demonstrated again, during the stresses and strains of court proceedings*”;⁶⁹
 - (e) it is only on past behaviour that this court is able to draw any conclusions as to the level of risk with respect to future behaviour;⁷⁰

⁶⁵ Decision p 3 ll 21 – 22.

⁶⁶ Decision p 3 ll 22 – 25.

⁶⁷ Decision p 3 ll 26 – 28.

⁶⁸ Decision p 3 ll 29 – 30.

⁶⁹ Decision p 3 ll 30 – 34.

⁷⁰ Decision p 3 ll 36 – 37.

- (f) the Federal Circuit Court proceedings should be concluded approximately two years from now;⁷¹
- (g) proceedings are already on foot and if the parties are able to negotiate and settle property matters before the Federal Circuit Court and those matters are concluded, my level of concern would be somewhat reduced, because the parties have adult children and, at the conclusion of these matters the parties have no reason to be consulting each other about time spent with children. They will have separate financial matter and there should be no interactions between them apart from, perhaps, interactions at their own choice at future family events⁷² and that is something all separated parties have to negotiate themselves;⁷³
- (h) she was of the view that if she made an order in the mandatory condition together with an order that the [appellant] does not go within 100 metres of the [respondent's] residence for a period of two years , that is both necessary and desirable in these particular circumstances but also sufficient to keep the peace between the parties whilst the matters are being resolved in the family courts;⁷⁴
- (i) after matters are thus resolved, and a period of time has gone by to make sure things are concluded completely, I would consider an order to vary or bring the order to an end, because that would be an order having done its job and come to a conclusion and she would not have any grounds with respect to necessary or desirable after that event has occurred;⁷⁵
- (j) this was a civil matter and not a criminal matter;⁷⁶ and
- (k) each party bear its own costs;⁷⁷

[65] I infer from what the learned Magistrate said after she had made her decision to grant the application for the protection order that she was critical of the appellant for seeking to involve the children in the proceeding.

The first ground and third of appeal:

⁷¹ Decision p 3 ll 37 – 39.

⁷² Decision p 3 ll 39 – 46.

⁷³ Decision p 4 ll 1 – 4.

⁷⁴ Decision p 4 ll 2 – 8.

⁷⁵ Decision p 4 ll 7 – 10.

⁷⁶ Decision p 4 ll 15.

⁷⁷ Decision p 4 ll 21.

- [66] The appellant submits in respect of this ground of the appeal that the Magistrate has not identified in the reasons what criteria the email of 22 March 2021 met which made it an act of domestic violence as she found it was at p 2 lines 43 – 45. Her reasons did not grapple with how the single email could be so construed.
- [67] In her reasons the learned magistrate did set out that the email was sent after the appellant had left the matrimonial home and the parties had separated.
- [68] The respondent submits that whilst the Magistrate does not identify how she makes that finding by reference to the legislation, there is no need for specificity and she did find that the email was a ‘very provocative step’ and could potentially have led to a lot of acrimony between the parties.
- [69] In my view, the learned Magistrate is in error in making such a finding, without anchoring it in some part of the legislation.
- [70] This is so in the particular circumstances of this case where:
- (a) the evidence was that the parties had separated on 14 January 2021 but continued to live under one roof;
 - (b) the respondent had taken the step to ask the appellant to leave the matrimonial home some weeks later, through her solicitors, after she had issued proceedings in the FCC and he had done so, at the same time putting on the record that he was unhappy about doing so and that he did not have the means to do so and there was no accommodation in the Air BNB properties the parties were involved in where he could live;
 - (c) the appellant was living in a garage;
 - (d) he gave notice in the terms of an email of his intentions a week in advance to her solicitors;
 - (e) the tone of the email was temperate;
 - (f) the grounds of the original TPO, which was made ex parte, set out that the email had asserted a legal right to the ‘matrimonial bed’ which the email did not on its face do; and

(g) he was not given any opportunity to respond to the respondent's assertions that he would damage her property or the house if he returned there.

[71] Having determined that there was an error by the magistrate it falls to me to consider whether on the material there should be a protection order granted.

[72] I note the magistrate made no assessment of either party in the giving of their evidence when they were cross-examined before her.

[73] On the application I need to consider:

(a) whether there has been an act of domestic violence by the appellant to the respondent; and

(b) whether the protection order is necessary or desirable to protect the aggrieved from domestic violence. In so doing, I am to consider the principles in section 4 and the other matters in s 37(2)(a), (b) (3) and (4).

[74] In that regard, the material advanced by the respondent on the application falls into two broad categories;

(a) economic or Financial abuse; and

(b) abuse relating to continued expressions about concerns about her mental health.

[75] I specifically find I am not in a position to make any findings in relation to the Bali incident, which is hotly disputed between the parties as to what occurred, and I am not satisfied that the respondent has met her onus in respect of that matter.

[76] As to economic abuse:

(a) there are some commonalities in the evidence:

(i) the appellant controlled the business affairs;

(ii) the respondent had her own bank account and earned her own income. She had some liquid assets at the time of these events

(iii) aspects of the business affairs were in trouble, as could be witnessed by arrears to the Council;

- (iv) there was no dispute that the appellant was aware when the respondent undertook transactions on the company credit cards;
 - (v) there is no evidence that the appellant had any notifications when the respondent undertook transactions on her own credit cards;
 - (vi) the parties are involved in family court proceedings to settle their property affairs;
 - (vii) there are interim orders of the Family Court Div 2 that the respondent has sole and exclusive occupation of the matrimonial property and the car, such orders having been made on 8 September 2021;
- (b) other issues between the parties concerning the financial disputes between them are hotly contested; and
- (c) in the absence of any findings made by the Magistrate as to whose evidence may have been preferred, and accepting that this court is not bound by the rules of evidence, I am not satisfied that the respondent has fulfilled the onus on her to establish that:
- (i) the economic issues which she raises constitute acts of economic abuse by the appellant towards her within the meaning of s 12 of the DFVPA; or
 - (ii) otherwise constitute acts of domestic violence within the meaning of that term in s 8 of the DFVPA.

[77] I turn now to the issues of mental health. The appellant admits that he has had concerns for many years about the respondent's mental health, that he is not a qualified health practitioner, and that he has, on occasion (the frequency being disputed) sought to raise those issues with the respondent. Those issues, particularly if not raised sensitively and supportively, are ones which are apt to cause great distress. He has made suggestions to at least the respondent's sister in a text message (Exhibit O to his affidavit of 23 June 2021) of the prospect of the respondent's self harming.

[78] Whilst I have not seen the terms of the appellant's application for a protection order it is apparent from the parts of it which were placed on the record by the respondent's counsel, that he was seeking for the Court to make significant intervention in terms of the respondent's mental health assessments and there was no evidence of a medical

nature which would support that being necessary. He has also, according to his own evidence, sought to prosecute those matters in the Family Court proceedings, at least initially.

[79] In those circumstances I find that by the appellant acting towards the respondent in seeking to have the Courts intervene to make assessments of her mental health in the absence of any medical evidence that this might be warranted constitutes an act of domestic violence, because it is conduct which is emotionally or psychologically abusive within the terms of s 8(1)(b) of the DFVPA.

[80] I turn therefore to the further issue which is whether it is necessary or desirable to make a protection order.

[81] In that regard, I adopt the approach set out by McGill DCJ at [32] – [33] of *GKE v EUT*.⁷⁸

In my opinion the focus must be on the issue of protecting the aggrieved from future domestic violence, the extent to which on the evidence there is a prospect of such a thing in the future, and of what nature, and whether it can properly be said in the light of that evidence that it is necessary or desirable to make an order in order to protect the aggrieved from that. The Magistrate spoke about this in terms of an assessment of the risk to the aggrieved, and that I think was an appropriate basis for analysis. I agree with the Magistrate that it is necessary to assess the risk of domestic violence in the future towards the aggrieved if no order is made, and then consider whether in view of that the making of an order is necessary or desirable to protect the aggrieved.

I also agree that there must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future. Broadly speaking I agree with what the Magistrate said in the passage beginning “fourthly” of his reasons, though I would express the last sentence as “the risk of future domestic violence against an aggrieved must be sufficiently significant to make it necessary or desirable to make an order in all the circumstances.” In assessing such a risk, it is relevant to consider the fact that there is going to have to be some ongoing relationship because of the position of the children, and, if as the appellant alleges the respondent has been difficult and uncooperative in the past in relation to the arrangements for him to have the opportunity to spend time with the children, there is a risk that there will be situations arising of a kind which have in the past produced domestic violence.

⁷⁸ [2014] QDC 248, citations in the original omitted.

- [82] I also have particular reference to the matters set out in paragraph 55 of the decision of *MDE v MLG and Queensland Police Service*.⁷⁹
- [83] As to what is necessary to protect the respondent in the future I note the evidence of the appellant that it is something he should not be pursuing in the Family Court proceedings⁸⁰ and that he did not pursue his application for a protection order in the future. As such, I am of the opinion that, in terms of future risk, the appellant does not pose a risk of further acts of such domestic violence towards the respondent.
- [84] The respondent has orders for sole occupancy of the matrimonial home and the car, whilst the family law proceedings are being resolved.
- [85] There is no suggestion that the appellant has ever sought to violate any terms of an order of a court.
- [86] I also note, in terms of ongoing relationship, the parties have adult children so once the family law proceedings are finalised as the Magistrate recognised, it will not be necessary for them to have any further contact, other than as may be agreed at family events.
- [87] In that regard, I take it into account the matters at section 4 of the DFVPA. And that is why I clarified at the outset that both of the parties were in the court to hear the reasons which I am setting out today and, in particular, that my concerns about the appellant's recent inquiries in the court proceedings or recent steps to have the courts intervene to have the respondent assessed.
- [88] In those circumstances, it is not apparent that a protection order directed only to keeping the appellant away from the respondent's residence would act to protect her from future risk in respect of these matters, although I have accepted that the future risk is minimal.
- [89] I determine that no protection order is necessary or desirable. I will hear parties as to costs.

⁷⁹ [2015] QDC 151.

⁸⁰ Transcript 1-82 1 1 1.